This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

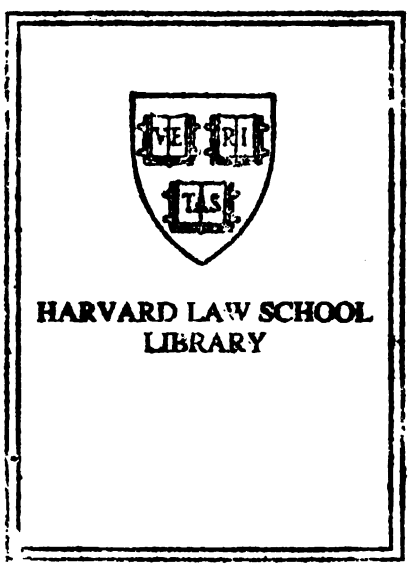
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 676 103


HARVARD LAW SCHOOL
LIBRARY

K14 74

THE

KENTUCKY

LAW REPORTER.

VOLUME XV.

JULY 1, 1893, TO JUNE 15, 1894.

FRANKFORT, KY.:
GEO. A. LEWIS, PUBLISHER.
1894.

Rec. Feb. 9, 1903.

TABLE OF CASES.

	Page.
Abert, &c., Taylor's Trustee v	515
Addyson Pipe & Steel Co. v. Copple	129
Alms v. Conn, &c	421
Alderson v. Caskey	589
Alexander, Commonwealth v	253
Alexander, McClure, &c. v	732
Allen's Ex'ors v. Allen, &c	496
Allen, Nevin v	886
Allen, &c. v. Pollard's Adm'r	52
Allen, Smith v	751
Alley, &c. v. Hastie, &c	690
Alley, &c., Holton & Co. v	529
Alvey, &c. v. Logsdon	486
Am. Accident Co., Couadeau v	667
Am. Accident Co. v. Reigart	469
Anderson v. McDaniel	151
Anderson v. Puryear	32
Anderson & Tice, Mayfield, City of v	63
Archibold. Fowler v	270
Armstrong v. Commonwealth	344
Arnold's Ex'or, Stevens, &c. v	559
Arthur, &c. v. Ingram & Davidson, &c	3
Arthur, &c., Moyers, &c. v	684
Arthur v. Watson	605
Ash, &c., Harris, &c. v	679
Asher v. Brock, &c	631
Asher's Heirs, Horsley v	105
Ashland, &c., Ry. Co., Elizabethtown, &c., R. R. Co. v	258
Atwater.&c., Caldwell, &c. v. 541,	570
Avritt, &c., Lebanon, Trustees of v	494
Bailey v. Commonwealth	826
Ballard v. Cincinnati, &c., R. R. Co	703
Ballard, &c., Clayton, &c., v	879
Baker, Wright v	109
Bamberger, Bloom & Co. v. Bank of Tupelo 301,	361
Banger v. Petty's Ex'ors	488
Bank of Big Stone Gap v. Craft	28
Bank of Tupelo, Bamberger, Bloom & Co. v 301,	361
Bannon, &c., Rohmeiser v	114
Banta, Richardson's Adm'r v	848
Barbour, &c., Northwestern Mutual Life Ins. Co. v	394
Barker, Owensboro, &c., R.R. Co. v	175
Barnard v. Commonwealth	51
Barnett, Commonwealth v	619
Barney, &c., Haney v	142
Barton v. Cumbers	606
Bates, L. & N. R. R. Co. v	724
Baum, &c., Glover v	688
Bayless Stove Co. v. McCarthy's Ass'ee 502,	864
Beam, L. & N. R. R. Co. v	875
Beard, &c. v. City of Hopkinsville, &c	756
Beatty, Crutchlow v	464
Beattyville, Board of Trustees of v. Daniel	793
Bedford v. Besler	81
Bell, Carpenter v	649
Bell v. Louisville, &c. R. R. Co.	885
Benge v. Benge	514
Bennyfield v. Commonwealth	821
Berryman, Tuttle, &c. v	294
Berry, &c. v. Berry's Adm'r	865
Berry's Ex'or v. Berry's Adm'r, &c	541
Berry v. Callahan, &c	589
Berry, Commonwealth v	888
Berry, Hansford v	415
Berry, Mattingly, &c. v	288
Berry v. McCullough	117
Best, Scott, &c. v	795
Bevins, &c., Slone v	598
Biggerstaff's Ex'ors, &c. v. Biggerstaff's Adm'r	725
Bigstaff, &c., Jones, &c. v	821
Bill v. Burgess, &c	41
Birch v. Powell & Lord	445
Bishop, &c., Shinkle's Ass'ee v	673
Blackburn v. Commonwealth	289
Blackburn, &c. v. Kentucky Central R. R. Co	808
Blackburn, May, &c. v	705
Blair, &c. v. Matthews, &c	425
Bland, Pollit v	297
Blankenship, &c. v. Ross	708
Blanton's Adm'r, Louisville, &c., R. R. Co. v	447
Board of Int. Imp., &c. v. Mozier	656
Boaz v. Wade	877
Boggs v. Commonwealth	653
Boles, N. N. & M. V. Co. v	447
Bollinger v. Commonwealth	780
Boone v. Nevine	547
Boreing, Persifull, &c. v	165
Bourne & Embry, Louisville, &c., Co. v	445
Bowen, Long v	276
Bowlin v. Commonwealth	149
Bowling's Heirs v. Roark	499
Boyd County, &c. v. Ross	520
Bracken Academy, Trustees of, Graded School District No. 2 v.	856
Bradford v. Bradford	61
Bradford, C. & O. R. R. Co. v	60

	Page.
Bradford, Cummings v	155
Bradford, Hays, &c v.	387
Brady v. Butts, &c	127
Brady v. Cooper, Ass'ee	848
Brafford v. Commonwealth	398
Brammell v. Eastern Ky. Ry. Co.	218
Brand, &c. v. Commonwealth, &c	482
Brandon, Cameron, &c. v 749,	777
Brannin, Brand & Glover, Thompson v	36
Breckinridge Co. v. Hicks	143
Breyfogle v. Wood's Adm'r	782
Bridgeford & Co, Risk v	206
Bridges, &c., McCallister v	92
Bridges, Vogle v	6
Briggs' Gd'n v. N. N. & M. V. Co	618
Brill v. Rack	383
Bristow, Shinkle's Ass'ee v	673
Broaddus, &c., Tribble's Ex'ors v.	324
Broadus, Throop v	812
Brock, &c., Asher v	631
Brooke Co., Crane & Co. v	80
Browning v. Kelly, &c	704
Brown, Knight v	750
Brown v. Popham	543
Bryan, &c. v. Maysville, &c., R. R. Co	448
Bryant, &c, L. & N. R. R. Co. v	181
Buchannon, &c. v. Commonwealth	738
Buchannon v. Little, &c	148
Buckler, Rafferty v	490
Bullins, L. & N. R. R. Co. v	752
Bullock, &c. v. Grinstead & Co	663
Bunch, Kirby, &c. v	238
Burch, Neff v	812
Burchett v. Dailey	402
Burgess, &c., Bill v	41
Burnett, Vance v	80
Burns, Greenbaum v	716
Burnside & Cumberland R. R. Co., Commonwealth v	449
Burton, Townsend v	618
Butler v. Davis, &c	273
Butts, &c., Brady v	127
Byrne, Solicitor v. City of Covington	33
Caldwell, Fisher-Leaf Co. v	542
Callahan, &c., Berry v	539
Callender v. Callender	63
Calvert, &c. v. Pewee Valley	644
Calvert, &c., Wilson, &c. v	489
Cameron, &c. v. Brandon	749
Cameron, &c. v. Branden	777
Campbell, E. T., V. & G. Ry. Co. v	813
Campbell, &c., Mitchell, &c. v	163
Campbell, N. N & M. V. Co. v	714
Campbell v. Williams	704
Camplin, &c. v. Eads	666
Caperton, &c. v. Humpick	430
Carder, &c v. Welsenburgh	497
Cardwell, &c. v. Atwater, &c. 541,	570
Carlisle v. Dodds	784
Carpenter v. Bell	649
Carr v. Commonwealth	828
Carroll, L. & N. R. R. Co. v.	268
Carroll, &c. v. Ward's Adm'r	695
Carter Co. v. Castner	61
Carter, Commonwealth v	253
Carter v. James, &c	127
Carter v. Jolly	217
Carter v. McDaniel	349
Carter, &c. v. McInteer, &c	128
Carter v. Mitchell's Ass'ee	53
Carter's Adm'r, Schmidt v	402
Carter, &c., Tompkins, &c. v	749
Caskey, Alderson v	589
Caskey v. Commonwealth	257
Castner, Carter Co. v	61
Caudell v. Woodward, &c	63
Caudill v. Caudill	567
Caudill, Sandy River Cannel Coal Co. v	655
Central Pass. Ry. Co., Louisville Bagging Co. v	417
Central Pass. Ry. Co. v. Rose	209
Central Pass. Ry. Co., Schlenk's Adm'r v	409
Chapin v. Fulkerson	635
Chenault v. George	649
Chenault, &c., Sterns v	347
C. & O. R. R. Co. v. Bradford	60
Chesapeake & Ohio Ry. Co. v. Cowherd	160
C., O. & S. W. R. R. Co., Elizabethtown, &c. v	313
Ches. & Ohio Ry. Co. v. Hickey	112
Ches. & Ohio Ry. Co. v. Mullins	139
Chesapeake, &c., R. R. Co. v. Stephens, &c	815
C. & O. R. R. Co. v. Thierman	855
C. & O. Ry. Co., Volz v	727
C., N. O. & T. P. Ry. Co., Harper, Receiver v	223
C., N. O. & T. P. Ry Co. v. Kern	656
C., N. O. & T. P. Ry. Co., Oatts v	87
Christian v. Rose, &c	145
Cincinnati, &c., R. R. Co., Ballard v	702
Citizens Nat. Bank, Lewis, &c. v.	622
Citizens Saving Bank v. Howard	331
City Nat. Bank of Cairo, Stanford v	607
Clark County National Bank v. Holloway	812
Clark, &c., Conner v	126
Clark, For Use, &c. v. Galloway	367
Clark, &c. v. Goodloe's Ex'or	61
Clark, Louisville Water Co. v	94
Clark, &c., McClure, Gd'n v	550
Clay, Louisville Gas Co. v	770
Clay, &c. v. Myers, &c	494
Clayton, &c. v. Ballard, &c	879
Clermont Distillery & Mill Co., Greer v	237
Clore & Sons v. Davis, &c	399
Cochran, Cream City Sash and Door Co. v	845
Cockrill v. Commonwealth	328
Cockesham, Jr. v. Miller	878

Page.

Coe, Sr. v. Commonwealth 284
Cogar, Louisville Southern R. R. Co. v 444
Coleman, &c., Sabree v 242
Coleman-Bush Investment Co. v. Figg, Trustee 817
Collier v. Kant's Adm'r 845
Collins v. Commonwealth 691, 885
Collopy v. Cloherty 870
Colson, &c., Taylor & Williams v. 607
Colyer v. Hyden, &c 101
Combs v. Commonwealth. 620, 659, 660
Commonwealth v. Alexander 253
Commonwealth, Armstrong v 344
Commonwealth, Bailey v 826
Commonwealth, Barnard v 51
Commonwealth v. Barnett 619
Commonwealth, Bennyfield v 321
Commonwealth v. Berry 833
Commonwealth, Blackburn v 989
Commonwealth, Boggs v 653
Commonwealth, Bollinger v 780
Commonwealth, Bowlin v 149
Commonwealth, Brafford v 398
Commonwealth, &c., Brand, &c. v 482
Commonwealth, Buchannon, &c. v 738
Commonwealth v. Burnside & Cumberland R. R. Co., &c 449
Commonwealth, Carr v 898
Commonwealth v. Carter 353
Commonwealth, Caskey v 257
Commonwealth, Cockrill v 398
Commonwealth, Coe, Sr., v 284
Commonwealth, Collins v ... 691, 885
Commonwealth, Combs v ... 620, 659, 660
Commonwealth, Covington & Cincinnati Bridge Co. v 320
Commonwealth, Cov. & Cin. Elevated R. R. Co. v 740
Commonwealth, Cowherd v 529
Commonwealth, Crawford v 856
Commonwealth v. Davis 262
Commonwealth, Davis v 396
Commonwealth v. Day 385, 466
Commonwealth, Delaney v 797
Commonwealth, Doolin v 408
Commonwealth v. Douglass 581
Commonwealth v. Elkton & Guthrie R. R. Co 449
Commonwealth, Evans v. 567, 591, 606
Commonwealth, Ferrell v 321
Commonwealth v. Finley ... 572, 650
Commonwealth v. Fleming 491
Commonwealth, Gambill v 477
Commonwealth, Godfrey v 3
Comonwealth, Green v .. 270, 297, 536, 566, 671
Commonwealth, Hall v 102, 856
Commonwealth, Handly v 736
Commonwealth, Harris v 269
Commonwealth, Haverly v 285
Commonwealth, Haynes v 8
Commonwealth, Hendrickson v .. 542
Commonwealth v. Hodgenville, &c., R. R. Co., &c 449

Page.

Commonwealth v. Hide 264
Commonwealth, Hourigan v 265
Commonwealth, Howard v 873
Commonwealth, Hunt v 591
Commonwealth, Hurd v 382
Commonwealth v. Hutton 619
Commonwealth, Johnson v 281
Commonwealth, Jones v 797
Commonwealth v. Kearns 382
Commonwealth, Kelly Ax Mfg. Co. v 446
Commonwealth v. Kensee Coal Co 449
Commonwealth v. K. & I. Bridge Co 449
Commonwealth v. Ky. Midland Ry. Co 449
Commonwealth, Kneffer, &c. v .. 176
Commonwealth, Kilpatrick v 270
Commonwealth, King v 247
Commonwealth, Kirkpatrick v ... 297
Commonwealth, Kirkpatrick, &c. v 671
Commonwealth v. Leach's Committee 268
Commonwealth v. Lexington Pass. & Belt Ry. Co 457
Commonwealth, Little v 289
Commonwealth, By. &c., Locke, &c. v 840
Commonwealth v. L., H. & W. R. R. Co 449
Commonwealth v. L. & N. R. R. Co 449
Commonwealth v. Lou. Southern R. R. Co., &c 449
Commonwealth v. L., St. L. & T. Ry. Co 449
Commonwealth v. Magoffin, &c .. 775
Commonwealth v. Mammoth Cave R. R. Co., &c 449
Commonwealth, Marks v 247
Commonwealth, Marler v 557
Commonwealth, Massie v 562
Commonwealth, McHargess v 323
Commonwealth v. Milby 568
Commonwealth, Mitchell v 803
Commonwealth, Morgan v 781
Commonwealth, Murphy v 215
Commonwealth v. Murphy 411
Commonwealth, Nelson v 255
Commonwealth, O'Bannon v 654
Commonwealth v. O. & N. R. R. Co., &c 449
Commonwealth v Ohio Valley R. R. Co., &c 449
Commonwealth, Oliver v 662
Commonwealth, Omer v 694
Commonwealth v. Owensboro, F. of R. & G. R. R. Co 449
Commonwealth v. Pence, &c 541
Commonwealth, Poff v 820
Commonwealth, Polly v 502
Commonwealth, Porter v 498
Commonwealth, Price v 43, 837
Commonwealth, Rhodes v 333
Commonwealth, Riley v 48
Commonwealth, Roberts v 341

	Page.
Commonwealth, Scott v	251
Commonwealth, Sharpe v	780
Commonwealth, Shelby v	552
Commonwealth, Slaughter v. 230,	569
Commonwealth, Sloan v	437
Commonwealth, Smith v. 357,	637
Commonwealth, Spencer v	182
Commonwealth, Stuart, Trustee v	513
Commonwealth, Taylor, &c. v	49
Commonwealth, Thompson v	838
Commonwealth v. Three Forks Coal Co	633
Commonwealth, Toler v	292
Commonwealth, Vaughn, alias Thacker v	256
Commonwealth, Vowells v	574
Commonwealth v. Warren	249
Commonwealth, Watson v	380
Commonwealth, Wells v	179
Commonwealth, West v	386
Commonwealth, Wilcoxsen v	261
Commonwealth, Williams v 270,	297
Commonwealth, Wooten v	495
Conger, Mullins, &c. v	171
Conner, &c. v. Clark, &c	126
Conner v. Cox, &c	140
Conner, Crigler, &c. v	751
Conn, &c., Aims v	421
Conn, &c., Malone v	421
Cook, McCulloch v	207
Coombs, Foor v	845
Cooper, Ass'ee, Brady v	848
Cooper, L. & N. R. R. Co. v	702
Cooper, Lucas v	642
Cooper v. Toebe	844
Cooper, &c. v. Newcomb	61
Copple, Addyston Pipe & Steele Co. v	129
Corn v. McKee	207
Cosgrove, &c., Sales v	791
Couadeau v. Am. Accident Co., &c	667
Couchman, &c. v. Lisle, &c	543
Covington & Cincinnati Bridge Co. v. Commonwealth	320
Covington & Cincinnati Elevated Railroad Bridge Co. v. Commonwealth	740
Covington, City of, Byrne, Solicitor v	83
Covington, City of v. Menzies	528
Covington, L. & N. R. R. Co. v	653
Cowherd, C. & O. Ry Co. v	160
Cowherd v. Commonwealth	829
Cox, &c., Conner, v	140
Cox, Doty, &c. v	68
Cox v. Hazelip, &c	21
Coyle, &c., Dempsey v	28
Craft, Bank of Big Stone Gap v	28
Craig, &c., Duggins, Gd'n v	124
Crane & Co. v. Brooke Co	30
Crawford v. Commonwealth	356
Crawley v. White	542
Cream City Sash and Door Co. v. Cochran	845
Crick, Ferguson v	461
Crigler, &c. v. Connor	751
Crosthwaite, &c., Ware v	807
Crutchlow v. Beatty	464
Culton, &c., Gillenwaters v	158
Culton, Lunsford v	504
Cumbers, Barton v	606
Cummings v. Bradford	155
Cummins v. Shawhan, &c	419
Current, &c., Paris, City of v	126
Curry v. Fetter	494
Curry, N. N. & M. V. Co. v	750
Curtis v. Louisville City Ry. Co.	351
Dailey, Burchett v	462
Daniel, Beattyville, Board of Trustees of v	793
Daniel, Garrison v	749
Daniel v. Town of Princeton	108
Daniels, &c., Western Union Tel. Co. v	812
Darnaby, &c., Snoden, &c. v	352
Darnell & Son, &c. v. Lewis	222
Davis, &c., Butler v	278
Davis, &c., Clore & Sons v	899
Davis, Commonwealth v	262
Davis v. Commonwealth	396
Davis, &c. v. Jones' Adm'r, &c	89
Davis, &c. v. Meaux, &c	308
Davis, &c., Middleton v	239
Davis' Adm'r v. Mitchell, &c	804
Davis, &c., Price v	120
Davis, &c. v. White	783
Dawson v. Shafer	77
Day, Commonwealth v 385,	466
Deatherage, L. N. R. R. Co. v	29
Degman v. Mason County	876
DeJarnette, Murray & Barnes v	879
Delaney v. Commonwealth	797
Deming, &c., Milliken v	332
Dempsey v. Coyle, &c	28
Denham, &c., Peerless Mfg. Co. v.	95
Denny v. Marksbury, &c	400
Dermody, Herron v	703
Deweese & Mantle, Tuck, &c. v	62
Dickey's Adm'r v. Sanderson, &c.	558
Dismuke, &c., Taylor v	703
Dittey, Ellis v	878
Dodds, Carlisle v	784
Domestic Sewing Machine Co. v. Murphy, &c	815
Doty, &c. v. Cox	68
Doolin v. Commonwealth	408
Doores, &c. v. Varnon, &c	244
Douglass, Commonwealth v	581
Douglass v. Commonwealth	581
Dover Christian Church, Trustees of v. M. & B. S. R. R. Co	332
Dresman, Fessler v	289
Droege, Schulte v	825
Duggins' Gd'n v. Craig, &c	124
Duncan, &c. v. Smith's Gd'n	58
Dunham v. Lefevers	608
Eads, Camplin, &c. v	666
Earl's Adm'r, L. & N. R. R. Co. v	184
E. T., V. & G. Ry. Co. v. Campbell	813
Easter, &c., Haydon, &c. v	597
Eastern Ky. Ry. Co., Brammell v.	218
Eastin, Commissioner v. Hatchitt.	780

Page.

Eaton v. Phœnix Ins. Co. 441
Eblin v. Sellars 539
Eddy's Ex'or v. Northup, &c. 434
Elfert, N. N. & M. V. Co. v. 575, 600
Elting, Voorheis, &c. v 161
Elgin, Perry v 855
Elizabethtown, Board of Trustees of v. C., O. & S. W. R. R. Co., &c 813
Elizabethtown Butter & Cheese Factory, Phillips v 574
Elizabethtown, &c., R. R. Co. v. Ashland, &c., R. R. Co 258
Elkton & Guthrie R. R. Co., Commonwealth v 449
Elliott v. Elliott 274
Ellis v. Dittey 378
Emison, &c., Northcutt, &c. v. 879
Epenbaugh v. Gooch, &c 576
Evans v. Commonwealth. 567, 591, 606
Evans, Norris v 77
Ezell, &c., Ragsdale v 495
Fain, &c. v. Turner's Adm'r 653
Fallen, &c., Nickell, &c. v 389
Farmers Bank v. Henry County Trust Co 96
Farmers Nat. Bank, &c., Garnett, Sr., &c. v 643
Farthing, &c., Hazelett, &c. v. 197
Fayette Nat. Bank, Pilkington v. 59
Feland v. Stirman & Gates 271
Ferguson v. Crick 461
Ferrel v. Commonwealth 321
Fessler v. Dresman 239
Fetter, Curry v 494
Fidelity Trust & Safety Vault Co., Preston, &c. v 130
Figg, Trustee, Coleman-Bush Investment Co. v 817
Finlay, Commonwealth v 65
Finley, Commonwealth v 572
Finney, Ohio, &c., R. R. Co. v. 29
First National Bank, &c., Peoples, &c. v 748
First National Bank of Covington v. The D. Kiefer Milling Co., &c 457
First National Bank of Elizabethtown, Goodin & Co. v 208
Fischer-Leaf Co. v. Caldwell 542
Fleming, Commonwealth v 491
Flinback, &c., Meier v 482
Flood v. Thommasson's Ex'or 658
Foley, L. & N. R. R. Co. v 17
Foote v. Miller's Adm'r 302
Foor v. Coombs 845
Ford, &c. v. Reid 606
Fortune, Rouse v 607
Fowler v. Archibald 270
Fox, &c. Johnson v 447
France's Adm'r v. L. & N. R. R. Co 244
Franks, Glaser, &c. v 844
Frye, &c. v. Jones, &c 500
Fuchner v. Schulten, &c 880
Fulkerson, Chapine v 635
Fulton Towboat Co. v. Pendergrass 208

Page.

Fuqua & Smith v. Massie & Sons. 849
Gallagher, &c. v. Loeb, Bloom & Co 572
Galliher v. Hartfield, &c 782
Galloway, Clark, For Use, &c. v. 367
Gambill v. Commonwealth 477
Gargan, L. & N. R. R. Co. v 95
Garnett, Sr., &c. v. Farmers Nat. Bank of Cynthiana 643
Garrison v. Daniel 749
Garrott, &c., Morrison, &c. v 305
Gebhart, &c., Graziani, Ass'ee, &c. v 702
George, Chenault v 649
Germania Safety Vault & Trust Co., Kreiger, &c. v 844
German Ins. Co. v. Horan 208
Gess v. Trustees of Common School District, &c 30
Gibson, &c., W. Va., P. & T. R. R. Co. v 7
Gillenwaters v. Culton, &c 158
Gillum, &c. v. Jarvis 92
Gilman, &c., Paintsville, &c., Passenger Line Co. v 748
Glaser, &c. v. Franks 844
Glass' Ex'or, &c., Mercer, &c. v. 710
Gleason, Keller v 445
Glover, &c. v. Baum, &c 688
Godfrey v. Commonwealth 3
Goff, &c. v. Wilburn 614
Goldsmith v. Owen, Judge, &c. 806
Goodin & Co. v. First National Bank of Elizabethtown 208
Goodin v. Trustees Common School District, &c 481
Goodloe's Ex'or, Clark, &c. v. 61
Gooch, &c., Epenbaugh v 576
Gore, Peak, &c. v 278
Graded School District No. 2 v. Trustees Bracken Academy 856
Graham, Kelly v 751
Graham, &c., Paducah Street Ry. Co. v 748
Grant v. Grant's Ass'ee 813
Gray, Thompson, &c. v 783
Graziani, Ass'ee, &c. v. Gebhart, &c 702
Greenbaum v. Burns 716
Green v. Commonwealth 270, 297, 536, 566, 671
Greer v. Clermont Distillery & Mill Co 237
Greer's Adm'r v. Greer's Adm'r. 472
Gresham's Adm'r v. L. & N. R. R. Co 599
Grider, &c., Sloan v 761
Griffith, &c. v. O. & N. R. R. Co. 271
Grinstead, &c., Bullock, &c. v. 663
Gunther & Son, Piper v 462
Hackett v. L., St. L. & T. P. Ry. Co 612
Hall v. Commonwealth 102, 856
Hall, Kant v 511
Hall v. Miles, &c 218
Hall v. Owensboro Wagon Co 782
Hamilton, Sr., Palmer & Bowman v 677

	Page
Hall's Ass'ee, Warner v	158
Hanauer, Kohn & Co. v. Oberlin	878
Haney v. Barney, &c	142
Handly v. Commonwealth	736
Hansford v. Berry	415
Hardwick, &c., Pryor, &c. v	166
Hardy, &c. v. Logan County Court	405
Hargis & Eastin v. Louisville Gas Co	369
Harlammert, &c. v. Moody's Adm'r	839
Harmon v. Ky. Coal, Iron & Development Co., &c	12
Harper's Adm'r, Mauk v	490
Harper, Receiver v. C., N. O. & T. P. Ry. Co	223
Harris, &c. v. Ash, &c	679
Harris v. Commonwealth	269
Harris v. Hill, &c	751
Harrison, Owensboro, &c., R. R. Co., v	316
Harrod, Hopper v	737
Hart v. Sheible	782
Hatfield, &c., Galliher v	782
Hartman's Adm'r v. Hartman	368
Hartwell, &c. v. L. & N. R. R. Co. v	781, 809
Hastie, &c., Alley, &c. v	690
Hatchett, Parrish, By, &c. v	847
Hatchett, Eastin, Commissioner v	780
Harverly v. Commonwealth	285
Hawes, &c., Nischen, &c. v	40
Haynes v. Commonwealth	8
Haydon, &c. v. Easter, &c	597
Hayes, Paducah Land, Coal & Iron Co. v	517
Hays, &c. v. Bradley	387
Hays, McRoberts v	400
Hays, Neale v	784
Hazelett, &c. v. Farthing, &c	197
Hazelip, &c., Cox v	21
Heaton, &c. v. Timmons	62
Heaverin, Phœnix Ins. Co. v	302
Heaverin, &c. v. Robinson & Co	15
Heekin, &c., Pendergest, &c. v	180
Henderson, City of v. Pargny	745
Henderson Hominy Mill, Mt. Vernon Banking Co. v	333
Henderson Hominy Mill Co. v. Watkins, &c	301
Hendrickson v. Commonwealth	542
Henry County Trust Co., Farmers Bank v	96
Herbert, &c. v. Long, &c	427
Herndon v. Waters' Ex'or	269
Herron v. Dermody	703
Hersperger v. Smith	605
Hessey, &c. v. Hessey	192
Hibbs, &c., Stamper, &c. v	174
Hickey, C. & O. Ry. Co. v	112
Hickman, Lillie v	861
Hicks, Breckinridge Co. v	145
Hicks, Lambert v	240
Hide, Commonwealth v	264
Hill, &c., Harris v	751
Hill v. Wilson, &c	814
Hill & Hill v. Johnson, &c	368
Hillard v. Rountree	556
Hilpp, McKee v	730
Hisle's Adm'r v. Hisle's Gd'n	237
Hisle v. Oldham	93
Hocker & Tabor, Wilson v	573, 651
Hodgenville, &c., R. R. Co., Commonwealth v	449
Holland, N. N. & M. V. Co. v	238
Holloway, Clark County National Bank v	812
Holton & Co. v. Alley, &c	529
Holtzhauer v. City of Newport	188
Holtzclaw, &c., McFatridge, &c. v.	319
Hook, &c. v. Joyce	337
Hopkinsville, City of, Beard, &c v	756
Hopper v. Harrod	737
Horan, German Ins. Co. v	208
Horsley v. Asher's Heirs	105
Horton, McCowan v	127
Hoskins, L. & N. R. R. Co. v	238
Hourigan v. Commonwealth	265
Houston, &c. v. Long, &c	721
Howard, Citizens Savings Bank v.	331
Howard v. Commonwealth	873
Howard, &c., Jacobs, &c. v	133
Howard v. Lock	154
Howard, L. & N. R. R. Co. v	25
Howard, &c. v. Maloney	654
Howard, &c. v. Singleton, &c	319
Howe v. Saddler, &c	765
Hughes v. Laughlin	575
Hughes, &c., Thomas v	792
Hughes v. Waggoner's Ex'or	780
Hughes, Watts v	846
Hughlett v. L. & N. R. R. Co	178
Huffman, Sparger, &c. v	848
Hume & Co., Mullins, &c. v	93
Humpick, Caperton, &c. v	430
Hundley, &c. v. Taylor	808
Hunt v. Commonwealth	591
Hunt, Trimble, &c. v	707
Hunter, Wolfe & Co. v	846
Hurd v. Commonwealth	332
Huston, &c., Roach & Weill v	61
Hutton, Commonwealth v	619
Hutton, &c., McGrew v	658
Hyden, &c., Colyer v	101
Ingram, &c., Arthur, &c. v	8
Jackson, Mengel, Jr., Bro. & Co. v	289
Jackson v. Roberts, Adm'r, &c	881
Jacob, Jr. v. Howard, &c	133
James, &c., Carter v	127
Jarvis, Gillum, &c. v	92
Jarvis v. Porter	447
Jenkins v. Jenkins	302
Jenkins, L. & N. R. R. Co. v	239
Johnson v. Commonwealth	281
Johnson v. Fox, &c	447
Johnson v. Johnson	587
Johnson, &c., Hill, &c. v	368
Johnson, Louisville, City of v	615
Johnson v. Nelson, &c	495
Johnson, &c. v. Stevens, &c	477
Johnson's Ex'ors, Payne, &c. v	522
Johnson v. Wilson	852

	Page.
Jolly, Carter v	217
Jones, &c. v. Bigstaff, &c	821
Jones v. Commonwealth	797
Jones' Adm'r, &c., Davis, &c. v.	89
Jones, &c., Frye, &c. v	500
Jones, McCormick, &c. v	215
Jones, Slusher v	575
Joyce, Hook, &c. v	337
Katz v. Laycock	606
Kanawha Dispatch v. Rankin's Adm'r	780
Kant's Adm'r, Collier v	845
Kant v. Hall	511
Karn, Slaughter, &c. v	429
Kearns, Commonwealth v	832
Kellar v. Gleason	445
Kelly Ax Mfg. Co. v. Commonwealth	446
Kelly, &c., Browning v	704
Kelly v. Graham	751
Kelly v. Shelby R. R. Co., &c	311
Kelley v. Toney, Judge, &c	718
Kelley, Wynn v	81
Kaubler v. Taylor	334
Kennedy v. McElroy, &c	168
Kensee Coal Co., Commonwealth v	449
Kenton County, Board of Com'rs of, Bird v	578
Ky. Coal, Iron & Development Co., Harmon v	12
Ky. C. R. R. Co., Blackburn, &c. v	308
K. & I. Bridge Co., Commonwealth v	449
Ky. Lumber Co., Powell County v	577
Ky. Midland Ry. Co., Commonwealth v	449
Ky. Nat. Bank v. Martin, &c	646
Kern, C., N. O. & T. P. Ry. Co. v	656
Kerrigan, Long & Co. v	65
Kesler, Bedford v	31
Kiel v. Kline	158
Kilpatrick v. Commonwealth	720
Kilgus, &c. v. Trustees of the Church Home, &c	318
Kilgus, &c. v. Trustees of the Orphanage of Good Shepherd, &c	318
Kimmel, Kinnimouth, &c. v	125
Kleier, Taylor v	859
King v. Commonwealth	247
King, &c. v. Tompkins' Adm'r, &c	29
King v. Walker, Surviving Partner	605
Kinnimouth, &c. v. Kimmel	125
Kirby, &c. v. Bunch	288
Kirkpatrick v. Commonwealth	297
Kirkpatrick, &c. v. Commonwealth	671
Kirksey v. Turner	585
Kline, Kiel v	158
Klotz v. Klotz	183
Kneffer, &c. v. Commonwealth	176
Knight v. Brown	750
Kohn Bros. v. Steinau, &c	751
Kreiger, &c. v. Germania Safety Vault & Trust Co	844
Lacey v. Lacey	439
Lachat, By, &c. v. Lutz	75
Lambert v. Hicks	240
Lancaster, &c., McKay v	159
Lancashire Ins. Co. v. Utterback	702
Lander, &c., Tabor v	8
Langford, &c., Spires' Adm'r v	792
Lanham v. Wilson, &c	109
Lape's Adm'r v. Taylor's Trustee	480
Laughlin, Hughes v	575
Laughlin, Norton v	788
Lawson, Whitley County Land Co. v	401
Laycock, Katz v	606
Layton v. Prewitt, &c	827
Leach's Committee, Commonwealth v	268
Lebanon, Board of Trustees of v. Avritt, &c	494
Lebus, &c., Trimble's Ex'tx v	85
Lee, &c. v. Marion Nat. Bank	49
Lefevers, Dunham v	608
Lewallen, Stanfell, &c. v	281
Lewis, &c. v. Citizens National Bank	622
Lewis, Darnell & Son, &c. v	222
Lewis, Markwell, &c. v	206
Lewis & Co., Tebbs v	537, 816
Lexington Pass. & Belt Ry. Co., Commonwealth v	457
Licking Valley Ia d & Mining Co., National Bank of Commerce, &c. v	211
Lillie v. Hickman	861
Lilly's Ex'ors, &c., Reid, &c. v	474
Link, Roche v	702
Lisle, &c., Couchman, &c. v	543
Little, &c., Buchannon v	148
Little v. Commonwealth	289
Little's Adm'r v. Rawlings	573
Locke, &c. v. Commonwealth, By, &c	840
Lockett, &c. v. Lockett, &c	79
Lock, Howard v	154
Loeb, Bloom & Co., Gallagher, &c. v	572
Logan County Court, Hardy, &c. v	405
Logsden, Alvey, &c. v	486
London & Lancaster Ins. Co. v. Oaks & Cook	540
Long v. Bowen	276
Long, &c., Herbert, &c. v	427
Long, &c., Houston, &c. v	721
Long & Co. v. Kerrigan	65
Long, &c., L. & N. R. R. Co. v	199
Louisville Bagging Mfg. Co. v. Central Passenger Ry. Co	417
L., C. & L. Ry. Co., Schmidt, &c. v	785
Lou. Courier-Journal v. Pope	877
Lou. Courier-Journal Co., Vance v	412
Louisville, City of v. Johnson	615
Louisville, City of v. Louisville Gas Co	177

Page.

Louisville, City of v. Muldoon, &c 233
Louisville, City of, Speed v..... 400
Louisville City Ry. Co., Curtis v. 351
Louisville Gas Co. v. Clay 770
Louisville Gas Co., Hargis & Eastin v. 369
Louisville Industrial School of Reform, Williamson, &c. v..... 629
L., H. & W. R. R. Co., Commonwealth v. 449
L. & N. R. R. Co. v. Bates 724
L. & N. R. R. Co. v. Beam 875
L. & N. R. R. Co. v. Bullins 752
L. & N. R. R. Co. v. Bryant, &c. 181
L. & N. R. R. Co. v. Covington.. 653
L. & N. R. R. Co. v. Carroll..... 268
L. & N. R. R. Co., Commonwealth v..... 449
L. & N. R. R. Co. v. Cooper 702
L. & N. R. R. Co. v. Deatherage. 29
L. & N. R. R. Co. v. Earl's Adm'r..... 184
L. & N. R. R. Co. v. Foley 17
L. & N. R. R. Co., France's Adm'r v..... 244
L. & N. R. R. Co. v. Gargan 95
L. & N. R. R. Co., Gresham's Adm'r v 599
L. & N. R. R. Co. v. Hoskins 238
L. & N. R. R. Co., Hartwell, &c. v 778
L. & N. R. R. Co. v. Harvey. 781, 809
L. & N. R. R. Co. v. Howard.... 25
L. & N. R. R. Co., Hughlett v... 178
L. & N. R. R. Co. v. Jenkins.... 239
L. & N. R. R. Co. v. Long, &c .. 199
L. & N. R. R. Co., McCain v 80
L. & N. R. R. Co. v. Miller.. 655, 699
L. & N. R. R. Co. v. Noel, &c... 493
L. & N. R. R. Co. v. Offutt..... 301
L. & N. R. R. Co. v. Pilkerton. 607
L. & N. R. R. Co. v. Quinn, &c . 83
L. & N. R. R. Co. v. Rains 423
L. & N. R. R. Co., Robinson v .. 626
L. & N. R. R. Co., Rogers v 686
L. & N. R. R. Co v. Schmetzer, By. &c 194
L. & N. R. R. Co., Smith, By, &c. v 390
L. & N. R. R. Co. v. Storms .. 333
L. & N. R. R. Co., Trustees Common School District v 160
L. & N. R. R. Co., Trustees Common School District No. 18 v... 880
L. & N. R. R. Co. v. Wallace ... 83
L. & N. R. R. Co. v. Walton..... 206
L. & N. R. R. Co. v. Welch 83
L. & N. R. R. Co., White, Jr. v .. 49
L. & N. R. R. Co. v. Whitley County Court 734
L. & N. R. R. Co., Wicks v 605
L. & N. R. R. Co. v. Wilkinson.. 92
L. & N. R. R. Co. v. Williams .. 31, 548
L. & N. R. R. Co. v. Woodward.. 445
Louisville Southern R. R. Co. v. Cogar..... 444

Page.

Louisville Southern R. R. Co., Commonwealth v 449
Louisville Southern R. R. Co. v. Ragland 814
Louisville Southern R. R. Co., Woolley, &c. v 18
L., St. L. & T. P. Ry. Co., Commonwealth v 449
L., St. L. & T. P. Ry. Co., Hackett v 612
Louisville Trust Co. v. County of Muhlenberg, &c..... 397
Louisville Trust Co. v. Todd, &c. 90
Louisville Water Co. v. Clark 94
Louisville, &c., R. R. Co., Bell v. 325
Louisville, &c., R. R. Co. v. Blanton's Adm'r 447
Louisville, &c., R. R. Co. v. Bourne & Embry..... 445
Louisville, &c., R. R. Co. v. Murphy 444
Lucas v. Cooper 642
Lucas, Morse v..... 85
Lucas, Southern Cal. Ins. Co. v.. 574
Lunsford v. Culton..... 504
Lutz, Lachat, &c. v..... 75
Mackey, Willis' Trustee v 815
Magoffin, &c., Commonwealth v. 775
Malone v. Conn, &c 421
Maloney, Howard, &c. v..... 654
Mammoth Cave R. R. Co., Commonwealth v 449
Maples v. Traders Deposit Bank.. 879
Marcum, &c., South's Adm'r v .. 339
Marion Nat. Bank, Lee, &c. v.... 99
Marks v. Commonwealth 247
Marksbury, &c., Denny v 400
Markwell, &c. v. Lewis 206
Marler v. Commonwealth..... 557
Martin, &c., Ky. Nat. Bank v .. 646
Martin, Todd v 238
Martz v. Swartz..... 269
Mason, Smith v..... 719
Mason County, Degman v 876
Masonic Savings Bank, Ass'ee, Papendick v 847
Massie v. Commonwealth..... 562
Massie & Sons, Fuqua & Smith v. 849
Matthews, &c., Blair, &c. v..... 425
Mattingly & Co. v. Berry 288
Mattingly v. Russell..... 875
Mauk v. Harper's Adm'r 490
May, &c. v. Blackburn 705
Mayfield, City of v. Anderson & Tice 68
Mayhall, &c., White v 880
M. & B. S. R. R. Co., Dover Christian Church, &c. v 838
Maysville, &c., R. R. Co., Bryan, &c. v 448
Maysville, &c., R. R. Co. v. Shofstall, &c 632
McAllister v. McAllister 750
McBrayer, N. N. & M. V. Co. v . 399
McCain v. L. & N. R. R. Co..... 80
McCallister v. Bridges, &c..... 92
McCann v. Rogers, &c 127
McCleery, Raymond v 269

Page.

McCarthy's Ass'ee, Bayless Stove Co. v ... 302, 364
McClure, &c. v. Alexander ... 782
McClure, G'd v. Clark, &c ... 580
McConnell v. Wilborn ... 596
McCormick, &c. v. Jones ... 215
McCormick, Ware v ... 59
McCowan v. Horton ... 127
McCullough, Berry v ... 117
McCulloch v. Cook ... 207
McDaniel, Anderson v ... 151
McDaniel, Carter v ... 349
McDonald, &c. v. McDonald's Adm'r, &c ... 367
McDonald, Slayden, &c. v ... 28
McDowell, &c., Robertson & Co. v ... 503
McFatridge, &c. v. Holtzclaw, &c. 312
McElroy, &c., Kennedy v ... 168
McElroy v. Russelll & Avritt ... 740
McFarland, Walton & Co. v. Pryse & Robinson ... 207
McGraw v. Hutton, &c ... 653
McHargess v. Commonwealth ... 323
McInteer, &c., Carter, &c. v ... 128
McInteer, &c., Richardson & Co. v ... 128
McInteer, &c., Robinson & Co. v. 128
McKay v. Lancaster, &c ... 159
McKee, Corn v ... 207
McKee v. Hilpp ... 730
McKinney v. Traders Deposit Bank ... 30
McLeod & Anderson's Ass'ee v. O'Neal, &c ... 152
McNees v. Owens, &c ... 126
McNeil, &c v. Watkins' Adm'r ... 780
McRoberts v. Hays ... 400
McRoberts, &c., Rawlings, &c. v. 771
Meaux, &c., Davis, &c. v ... 308
Meier v. Flinsbach, &c ... 482
Melton v. N. N. & M. V. Co ... 781
Memphis & Cin. Packet Co. v. Nagel ... 742
Mendenhall, &c. v. Tungate, &c. 639
Mengel, Jr., Bro. & Co. v. Jackson ... 289
Menne's Heirs v. Menne ... 774
Menzies, Covington, City of v ... 528
Mercantile Trust Co. v. South Park Residence Co ... 70
Mercer, &c. v. Glass' Ex'or, &c ... 710
Metropolitan Life Ins. Co. v. Reinke ... 125
Middleton v. Davis, &c ... 239
Milby, Commonwealth v ... 568
Miles, &c., Hall v ... 218
Miller's Adm'r, Foote v ... 302
Miller, Cookesham Jr. v ... 878
Miller, L. & N. R. R. Co. v. 655, 699
Miller, Nall, &c. v ... 862
Milliken v. Deming, &c ... 332
Milliken v. Piles ... 584
Million, Newby v ... 63
Mitchell's Ass'ee, Carter v ... 53
Mitchell, &c. v. Campbell, &c ... 163
Mitchell v. Commonwealth ... 803
Mitchell, &c., Davis, Adm'r v ... 304

Page.

Mitchell, Ass'ee v. Porter, &c ... 335
Mitchell, &c., Schmidt v ... 768
Mize v. Turner ... 67
Monarch, Rock Springs Distilling Co. v ... 866
Morgan v. Commonwealth ... 781
Montague, &c. v. Smith & Nixon. 540
Moody's Adm'r, Harlammert, &c. v ... 839
Moore, &c., Newman v ... 1
Moore v. Offutt ... 376
Moore v. Parker ... 125
Moore, Trustee, Passmore v ... 107
Moore, &c. v. Reynolds ... 47
Moore, &c., Robertson v ... 240
Moore v. Traxel ... 125
Morehead, &c., Young, &c. v ... 383
Morrison, &c. v. Garrott, &c ... 305
Morse v. Lucas ... 85
Moyers, &c. v. Arthur, &c ... 684
Mozier, Board of Int. Imp., &c. v. 655
Mt. Sterling Nat. Bank, Snyder, &c. v ... 4
Mt. Vernon Banking Co. v. Henderson Hominy Mills ... 338
Mud River Coal, Coke & Iron Co. v. Williams' Adm'r ... 847
Muhlenberg, County of, Louisville Trust Co. v ... 397
Muldoon, &c., Louisville, City of v ... 233
Mulholland, Jr., Paducah Land, Coal & Iron Co. v ... 22, 624
Mullikin, Ex'tx, &c. v. Mullikin. 609
Mullins & Crigler v. Hume & Co. 93
Mullins, C. & O. Ry. Co. v ... 139
Mullins, &c. v. Conger ... 171
Murphy v. Commonwealth ... 215
Murphy, Commonwealth v ... 411
Murphy, &c., Domestic Sewing Machine Co. v ... 815
Murphy, Louisville, &c., R. R. Co v ... 444
Murray & Barnes v. DeJarnette. 879
Myers, &c., Clay, &c. v ... 404
Myers, &c. v. White ... 621
Nagel, Memphis & Cin. Packet Co. v ... 742
Nall, &c. v. Miller ... 862
Nat. Bank of Commerce of Pittsburgh v. Licking Valley Land & Mining Co ... 211
Nat. Exchange Bank, &c v. Wiggins' Ex'ors, &c ... 763
Neale v. Hays ... 784
Neff v. Burch ... 812
Nelson v Commonwealth ... 255
Nelson, &c., Johnson v ... 495
Nelson Bros., Overman & Schrader v ... 92
Nevin v. Allen ... 886
Nevine, Boone v ... 547
Nevine, Rowan v ... 547
Newby v. Million ... 63
Newcomb, Cooper, &c. v ... 61
Newcome, &c. v. Turner, &c ... 573
Newman v. Moore, &c ... 1
Newport, City of, Holtzhauer v. 188.

	Page.
N. N. & M. V. Co v. Boles	447
N. N. & M. V. Co., Briggs' Gd'n v	618
N. N. & M. V. Co. v. Campbell	714
N. N. & M. V. Co. v. Curry	750
N. N. & M. V. Co. v. Elfert. 575,	600
N. N. & M. V. Co. v. Holland	238
N. N. & M. V. Co. v. McBrayer	399
N. N. & M. V. Co., Melton v	781
N. N. & M. V. Co., Pusey v	303
N. N. & M. V. Co., Quinn's Adm'r v	74
N. N. & M. V. Co. v. Thomas	876
Newsome v. Newsome	801
Nickell, &c. v. Fallen, &c	389
Nischen, &c. v. Hawes, &c	40
Noel, &c., L. & N. R. R. Co. v	493
Normant, &c., Smith, &c. v	545
Norris v. Evans	77
Northcutt, &c. v. Emison	879
Northup, &c., Eddy's Ex'or v	434
Northup, &c. v. Standifer	740
Northwestern Mutual Life Ins. Co. v. Barbour, &c	394
Norton v. Laughlin	783
Norton v Norton, &c	872
Oaks & Cook, London & Lancashire Ins. Co. v	540
Oatts v. C., N. O. & T. P. Ry. Co	87
O'Bannon v. Commonwealth	654
Oberlin, Hanauer, Kohn & Co. v	878
O'Daniel, Ohio Valley R. R. Co v	268, 295
Offutt, L. & N. R. R. Co. v	301
Offutt, Moore v	370
Ohio Valley R. R. Co., Commonwealth v	449
Ohio Valley Ry. Co. v. O'Daniel.	268, 295
Ohio, &c., R. R. Co. v. Finney	29
Omer v. Commonwealth	694
Oldham, Hisle v	93
Oliver v. Commonwealth	662
O'Neill, &c., McLeod & Anderson's Ass'ee v	152
Orphanage of the Good Shepherd, Trustees of, Kilgus, &c. v	318
Overman & Schrader v. Nelson Bros	92
Owen, Judge, &c., Goldsmith v	806
Owensboro, City of v. Weir, Weir & Walker	503
Owensboro, F. of R. & G. R. R. Co., Commonwealth v	449
O. & N. R. R. Co., Commonwealth v	449
O. & N. R. R. Co., Griffith, &c. v.	271
Owensboro, &c., R. R. Co. v. Barker	175
Owensboro, &c, R. R. Co. v. Harrison	316
Owensboro Wagon Co., Hall v	782
Owens, &c., McNess v	126
Owens, &c., Supreme Lodge K. & L. of Honor v	134
Owings v. Smith	167

	Page.
Paducah Land, Coal & Iron Co. v. Hayes	517
Paducah Land, Coal & Iron Co. v. Mulholland, Jr	22, 624
Paducah Street Ry. Co. v. Graham, &c	748
Paducah, Tenn. & Ala. R. R. Co., Snellbaker v	380
Paintsville, &c, Pass. Line Co. v Gilman, &c	748
Palmer & Bowman, &c. v. Hamilton, Sr	677
Papendick v. Masonic Savings Bank, Ass'ee	847
Pargny, City of Henderson v	745
Paris, City of v. Current, &c	126
Parker, Moore v	125
Parrish, By, &c. v. Hatchett	847
Parrish, &c. v. Ross	682
Parrish, Ex'or, Stamp, Gd'n v	55
Passmore v. Moore, Trustee, &c	107
Patterson v. Patterson, Ex'or, &c.	755
Payne, &c. v. Johnson's Ex'ors, &c	522
Payne, Richardson v	159
Peak, &c. v. Gore	278
Pearl, &c. v. Pittman	16
Peerless Mfg. Co. v. Denham, &c.	95
Pence, &c., Commonwealth v	541
Pendergest, &c. v. Heekin, &c	180
Pendergrass, Fulton Towboat Co. v	208
Peoples, &c. v. First Nat. Bank of Stanford	748
Perkins, &c., Smith v	627
Perkins v Stein & Co	203
Perry v. Elgin	855
Persiful, &c. v. Boreing	105
Pettit, Stewart, &c. v	654
Pettit, &c., Williams v	243
Petty's Ex'ors, Banger v	488
Pewee Valley, Calvert, &c. v	644
Pfingst, &c. v. Senn, &c	325
Phœnix Ins. Co., Eaton v	441
Phœnix Ins. Co. v. Heaverin	302
Phillips v. Elizabethtown Butter and Cheese Factory	574
Phillips' Adm'r, &c. v. Phillips.	816
Phillips, Jr., Russell v	76
Phillips, &c. v. Thomas Lumber Co	219
Pile v. Pile	88
Piles, Milliken v	584
Pilkerton, L. & N. R. R. Co. v	607
Pilkington v. Fayette Nat. Bank.	59
Piper v. Gunther & Sons	462
Pittman, Pearl, &c. v	16
Poff v. Commonwealth	820
Pollad's Adm'r, Allen, &c. v	52
Pollitt v. Bland	227
Polly v. Commonwealth	502
Pope, Louisville Courier-Journal v	877
Popham, Brown v	543
Porter v. Commonwealth	493
Porter, Jarvis v	447
Porter, &c., Mitchell, Ass'ee v	335
Porter & Co v. Walt	60

	Page
Powell County v. Kentucky Lumber Co	577
Powell & Lord, Birch v	445
Preston, &c. v. Fidelity Trust & Safety Vault Co	120
Prewitt, &c., Layton v	827
Price v. Commonwealth	43, 837
Price v. Davis, &c	120
Princeton, Town of, Daniel v	108
Pryor, &c. v. Hardwick, &c	166
Pryse & Robinson, McFarland, Walton & Co. v	207
Purdy, &c. v. Woolson Spice Co., &c	367
Puryear, Anderson v	32
Pusey v. N. N. & M. V. R. R. Co.	803
Quinn, &c., L. & N. R. R. Co. v.	83
Quinn's Adm'r v. N. N. & M. V. Co	74
Rack, Brill v	383
Rafferty v. Buckler	410
Ragsdale v. Izell, &c	495
Ragland, Louisville Southern R. R. Co. v	814
Rains, L. & N. R. R. Co. v	423
Rankin's Adm'r, Kanawha Dispatch v	780
Rawlings, Little's Adm'r v	573
Rawlings, &c. v. McRoberts, &c.	771
Raymond v. M'Cleery	269
Reid, &c. v. Lilly's Ex'ors, &c	474
Reid, Ford, &c. v	606
Reigart, American Accident Co. v	469
Reinke, Metropolitan Life Ins. Co. v	125
Reynolds, Moore, &c. v	47
Rhodes v. Commonwealth	333
Rich v. Swetman, &c	602
Richardson's Adm'r, &c. v. Banta	348
Richardson Bros. & Co. v. McInteer, &c	128
Richardson v. Payne	159
Rider v. Sullivan	749
Riley v. Commonwealth	46
Risk v. Bridgeford & Co	206
Roach & Weill v. Huston, &c	61
Roark, Bowling's Heirs v	499
Robb, Walls v	159
Roberts v. Commonwealth	341
Roberts, Adm'r, &c., Jackson v.	831
Roberts v Yancey, &c	10
Robertson & Co. v. McDowell, &c.	102
Robertson v. Moore, &c	240
Robinson & Co., Haverin, &c. v.	15
Robinson v. L. & N. R. R. Co	626
Robinson & Co. v. McInteer, &c.	128
Roche v. Link	702
Rock Springs Distilling Co. v. Monarch	866
Rogers v. L. & N. R. R. Co	686
Rogers, &c., McCann v	127
Rohmeiser v. Bannon, &c	114
Rose, Central Passenger Ry. Co. v	209
Rose, &c., Christian v	145
Ross, Blankenship, &c. v	708
Ross, Boyd County, &c. v	520
Ross, Parrish, &c. v	682
Ross, Tinsley v	44
Rountree, Hilliard v	556
Rouse v. Fortune	607
Rowan v. Nevine	547
Russell & Avritt, McElroy v	750
Russell, Mattingly v	875
Russell v. Phillips, Jr	76
Saddler, &c., Howe v	765
Sadler, &c., Young's Gd'n v	581
Saffell, Tamplet & Washburn v.	81, 94
Sales v. Cosgrove, &c	791
Sanderson, &c., Dickey's Adm'r v	558
Sandy River Cannel Coal Co. v. Caudill	655
Sanford v. City Nat. Bank of Cairo	607
Saylor v. Saylor	878
Schlenk's Adm'r v. Central Pass. Ry. Co.	409
Schmetzer, by, &c., L. & N. R. R. Co. v	194
Schmidt v. Carter's Adm'r	402
Schmidt, &c. v. L., C. & L. Ry. Co.	785
Schmidt v. Mitchell, &c	768
Schulte v. Droege	825
Schulten, &c., Fuchner v	880
Schweitzer v. Wagner	229
Scott, &c. v. Best	765
Scott v. Commonwealth	251
Sear's Heirs v. Sears Heirs	510
Sebree v. Coleman, &c	242
Sellers, Eblin v	539
Senn, &c, Pfingst, &c. v	325
Shafer, Dawson v	77
Shafer, Swope, &c. v	42
Sharpe v. Commonwealth	780
Shawhan, &c., Cummins v	419
Shaw, &c. v. Shaw, &c	592
Sheible, Hart v	782
Shelby v. Commonwealth	552
Shelby R. R. Co., Kelly v	311
Shinkle's Ass'ee v. Bishop, &c.	673
Shinkle's Ass'ee v. Bristow	673
Shofstall, &c., Maysville, &c., R. R. Co. v	632
Short, &c. v. Terry, Sr., &c	241
Siler, Tye v	159
Simpson v. Simpson's Ex'ors	353
Singleton, &c., Howard, &c. v	509
Slaughter v. Commonwealth	280, 569
Slaughter, &c. v. Karn	429
Slayden, &c. v. McDonald	28
Sloan v. Commonwealth	437
Slone v. Bevins	598
Slone v. Grider, &c	761
Slusher v. Jones	575
Smith v. Allen	751
Smith v. Commonwealth	357, 687
Smith, Hersperger v	605
Smith v. Mason	719
Smith, Owings v	137
Smith v. Perkins, &c	627
Smith, Western Union Telegraph Co. v	334
Smith's Gd'n, Duncan, &c. v	58

	Page.
Smith, By, &c. v. L. & N. R. R. Co	390
Smith, &c. v. Normant, &c	545
Smith & Nixon, Montague, &c. v	540
Snelbaker v. Paducah, Tenn. & Ala. R. R. Co	880
Snowden, &c. v. Darnaby, &c	332
Southern California Insurance Co. v. Lucas	574
South's Adm'r, &c. v. Marcum, &c	339
South Park Residence Co., Mercantile Trust Co. v	70
Spalding v. Spalding	246
Sparger, Hulett & Co. v. Huffman	848
Speed v. City of Louisville	400
Spencer v. Commonwealth	182
Spire's Adm'r v. Langford, &c	793
Stamp, Gd'n v. Parrish, Ex'or	55
Stamper, &c. v. Hibbs, &c	174
Standifer, Northup, &c. v	740
Stanfell, &c. v. Lewallen	231
Stearns v Chenault, &c	347
Steinau, &c., Kohn Bros. v	751
Stein & Co., Perkins v	203
Stephens, &c., Chesapeake, &c., R. R. Co. v	815
Stevens, &c. v. Arnold's Ex'or	559
Stevens, &c., Johnson, &c. v	477
Stewart, &c. v. Pettit	654
Stirman & Gates, Feland v	271
Storms, L. & N. R. R. Co. v	833
Strutton v. Young, &c	657
Stuart, Trustee v. Commonwealth	513
Sullivan, Rider v	749
Supreme Lodge Knights and Ladies of Honor v. Owens, &c	134
Swartz, Martz v	269
Swetman, &c., Rich v	602
Swope, &c. v. Shafer	42
Sydner, &c. v. Mt. Sterling Nat. Bank	4
Tabor v. Lander, &c	8
Tague, &c., Wilson, &c. v	414
Tamplet & Washburn v. Saffell.31,	94
Taylor v. Dismuke, &c	703
Taylor, Hundley, &c. v	808
Taylor v. Kleier	859
Taylor, Keubler v	334
Taylor v. Taylor	741
Taylor & Williams v. Colson, &c	607
Taylor, &c. v. Commonwealth	49
Taylor's Trustee v. Abert, &c	515
Taylor's Trustee, Lapes' Adm'r v	480
Tebbs v. Lewis & Co.	537, 816
Terry, Sr., &c., Short, &c. v	241
Terry, Willis, &c. v	753
The D. Kiefer Milling Co., First Nat. Bank, &c. v	457
Thierman, C. & O. R. R. Co. v	655
Thomas v. Hughes, &c	792
Thomas Lumber Co., Phillips, &c. v	219
Thomas, N. N. & M. V. Co. v	876
Thomasson's Ex'or, Flood v	658
Thompson v. Commonwealth	838
Thompson v. Brannin, Brand & Glover	86
Thompson, &c. v. Gray	783
Three Forks Coal Co., Commonwealth v	688
Throop v. Broadus	812
Timmons, Heaton, &c. v	69
Tinsley v. Ross	44
Todd, &c., Louisville Trust Co. v.	90
Todd v. Martin	238
Toebe, Cooper v	844
Toler v. Commonwealth	292
Tompkins' Adm'r, &c., King, &c v	29
Tompkins, &c. v. Carter, &c	749
Toney, Judge, &c., Kelley v	718
Townsend v. Burton	648
Traders Deposit Bank, Maples v	879
Traders Deposit Bank, McKinney v	30
Traxel, Moore v	125
Tribble's Ex'ors v. Broaddus, &c	824
Trimble, &c. v. Hunt	707
Trimble's Ex'tx v. Lebus, &c	85
Trustees of the Church Home, &c., Kilgus, &c. v	318
Trustees Common School District, &c., Gess v	30
Trustees Common School District, &c., Goodin v	481
Trustees Common School District v. L. & N. R. R. Co	160
Trustees Common School District No. 13 v. L. & N. R. R. Co	880
Tuck, &c. v. Deweese & Mantle	62
Tungate, &c., Mendenhall, &c. v	639
Turner's Adm'r, Fain, &c. v	653
Turner, Kirksey v	585
Turner, Mize v	67
Turner, &c., Newcome, &c. v	573
Tuttle, &c. v. Berryman	294
Tye v. Siler	159
Umpfenback, Weble, Ex'or v	846
Utterback, Lancashire Ins. Co. v.	702
Vance v. Burnett	30
Vance v. Louisville Courier-Journal Co	412
Varnon, &c., Doores, &c. v	244
Vaughn, alias Thacker v. Commonwealth	256
Vertree's Adm'r, N. N. & M. V. Co. v	680
Vogle v. Bridges	6
Volz v. C. & O. Ry. Co	727
Voorheis, Miller & Rupel v. Eiting	161
Vowells v. Commonwealth	574
Wade, Boaz v	877
Waggoner's Ex'or, Hughes v	780
Wagner, Schweitzer v	229
Wait, Potter & Co. v	60
Walden v. Webber	846
Walker, Surviving Partner, King v	605
Wallace, L. & N. R. R. Co. v	83
Walls v. Robb	159
Walton, L. & N. R. R. Co. v	206
Ward's Adm'r, Carroll, &c. v	699

	Page.
Ward v. Ward, Sr	706
Ware v. Crosthwaite, &c	807
Ware v. McCormick	59
Warren, Commonwealth v	249
Warner v. Hall's Ass'ee	158
Waters' Ex'or, Herndon v	269
Watkins, &c., Henderson Hominy Mill Co. v	801
Watkins' Adm'r, McNeill, &c. v.	780
Watson, Arthur v	605
Watson v. Commonwealth	360
Watt v. Hughes	846
Wayman, &c. v. Wayman	374
Webber, Walden v	846
Webster's Trustee v. Webster, &c.	97
Wehle, Ex'or v. Umpfenback	346
Weir, Weir & Walker, Owensboro, City of v.	506
Weisenburgh, Carder, &c. v	447
Welch, L. & N. R. R. Co. v	83
Wells v. Commonwealth	179
Wells v. Wells, &c	206
West v. Commonwealth	386
West Virginia, P. & T. R. R. Co. v. Gibson, &c	7
Western Union Tel. Co. v. Daniels, &c	813
Western Union Telegraph Co. v. Smith	334
Wheeler, &c. v. Wheeler	539
White, Crawley v	542
White, Davis, &c. v	783
White, Jr. v. L. & N. R. R. Co	49
White, &c. v. Mayhall, &c	830
White, Myers, &c. v	621
Whitley County Court, L. & N. R. R. Co. v	734
Whitley County Land Co. v. Lawson	401
Wicks v. L. & N. R. R. Co	605
Wilborn, McConnell v	596
Wilburn, Goff, &c. v	614
Wilcoxen v. Commonwealth	261
Wilgus' Ex'ors, &c., Nat. Exchange Bank, &c. v.	763
Wilkinson, L. & N. R. R. Co. v.	92
Williams, Campbell v	704
Williams v. Commonwealth	270, 287
Williams, L. & N. R. R. Co. v	31, 548
Williams' Adm'r, Mud River Coal, Coke & Iron Co. v	847
Williams' Ex'or v. Pettit, &c	243
Williams' Ex'or, &c. v. Williams, &c	432
Williamson, By, &c. v. Louisville Industrial School of Reform	620
Willis' Trustee v. Mackey	815
Willis, &c. v. Terry	753
Wilson, &c. v. Calvert, &c	489
Wilson, &c., Hill v	814
Wilson v. Hocker & Tabor	573
Wilson v. Hocker, &c	651
Wilson, Johnson v	852
Wilson, &c., Lanham v	109
Wilson, &c. v. Tague, &c	414
Wolf & Co. v. Hunter	846
Woods' Adm'r, Breyfogle v	782
Woodward, &c., Caudell v	63
Woodward, L. & N. R. R. Co. v.	445
Woolley, &c. v. Louisville S. R. R. Co., &c	13
Woolson Spice Co., Purdy, &c. v.	367
Wooten v. Commonwealth	495
Wright, &c. v. Baker	109
Wright v. Wright, By, &c	573
Wynn v. Kelley	81
Yancey, &c., Roberts v	10
Young's Gd'n v. Sadler, &c	531
Young, &c. v. Morehead, &c	383
Young, &c., Strutton v	657
Bird v. Board of Commissioners of Kenton County	578

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. JULY 1, 1893. No. 1

KENTUCKY COURT OF APPEALS.

NEWMAN v. MOORE, &c.

(Filed March 9, 1893.)

1. Rights of vendee of married woman who refuses to convey—Although the contract of a married woman to convey her land is void and can not be specifically enforced in favor of the vendee, yet, where the vendee was put in possession of the land and the married woman has received from him a part of the purchase money, he will be allowed a lien to secure the repayment of the amount so paid by him.
2. Rights of holder of lien note by assignment where a married woman refuses to convey—Where the vendee refuses to pay the purchase money notes executed by him for the land to one who has purchased them from the married woman, because of her refusal to convey, the holder of the notes is entitled to a lien on the land for the amount he paid for such notes; he will not be given a lien for the face value of the notes when he paid less than that sum for them.
3. The appearance of the married woman to the cross petition of the assignee of notes was entered by the filing of exceptions by her to the commissioner's report fixing the amount due such assignee, although summon thereon had not been served on her.

R. W. Holland and J. T. Simon for appellant.

Leslie T. Applegate and John H. Barker for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Hazelrigg.

While a contract between a married woman and another may not be enforced specifically, yet not even a married woman may so conduct herself as to defraud another and escape responsibility, if in the nature of things reparation can be made. She will not be allowed to take advantage of her own wrong, and will be estopped from interposing her inability to contract in bar of the consequences of her own fraud.

In this case Mrs. Moore, in conjunction with her husband, sold and covenanted to convey her land to J. C. Lowe. She received $250 of the purchase money, accepted and sold the notes for the remaining purchase price of her land. She put the purchaser in possession and then refused to convey.

Upon this state of case her land, the subject-matter of her attempted contract, may be subjected to the payment of the sums paid by Lowe, the purchaser; also to the sum paid by Newman for the notes on Lowe, who refuses to pay them only because he can get no title to the land.

It is contended by Newman that he should recover the full face value of the notes, and so should he if he paid that for them. The measure of recovery is the extent to which he is actually injured or damaged. He must be made whole—reimbursed to the extent of his loss. Mrs. Moore's liability arises not by reason of the contract of assignment and sale of the notes, but out of the equity fixing her responsibility at a price equal to that expended by the victim of her fraud.

Any other criterion of damage would amount to the specific enforcement of a void contract. She insists, however, that she was not summoned on the cross petition of Newman and that he is, therefore, not entitled to any relief against her. But she filed exceptions in open court to the commissioner's report, fixing the amount coming to Newman, which were sustained by the court, and as she thus took part in the trial and by her exceptions combatted the claim set up in Newman's action, she can not be allowed to say that she was not in court. She can not appear in court and attempt to defeat the purpose sought to be effected by the cross petition and yet shelter herself behind the plea that she has not been summoned. We think she thereby entered her appearance.

The judgment below fixing the amount due Lowe need not be disturbed, save in so far as the accumulations of rents, if any, on the one side and of interest on the other may be taken into the account, but to the extent that Newman is denied relief it is erroneous. The issues attempted to be raised by the reply of Lowe are, so far as he is concerned, wholly immaterial, but on a return of the case, if Mrs. Moore desires to plead further, she may be allowed to do so, the object of further investigation being the ascertainment of Newman's actual loss grown out of his purchase of the Lowe notes.

Wherefore, the judgment below is reversed, with directions to allow the case to proceed in accordance with the principles herein announced.

Judge Hazelrigg delivered the following response to a petition for rehearing:

This case was remanded, with directions to allow Mrs. Moore to plead further if she desired to do so, the object being to ascertain Newman's actual loss growing out of his purchase of the Lowe notes.

It is apprehended by counsel that she will not be permitted to show that Newman paid nothing for these notes, or that he obtained them fraudulently or without consideration. Such was not the intention of the court, or, as we think, a fair construction of its language. It is our opinion that she may put in issue any matter affecting Newman's alleged ownership of the notes.

The petition for rehearing is overruled.

ARTHUR, &c. v. INGRAM & DAVIDSON, &c.

(Filed March 30, 1893—Not to be reported.)

Adverse possession—Void patents—A patent or grant for land that has been inclosed, possessed and claimed by occupants thereof for more than fifteen years is void, although the calls of the patents or conveyances through which the occupants derive title do not embrace that part of the inclosed tract for which the patent is issued.

Wm. Lindsay and Wilson & Rawlings for appellants.

W. J. Hendrick and Reid Rogers for appellees.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Pryor.

We think it plain, from the facts of this record, that the appellants were led to obtain their patents under the belief that the calls or courses of the conveyances or patents under which the appellees claim did not embrace the land in controversy. There were marked lines and corners, with fencing almost entirely around this land, erected by the then claimant, who, and his vendees or successors, have been in the continued possession long beyond the statutory period. When the courses of several calls were reached by the surveyor, Tuggle, it leaves no room for dispute, and this accords with the claims, use and possessions under the patent to Myers & Dougherty for so long a time.

The patents of 1882 and 1889, in so far as they interfered with this possession and title of the appellees, are void, and the proof shows that the appellants must have had actual notice of appellees' right when these patents were issued, and were relying on the calls of the patent under which appellees claim to show that this land, although occupied for years and the most of it fenced in, was vacant and subject to entry and survey.

It is also immaterial whether the appellants had or not notice of the possession of appellees; the facts show the possession and title and that appellants have no title in law or equity to the disputed territory.

Judgment affirmed.

GODFREY v. COMMONWEALTH.

(Filed March 30, 1893—Not to be reported.)

Instructions—Self-defense—An instruction that if the defendant assaulted the deceased, and thereby began the difficulty in which the deceased was killed, he could not rely on the ground of self-defense as an excuse, was not prejudicial to the accused, when the court also instructed the jury that if at the time the defendant did the shooting he was in immediate danger of death or great bodily harm, then about to be inflicted on him, or which reasonably appeared to him to be about to be inflicted on him by the deceased, they should find him not guilty on the ground of self-defense.

Mann & Day and J. B. White for appellant.

W. J. Hendrick for appellee.

Appeal for Lee Circuit Court.

Opinion of the court by Judge Lewis.

The principal reason for reversal of judgment in this case is an instruction in substance that if the defendant, Godfrey, assaulted the deceased, and by said assault began the difficulty in which Ward was killed, in that event he can not rely upon the ground of self-defense and apparent necessity.

The court had previously instructed the jury that if at the time defendant did the shooting he was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to him to be about to be inflicted on him by the deceased, Ward, they should find him, the defendant, not guilty upon the ground of self-defense and apparent necessity.

Although it might have been understood by a person experienced in analyzing and interpreting meaning of instructions that defendant could not, under the last instruction, avail himself of the plea of self-defense, if he had first assaulted deceased and thereby brought on the difficulty that terminated in the homicide, still the jury might have construed it differently, and, consequently, the instruction objected to was apparently necessary. It certainly is not abstract or misleading, for there is evidence the defendant commenced the altercation by using insulting language and seizing the pistol of a bystander, fired from behind that person the first shot and continued to fire until fatal wound was inflicted. There is, moreover, not only previous threats proved to have been used by him against deceased, but a feeling of revenge entertained on account of preference of a damsel, to whom he had paid court, being given to deceased.

There is no question of competency of testimony allowed by the court showing that a party who was jointly indicted with defendant while the shooting was going on interfered and struck the deceased on the head with a rock. All the elements of murder are shown by the evidence in this case to exist, and the jury was fully authorized to find defendant guilty of that crime and inflict the punishment of confinement in the penitentiary for life.

Judgment affirmed.

SYDNER, &c. v. MT. STERLING NATIONAL BANK.

(Filed March 30, 1893.)

National banks—Forfeiture of interest—Where a national bank loans money at a usurious rate of interest which is included in the face of the note executed therefor, which note is renewed from time to time at usurious rates, it can recover on the last renewal note only the principal of the original loan. Under the national banking law the charging of the usury operates as a forfeiture of all interest.

Stone & Sudduth and Z T. Young for appellants.

Lewis Apperson for appellee.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellee is doing a banking business in this State under the U. S. banking law. As such banking institution it loaned the appellants money and took their note therefor, charging

them a usurious rate of interest and adding the same in the note, and at the maturity of the note it was renewed and usurious interest again charged and included in the new note. Renewals were in like manner made and usurious interest added therein until it resulted in the present note, when it was sued on.

The appellants plead the foregoing facts in regard to the usury embraced in the several renewal notes and asked that the interest be forfeited in consequence of the usury embraced in the several renewals, and that only the principal be recovered. The national banking law provides: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon."

There is no doubt that each renewed note contained usury therein, and that it was "knowingly done." The question to be decided is whether the entire interest that the several renewed notes bore can be eliminated from said notes in an action on the last note so that nothing shall be recovered therein except the principal. Upon that subject the following case seems conclusive: The case of Farmers & Mechanics Bank of Mercer v. Hoagland (United States Circuit Court), 7 Federal Reporter, 161. The court says: "By the terms of the act of congress the charging of such rates of interest worked a forfeiture of the entire interest which the several notes carry with them. Now such forfeiture was not waived by the giving of the subsequent notes, although as respects them the agreed rate of interest was a legal rate. They were mere renewals and given without any new consideration. Nor did the new notes operate as payment of the debts for which they were given. In so far, then, as the notes in suit embrace the fofreited interest they are without consideration.

Moreover it is an established principle that if there be usury in the original transaction it affects all consecutive securities, however remote, growing out of it, and neither the renewal of an old nor the substitution of a new security between the same parties can efface the usury; * * * the bank incorporated in the new notes usurious interest previously charged as a part of the new principal, and this illegal consideration pervaded the whole subsequent series of notes. Upon fresh renewal interest was charged upon usurious interest which had entered into the prior notes as principal."

The case of the Moniteau National Bank v. Miller, 73 Mo., 187, decides the same question the same way. The case of Alves' Assignee v. The National Bank of Henderson, Ky., 12 Ky. Law Rep., 69-722, directly decides the same principle. The leading idea in these decisions is that the new notes are mere renewals—new evidences of an old debt—and given without any new cosideration, nor do the new notes operate as a payment of the debts for which they were given, and as the usury embraced in the old notes taints the entire interest and renders it vicious and void, the agreement to pay it is without any lawful consideration; consequently, the unlawful consideration may be eliminated from each renewal note, for such note is but the new evidence of the old debt, which includes the vice and unlawful consideration, which, as between the same parties, may be traced to the new note and eliminated.

We now construe Brown v. Marion National Bank, 13 Ky. Law Rep., 812, to be in harmony with the foregoing views. The judgment does not eliminate the entire interest from the several notes, but only the usury. This is error. The entire interest on

all the notes should be eliminated and judgment rendered for the principal alone, and the partial payments should be applied to the principal.

The judgment is reversed and cause remanded, etc.

VOGLE v. BRIDGES.

(Filed April 1, 1893—Not to be reported.)

1. Opening of road—The sheriff is authorized to appoint another day for the inquest when the jury has not been summoned to meet on the day fixed in the writ of ad quod damnum, and the proceedings on such day are valid, all parties in interest being present.

2. Same—Viewers' report—Amendment—The viewers' report fixes with sufficient definiteness the beginning point of the proposed road when it states that "it begins at a point on the Rolling Mill road near Mrs. Bohannon's home," and describes the point where it leaves said road as "north 72 west 42 3-5 poles from a point in said road directly in front of Mrs. Bohannon's door."

The viewers may file an amended report at any time before final action as to the proposed road.

Cassidy & James and John T. Young for appellant.

T. J. Watkins for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Pryor.

The statute expressly provides that the officer may fix another day on which to hold the inquest if the jury be not sworn on the day specified. Here the jury had not been summoned to meet on the day fixed by the writ, but was summoned and heard the case on the day fixed by the officer. Both parties were present, represented by counsel and a verdict assessing the damages rendered. The officer had full power to fix the day under section 10 of the General Statutes, page 1121, chapter 94.

It is urged that the report of the viewers is defective, because there is no fixed point at which the road is to begin, but the amended report shows that it begins at a point on the Rollingmill road near Mrs. Bohannon's home. The point where it leaves the Rollingmill road is, by the course of that road, north 47 west 42 3-5 poles from a point in said road directly in front of Mrs. Bohannon's door. This is sufficiently specific, nor are we prepared to adjudge that the original report is defective. We think it abundantly appears that this is the only roadway for wagons to reach the ferry from the neighborhood in which this road is located. The conveniences and inconveniences to the public and individuals are aptly stated, and the report of the viewers and all the proceedings conform to the statute. The amended report was properly filed, as the statute provides that the report may be amended at any time before final action. In order to reverse this case the merest technical objections would have to prevail over what is right and just between these parties.

Judgment affirmed.

W. VA., P. & T. R. R. CO. v. GIBSON, &c.

(Filed April 4, 1893.)

1. Eminent domain—Measure of damages—The damages that the owner of land taken for the right of way for a railroad is entitled to are to be fixed by ascertaining the value of his entire tract, excluding any enhancement in value that may result from the construction of the road, and then deducting its value after the right of way is taken, excluding its enhanced value on account of the proposed road. The measure of value of the way taken is not its inherent value for any use that might be made of it, but its value with reference to the entire tract of the owner, and every damage or injury to the entire tract resulting from its taking is to be considered.

2. Same—In determining the compensation the owner is entitled to, the jury must not consider what the right of way is worth to the railroad or how profitably it will probably use the way in its business or the costs or expense it would be compelled to incur to secure any other way.

J. R. Sampson, W. J. Moss, Unthank & Riley, D. G. Colson and J. G. Fitzpatrick for appellant.

C. W. Metcalfe and Wm. Lowe for appellees.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellant sought by this action to condemn a strip of land along the bank of the Cumberland river and near the town of Pineville, Ky., and immediately at the foot of the mountain for its railroad track.

The trial, on appeal to the circuit court, resulted in a verdict and judgment estimating the value of about five and one-half acres of land condemned at over $12,000. The appellant has appealed.

The rule, according to the cases of Asher v. L. & N. R. R. Co., 10 Ky. Law Rep., 187, and L. & N. R. R. Co. v. James F. Ingram, MS. opinion, October 14, 1890, 11 Ky. Law Rep., 456, is that just compensation must be first made the owner of property when it is taken for public use, which must be done by ascertaining, in case of condemnation for railroad purposes, the value of the entire tract, excluding all consideration of the question of the enhancement of the value of the land resulting from the proposed improvement; then what will be the value after deducting such part of it as may be taken. The difference in value thus found, still excluding the enhancement, is the true compensation to which the owner is entitled. How much less is the land worth after the taking than before the taking, excluding always the question of enhancement of value by reason of the improvement? The value is not reached by determining the value of the land taken for actual use, but its value, when considered in its relation to the entire tract, which includes every direct damage or injury tending to diminish in value the entire tract by reason of the use and appropriation of the strip for the contemplated purposes. The diminution in value of the entire tract is a condemnation for public use, which should be paid for the same as the strip that is condemned for the roadbed. It is this condemnation that the owner is entitled to pay for, etc.

The court allowed the appellee to prove what was the market value of this strip of land, taking into consideration its close proximity to the town of Pineville and its adaptability for town lots and building residences thereon, and for railroad tracks and

other railroad purposes. The question is, was such evidence competent? The rule seems to be that in estimating the value of property taken for public use the owner is entitled to the reasonable market value of the property, which value must be ascertained, not by what use the property has been actually applied, but with reference to its availability and adaptability for valuable uses, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The proper inquiry in such case is, what is its value in view of any use to which it may be applied and to all the uses to which it is adapted? (Boone & Co. v. Patterson, 98 U. S., 403; Lewis on Eminent Domain, section 479.)

The issue in such case is not what the land is worth to the appellant, or how profitably it may use it in its business, nor the costs and expense that it would be compelled to incur in obtaining other property or in fitting it for his business, if he failed to obtain that particular property. (Lewis on Eminent Domain, section 479, and authorities there cited.)

The law should be given to the jury without including the evidential matters indicated. They are evidence only, but in such cases the jury should be admonished not to let those matters indicated as not evidence influence them.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

TABOR v. LANDER, &c.

HAYNES v. COMMONWEALTH.

(Filed April 4, 1893.)

Repeal of local option law by implication—An amendment to the charter of the town of Hawesville, enacted in 1888, which authorized the town council to license taverns and coffeehouses with the privilege of retailing liquors in the town, operated as a repeal of the general local option law as to said town which was then in force in the magisterial district of which the town was a part; the amendment, being repugnant to and inconsistent with the "local option law," must be regarded as a repeal of it.

The vote taken on the "local option question" in said district in 1890, which resulted against the sale of intoxicating liquors therein, did not in any sense operate as a re-enactment of the local option law as to the town, or suspend the force of the amendment to its charter.

Sweeney, Ellis & Sweeney for appellants.

W. J. Hendrick for Commonwealth.

W. S. Morrison for Lander, &c.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Hazelrigg.

On the petition of the appellees, Lander and others, filed in the circuit court in May, 1892, a writ of prohibition issued against the appellant, Tabor, as judge of the Hancock County Court, who is alleged to be about to grant licenses to sell spirituous, vinous and malt liquors within the limits of Hawesville, a city embraced within the territorial limits of Magisterial Dis-

trict No. 1 in Hancock county. In this district, it is alleged, at a duly appointed election held in August, 1890, a majority of the legal voters had voted against the sale of such liquors, and of which fact due record had been made in the proper office.

Such is the first-named proceeding.

In the second case mentioned above the appellant, Haynes, having obtained a license from the county court (Tabor, judge) to sell such liquors in the town named, and, being engaged in so selling, was indicted in May, 1892, for violating the "local option" law, so called, and on an agreed state of fact the lower court, having perpetuated the writ of prohibition against County Judge Tabor and found Haynes, the liquor dealer, guilty of violating the law named, they have each appealed from the judgment against them, and as the main question in each case is the same they will be heard together.

That question is whether or not in May, 1892, the local option law was in force in the town of Hawesville.

In the district a vote was taken under the provisions of the law in August, 1884, and again in 1890, resulting each time against the sale. In April, 1888, an amendment to the charter of the city of Hawesville was adopted by the legislature conferring for the first time authority on the city council to license taverns and coffeehouses, with the privilege of retailing liquors in the city, and it is now insisted that this act repealed the operation of the local option law then in force so far as the city was concerned.

In the case of Gifford v. Commonwealth, 2 Ky. Law Rep., 437, it was held by this court that a section in the charter of the town of Falmouth, passed by the legislature in 1878, granting the council of that town the power to license and regulate the sale of liquors, operated as a repeal of the general local option law which was then in force in the town, because repugnant thereto and inconsistent therewith, and the same construction has been adopted by the courts of other States. (Wisenheub v. State, 18 Texas App., 491.) And it would seem, outside of this direct authority, that such must be the necessary result of such legislation. The legislature has complete control of the subject. It may say that liquors shall not be sold in a given territory, or that the question of its sale shall be left to all the voters therein, or that liquors may be sold in a given locality, or that the question may be left to the council of a city or board of trustees.

In this case the legislative body must have known that the local option law had been voted into operation in Hawesville and was in force in April, 1888, and its action in making it thereafter lawful for the council of said city to fix the rate of city tax for the privilege of selling liquors by retail in the city must have been intended to vest the power of licensing the sale in a different set of electors—that is, in the councilmen of the city, instead of the voters in the district.

The city was incorporated in 1882, and while the powers of the city council are set out in great detail, and the trades and occupations placed under the control and regulation of that body are extraordinarily numerous, the right to license, regulate or control the liquor trade is no where conferred; and while the local option law was in full force and in operation in the district the legislature enacts a law directly repugnant to and inconsistent with the general law, and specially empowers the city authorities to exercise its taxing power on this special traffic for the benefit, it is alleged, of the common schools of the city.

We think a clear intent to repeal or suspend the operation of the general law is evident.

It was, in effect, a separation of the two political divisions—the city from the civil district.

But thereafter, and in 1890, the vote was taken in the district, and resulted against the sale, and it is insisted that this should operate to re-enact the general law, or at least again put into orce and effect that law, even if it had been suspended by this amendment. We can not see how this could be. If the right to regulate the traffic was conferred on the council, a vote of the people—and that, too, of a people in an outlying territory—can not affect the legislative power so conferred. The power to license and tax in such a case must mean an exclusive power. Any other construction would result in irreconcilable conflict of authority.

Prior to the passage of the local option law the councils of the various towns and cities of the State, as a rule, had the right to license and tax this business. The local option law was enacted applicable to all alike, and it was the manifest intention of the legislature to have this law apply to such towns and cities in spite of the right theretofore conferred to so control this trade by the councils, etc.; but where that law has been put into operation in a civil district, and the legislature, as in this case, deliberately confers that right or power on another and specified tribunal, it must be supposed to have intended a change in the manner of controlling and reuglating the traffic, and until this special act be repealed the special power and right therein conferred must be regarded as the exclusively controlling power. It may be observed in this case that before exercising the power conferred under the amendment the vote was again submitted to the people of the city of Hawesville as provided by the general law, and this resulted in favor of the sale. This, whether necessary or not, was in pursuance of the spirit of the local option law.

The least possible effect to be given the amendment of April, 1888, is that of separating or divorcing the theretofore existing political divisions and of recognizing the city as having a distinct and separate entity, and as a separate and distinct political division. And in this view the most that can be required of the city is to take the vote on the question of the sale as such distinct division, and this was done by the vote of 1892.

We think it clear, therefore, that the right to issue the license existed, and that when issued it afforded protection to the licensee. It is not necessary to consider other minor questions raised by counsel for the appellants. The petition should have been dismissed and the writ of prohibition quashed and the finding in the penal case should have been for the defendant.

For these reasons the judgments in both cases are reversed, with directions to dismiss both proceedings.

ROBERTS v. YANCEY, &c.

(Filed April 6, 1893.)

1. Champerty—A contract between an attorney and his client, whereby the attorney takes from the client an assignment of a note, agreeing to prosecute an action upon it in his own name and at his own expense, and to pay the client a certain part of the "amount collected," retaining the balance for his services, is champertous and, therefore, void.

2. Same—Conclusiveness of judgment—As such a contract extends to the collection of the judgment that may be recovered, in an action by the attorney to subject to the payment of a judgment which he has obtained under the contract a fund held in trust for the judgment defendant, the trustee, not being a party to the action in which judgment was rendered, may plead that the contract was champertous; the common law judgment against the cestui que trust does not bind the trustee.

Lindsay & Botts for appellant.

E. E. Settle for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Bennett.

R. S. Yancey executed and delivered to Jesse Halbrook his promissory note. Thereafter Halbrook assigned said note to W. B. Roberts, a lawyer, and appellant.

The consideration of the assignment was that the appellant, as such assignee, was to bring suit on said note against R. S. Yancey at his own costs and expense and divide whatever sum that he might collect from said Yancey between himself and Halbrook. Judgment was obtained by default against Yancey for the amount of said note, and execution having issued thereon and returned no property found, the appellant instituted this equitable action against the said appellant and R. H. Yancey, his trustee, to subject the trust estate held by R. H. Yancey to said debt. R. H. Yancey, who was not a party to the common law suit, by an amended answer contested the right of the appellant to subject said trust estate to said debt upon the ground that the contract being champertous and void, the judgment rendered thereon was void.

The lower court overruled a demurrer to the amended petition, and from this judgment the appellant appealed to the Superior Court, and that court affirmed the judgment, and from that opinion this appeal is prosecuted. (Ante, 42.)

The appellant contends, first, that the law of champerty does not apply to this case, because it is not alleged that suit was pending at the time the contract was made with a person not a party on record.

Section 1 of chapter 11, General Statutes, provides: "All contacts, agreements and conveyances made in consideration of the services to be rendered in the prosecution or defense, or in the aiding in the prosecution or defense, in or out of court of any suit by any person not a party on record in such suit, whereby the thing sued for or in controversy, or any part thereof, is to be taken, paid or received by such person for his services or assistance, shall be null and void.

"Section 8. Neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon."

As to the first contention of the appellant it is sufficient to say that it is not necessary that an action should be pending the order to create a champertous contract in the meaning of said section. (Burt v. Larue, &c., 4 Litt., 418; 3 American and English Encyclopædia of Law, page 70.) Also the section quoted under the statute does not mean that an action must be pending in order to make the contract champertous.

The eighth section quoted expressly provides that neither party to such contract shall have any right of action or suit thereoon. Said section makes it clear, if there was otherwise

any doubt, that no action or suit shall be brought on such contract, evidently because the contract, being vicious and against public policy, tainted the whole transaction, and, consequently, any judgment rendered thereon, the object of which is to enforce said contract, may be set aside by the proper parties. Therefore, there is no doubt that any person not a party or privy to said common law judgment is not bound thereby, and whenever an attempt to enforce it antagonizes his rights or duties he may resist said judgment to the extent that its enforcement antagonizes his rights, and in order to do so he may show that said judgment is void on account of champerty, etc.

The trustee held some estate willed to him by his father in trust for his brother, R. S. Yancey, and he was entrusted with the control and management of the same for the use of his said brother during his life and then to his children. This trust does not make him his brother's privy. His control and management of the estate is absolute, being only subject to an action for damages if he abuses his trust.

"He, as trustee, and his brother as cestui que trust, as a general rule, are regarded as being so independent that proceedings against one has no effect upon the other, and both are essential to a complete determination of any action in reference to the trust estate." (Freeman on Judgments, section 173.)

That is to say, as a general rule, a common law judgment against the cestui que trust, a trustee not being a party, does not bind him; and he, in an action that seeks to subject the trust estate to satisfaction of that judgment, may contest the correctness of the judgment and show that it is void in order to protect the trust property.

The judgment is affirmed.

HARMON v. KY. COAL, IRON & DEVELOPMENT CO. (LIMITED), &c.

(Filed April 6, 1893—Not to be reported.)

Appointment of a receiver—The lower court did not abuse its discretion in refusing to appoint a receiver for the large tracts of land involved, since it appears that the lands are in the hands of appellees, who paid full value therefor at a fair sale, and that appellant's interest therein is small and uncertain, and that he has an adequate remedy by attachment or demanding an allotment.

W. J. Hendrick for appellant.

Knott & Edelen, Johnson, Gallup & Hurry, Ed. C. O'Rear and Thos. J. Bigstaff for appellees.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Pryor.

This case is not here on its merits, but is an appeal from an order made by the court below refusing to appoint a receiver at the instance of the appellant. The appellant is claiming an interest in many thousand acres of mountain land, or its proceeds, purchased by some of the appellees, and after which the appellant became interested on certain conditions.

Insolvency, nonresidency and fraud are all alleged and denied, and an ample remedy exists by an allotment or an injunction; but the appellant has preferred to have a receiver appointed and the property taken from those who are greatly more interested than he is, and upon a state of facts that do not entitle him to the relief.

Patterson, from the proof before us, is the party to suffer by the depreciation, if any, in the price of this land and whose connection with the appellant, in relation to these land transactions, evinces no disposition to deprive appellant of any right he may have in the premises. If the appellant fears the probability of wrong on the part of the appellees, let him resort to his attachment or injunction. The appellant seems to be in the condition of not knowing what interest he has in the land or the proceeds, but is asserting a right he may probably have and against those not before the court. The Kentucky Development Co. has pepretrated no wrong on the appellant, but has purchased land that was sold for the benefit of all interested and from those authorized to sell. Besides, the appointment of a receiver is within the sound discretion of the chancellor, and it has not been abused in this case.

Judgment affirmed.

WOOLLEY, &c. v. LOUISVILLE SOUTHERN R. R. CO., &c.

(Filed May 24, 1893.)

1. Elections—Subscription by city in aid of railroad—Receiving illegal votes—When the question of subscription by a city to the capital stock of a railroad has been submitted to the "legal voters" of the city by order of the proper authorities thereof, the receiving of illegal votes by the officers of election, upon the advice of the mayor of the city, will not per se render the election void. The receiving of the illegal votes does not vitiate the submission of the question, and if the true result can be ascertained by eliminating the illegal votes the election will be upheld.

2. Same—When 3,185 votes were received by the election officers, only 2,307 of which were legal voters, and the plaintiffs, seeking to have the election declared void, do not allege that a majority of the votes cast were illegal, or that a majority of the legal votes cast were against the subscription, it must be presumed that a majority of the legal votes were cast for the subscription, and the election must be upheld.

3. Same—Bribed votes—Pleadings—An allegation that "a large number of voters' were bribed, etc., is not equivalent to an allegation that a majority of the legal voters at the election were bribed, and an allegation that "the majority of those voting in favor of the subscription were not unbribed" is not equivalent to an allegation that a majority of those voting in favor of the subscription were bribed.

B. F. Buckner and R. A. Thornton for appellant.

Bullitt & Shield, J. T. Shelby and C. J. Bronston for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellants, as citizens and taxpayers of the city of Lexington, Ky., seek, by petition in equity, to have the election and subscription of $100,000 in city bonds by said city to the appellee declared void.

The general assembly of the State of Kentucky, by an act approved May 3, 1888, authorized the city of Lexington to subscribe as much as $100,000 to the capital stock of the appellee, to be used in the construction of its road from Lexington to the town of Lawrenceburg, Ky.

As a precedent condition to the right of the city of Lexington to make said subscription the act provides, among other things, that the mayor and general council of the city of Lexington shall, by order, submit the question of subscription to a vote of the legal voters of said city at an election, etc.; and if a majority of the vote cast at said election shall be in favor of the proposed subscription, then it shall be made, etc.

The mayor and general council of said city did by order submit the question to the "legal voters" of said city, whether or not $100,000 should be subscribed to the capital stock of the appellee, which, in the opinion of the proper city authorities, resulted in favor of the subscription, and in the issual of the city's bonds to the appellee.

It is not contended by the appellants that the order of the mayor and city council, submitting the question of subscription to the "legal voters of the city," was in any particular irregular or void; but it is that the mayor of the city, on the morning of the day of the election, and before the hour of voting had arrived, issued a circular to the officers of the election, which they received and by which they were governed, informing them that no payment of poll tax was required of the voters at the election to be held that day, in order to entitle them to vote at the election, if they were otherwise qualified under the general State law to vote; that as the law required the payment of a poll tax and a registration by each citizen in order to entitle him to vote at city elections; and as all citizens of the city, without regard to their having paid their poll tax, and who were entitled to vote at a State election, were allowed to vote at said election the election was void and conferred no power upon the city to issue bonds to the appellee.

It appears that 3,185 votes were cast at said election, and only 2,307 of which were legal voters. The appellants claim that receiving the illegal votes by the officers of the election, upon the authority of the mayor, vitiated the election upon the ground that the submission was not legal; therefore, the election was void.

It is conceded that the submission to legal voters, in all cases, is a condition precedent to a valid election; but the receiving of illegal votes by the officers of the election, who have no authority to order an election, is wholly a different question, for if the election has been legally ordered the condition precedent to a valid election has been complied with, and if the officers of the election violate the law in receiving illegal votes, and such illegal votes can be eliminated and the true result of the legal votes ascertained, the election is not invalid, but it will be upheld.

Upon that subject Mr. Dillon on Municipal Corporations, section 188, and McCrary on Elections, section 444, correctly, as we think, lay down the proper rule. The former says: "Receiving illegal or improper votes will not alone vitiate an election. It must be shown affirmatively, in order to overturn the declared result, that the wrongful action changed it." The latter says: "It is not a valid objection to an election that illegal votes were received, if they did not change the result. If, therefore, a number of legal voters withdraw from an election and decline to vote upon the ground that illegal votes are being received, they do so at their peril, and take the chance of being able afterward

to show that such illegal votes were large enough to change the result."

He also says, section 305: "It is impossible to define exactly the degree of irregularity and illegality in the conduct of an election which will render it void; but perhaps the best rule upon the subject is this: If the voice of the electors can be made to appear from the returns, either alone or aided by extrinsic evidence, with reasonable clearness and certainty, then the election should stand, but not otherwise. This rule has made necessary another, viz.: That if it appear that illegal votes have been admitted, it is the first duty of the tribunal trying the contest to purge the poll of such illegal votes, if there is evidence upon which this can be done, and effect should be given to the majority of the good voters."

Now the circular of the mayor to the officers of the election was not a part of the submission of the question to the voters of the city; he had no legal authority to issue the circular; his advice to the officers was not binding upon them; it amounted to no more than the advice of any citizen upon the subject.

The action of the officers in receiving illegal votes was not based upon the submission of the question, but upon the advice of a person that had no authority upon that subject. The submission was, therefore, legal. Nor does it not appear from the petition that the majority of the votes cast were illegal votes. On the contrary it appears from the petition that not half of the votes cast at the election were illegal voters. Nor does it appear from the petition that a majority of the legal votes cast was not for the subscription.

It is clear that it could have been ascertained with judicial certainty how many legal votes were cast for and against this subscription, and the appellants' silence upon that subject creates the presumption that the subscription obtained a majority of the legal votes, and the declared result was in accordance with that vote.

It is also alleged that the appellee "did, by the payment of money and by the use of corrupt and illegal means, entice, persuade, influence and bribe a large number of voters, both those who were and those who were not at the time legal voters of the city of Lexington, to vote in favor of such subscription; * * * that the majority of the voters, who voted at said election in favor of the subscription, were not unbribed."

The expression "a large number of voters" means any number that the draftsman may have upon his mind, viz., five, ten, a hundred, etc., but it does not mean that a majority of the legal votes cast for the subscription were bribed to vote for it. Also the expression "that the majority of those voting in favor of the subscription were not unbribed" is not equivalent to an allegation that a majority of those voting in favor of the subscription were bribed. The allegation is only, at most, an implied or indirect charge. It is not equivalent to a direct charge of bribery, made in plain and concise language, as the Civil Code requires.

The judgment sustaining the demurrer to the petition is affirmed.

HEAVERIN, &c. v. ROBINSON & CO.

(Filed March 28, 1893—Not to be reported.)

Pleadings—Delay in offering answer—In an action by appellees against the father of appellants, seeking to attach certain property of the father, which was consolidated with other actions to which both their father and

the appellants were parties, the appellants offered to file their joint petition to be made parties, in which they claimed ownership of a storehouse and lot, which was about to be subjected as the property of the father. The court refused to permit their petition to be filed, and entered judgment, subjecting the property to the fathers debts. Held—That the appellants had a right to file their petition and assert their claim to the property; they were not made parties to the suit against the father, and hence can not be considered as having unreasonably delayed the offer to file their petition.

J. Edwin Rowe and M. L. Heaverin for appellants.

J. E. Fogle for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1888 the appellees brought their action against one F. M. Heaverin, the father of the appellants, seeking to subject his property to sale under attachment. The sons were not made parties to this action, but were to other actions brought just before this. After the case had been consolidated with that of Moses & Co. and others, and after the debts of the prior attaching creditors had been satisfied by a sale of personalty, a judgment was rendered ordering a sale of a storehouse and lot, as the property of F. M. Heaverin, to pay the debt of the appellees.

Before this judgment was rendered the two sons—appellants here—offered to file their joint petition to be made parties, in which they set up ownership of this house and lot, by properly recorded deed.

The court, probably on the idea that they should have done this before, refused to allow the pleading to be filed and adjudged a sale of their property, or of the property they claimed.

If the appellants had been parties to the suit of appellees there might have been some discretion with the court as to the filing, but, under the circumstances, there was none. They had the right to come in by petition and claim the attached property at any time before judgment respecting it.

Not until after the sale and distribution of the personal property among the first attaching creditors was it known that the real estate was needed to pay the debt of the appellees. When that fact was ascertained, and before the judgment was rendered to that effect, the pleading was offered. It should be permitted to be filed, and it was error to adjudge a sale under this state of case.

Upon a return of the case this petition and answer may be filed and the ownership of the property determined.

For that purpose the judgment is reversed.

PEARL, &c. v. PITTMAN.

(Filed March 28, 1893—Not to be reported.)

Boundary of grant—Evidence—The evidence shows the lines of the patent herein were correctly located by the surveyor, and the judgment below will not be disturbed.

W. O. Bradley and R. L. Ewell for appellants.

Thomas H. Hines and C. B. Faris for appellee.

Appeal from Laurel Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

It is contended that the east and west lines of the Remy & Thompson surveys were necessarily settled in a former appeal of this case to this court. We think not.

The appellee, then the appellant, was then a party as administrator only, and more than that the lines of the surveys named were in nowise fixed in the former judgment appealed from, nor, in the opinion of this court, confirming it.

It is true some deduction was made on the notes in question on that appeal by reason of a deficit of land, but neither the judgment below nor the opinion here was based on the location of the lines in question, except indirectly.

When the case went back further proof was taken, and we are of opinion that the true line was found by the surveyor, Brown, as shown by the map filed by him.

This is adopted as the true line by the chancellor, is fairly supported by the proof and will not be disturbed. This leaves the land in controversy on the south side and in the Thompson survey, and hence the property of the appellee.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. FOLEY.

(Filed March 28, 1893.)

1. Neglect—Pleading—Evidence—Where the brakeman alleged that the injury to his hand, suffered while endeavoring to couple freight cars pursuant to an order of the conductor, was caused by the defective condition of the darwbars of the cars and the shortness of the link and by the negligent manner in which the cars were backed by the engineer, and also by the negligence of the conductor in signalling the engineer to back the train without giving any notice thereof to the brakeman, the plaintiff may be entitled to recover if the other negligent acts be proven, although the evidence wholly fails to show negligence of the conductor in signalling the engineer to back the train, and although the petition avers that the accident would not have occurred but for such alleged neglect.

If the injury resulted from any one of the causes alleged, or from the concurrence of any two or more of them, a right of recovery exists.

2. Same—Defective appliances—The rule requiring railroads and other employers to provide reasonably safe and suitable machinery and appliances for their employes and to keep them in reasonable repair while they are being used, is just and fair and well settled in this court. This rule does not place the burden on the employe where he seeks damages for injuries suffered by reason of defective machinery furnished to show, as a condition precedent to his right of recovery, that he exercised care and diligence to discover the character and condition of the machinery, except where the inspection thereof is a part of his duty.

3. Same—Question for jury—Whether the defective condition of the drawbar and link was the sole cause of the plaintiff's injury, or it resulted from other causes, is for the jury to determine, and their finding in relation thereto will not be disturbed.

4. Same—Evidence—The statement of the car inspector, made within ten minutes of the injury, that he had been troubled with coupling the two cars which caused the injury, was evidently made as the result of feelings and

motives co-existent with the injury, and is to be regarded as a part of the res gestæ and competent evidence.

5. Same—Contract to use coupling stick—Contributory neglect—The failure of the brakeman to use a coupling stick, which was furnished him when he was employed, and which, by writing, he agreed to use in coupling cars, was not such contributory neglect as to defeat a recovery, unless but for his failure to use the stick the accident would not have occurred.

The agreement to use the coupling stick was not binding on the brakeman unless it was indispensable or clearly necessary for security to him against danger incident to coupling cars.

Evidence of other brakemen concerning the advantages or disadvantages arising from the use of the coupling stick and of its universal disuse by brakemen was competent, and whether the failure to use it was contributory neglect was a question for the jury to determine.

6. Same—Excessive verdict—A verdict for $5,000 damages for the loss of two fingers is so excessive as to indicate passion or prejudice on the part of the jury, and must be set aside.

Helm & Bruce for appellant.

Humphrey & Davie for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is an appeal from a judgment in favor of M. J. Foley against the Louisville & Nashville Railroad Company for $5,000 in damages on account of a personal injury.

It is stated substantially in the petition that August 18, 1889, plaintiff was in employment of defendant as brakeman on a freight train, which, leaving about 11 p. m., started on a run from the freight yard in Louisville, became, when it reached East Louisville, disconnected by reason of the coupling machinery of two cars breaking or becoming loosened; that he was thereupon directed by the conductor to recouple the two cars, and while he was between them for that purpose the conductor signaled the engineer to back the locomotive, to which was attached five of the twenty-five cars composing the train, but did not warn plaintiff he had done or was about to do so, and in consequence of such failure his hand was caught between drawbars of the two cars when they came together and injured; that said drawbars could not be safely or properly used together, because not on a level, one being about four inches higher than the other, and that only a short link with which to couple the cars was provided, consequently performance of plaintiff's duty was rendered on that occasion extra hazardous; that the locomotive and cars attached to it were backed on a down grade without brakes being fastened so as to moderate their speed, and as a consequence the engineer lost control and they moved to the stationary part of the train more rapidly than would have been otherwise the case. It is further stated that condition of the drawbars and character of link as described were known to the conductor, but not to plaintiff until the accident occurred. The evidence does not satisfactorily show the conductor was negligent as to the matter of signalling the engineer to back the train, and for that reason and because it is in general terms alleged in the petition the injury would not have been done but for such negligence of the conductor, counsel argue the verdict is not supported by competent and relevant evidence. But it is else-

where in the petition alleged that the injury resulted from backing the locomotive and cars in the negligent manner mentioned and from inequality and unevenness of said drawbars and shortness of the link, as well as from negligence of the conductor in signalling the engineer to back without warning to plaintiff. And as the other facts stated show prima facie an actionable injury independent of negligence of the conductor in the particular charged, it was competent for plaintiff to prove all circumstances legitimately connected with the occurrence, and for the jury, under proper instructions, to inquire and find whether defendant was liable by reason of negligence of the conductor, engineer or other employe in respect to defects of the coupling machinery or manner in which the locomotive and cars were backed. For, if the injury to plaintiff resulted from either of the alleged causes, or from the two combined, right of recovery existed, whether the conductor was or not guilty of negligence in the particular matter mentioned.

The lower court, therefore, properly instructed the jury that if the injury was caused by improper or defective appliances furnished plaintiff by defendant with which to perform the duties required of him, and defendant knew or might have known of their condition and character by use of ordinary care, and plaintiff did not know thereof, the law was for him, and the jury should so find. Equally pertinent and proper was an instruction to so find if the injury was caused by gross negligence of the engineer or other co-employe.

But counsel contend that the first instruction is erroneous because exercise by plaintiff of care and diligence to discover the character and condition of the coupling machinery before using them was not made a condition of his right to recover.

The rule requiring an employer to provide reasonably safe and suitable machinery and appliances for use of employes, and to keep them in reasonable repair while being used, is so just and fair that it has never been called in question by this court. But if an employer may in every case escape liability for an injury to a subordinate employe by reason of defective machinery or appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof, that rule would not amount to much as either an incentive to the employer to do his duty, or protection to the employe against personal injury.

The limit of inquiry in such case as this is whether as matter of fact the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective. The rule, of course, does not apply when examination and inspection is in the line of an employe's duty; but a brakeman is never entrusted with the duty of inspecting, and, therefore, can not be reasonably expected or required to know whether all the machinery and appliances of a railroad train are in proper condition.

In this case the plaintiff testified he did not know of the condition and character of the drawbars and link in question before he was injured. And in view of the fact the train had been recently made up in the defendant's yard by other employes, and he was unexpectedly called on near midnight to perform the service of coupling the two cars that had broken apart, it is manifest he had no previous opportunity, even if it had been his duty, to inspect the twenty-five cars composing the train in order to ascertain the condition of each of them. And it, therefore, seems to us, not only that plaintiff's statement is entitled to credence, but that here is presented a fit illustration of the injustice and unfairness of requiring a subordinate employe, like a brakeman, as a condition of his right to recover against his

employer for personal injury, to show that he had previously exercised diligence to discover the character and condition of all the machinery and implements provided for him to use and by which the injury was done.

There may be cases where in fact the defect is so patent that the jury will conclude such subordinate must have discovered and known it before taking the risk of injury, but such is not this case.

Whether the condition and character of the drawbars and link plaintiff was required to use was the sole cause of his injury, or it resulted from the manner in which the locomotive and cars were backed, or be attributed to the two causes combined, or was altogether result of his own negligence, were questions for the jury, whose finding in that respect we do not feel authorized to disturb.

An objection was made to evidence tending to show that the car inspector said, about ten minutes subsequent to the injury, and after plaintiff had been carried to the depot near, that he had been troubled with coupling of the two cars in question before the train started from the yard; but it seems to us that declaration of the car inspector having been evidently made as the mere result or consequence of feelings or motives co-existent with the injury, and without time or incentive for calculation as to effect or influence it would have upon rights of the parties, should be regarded as of the res gestæ, and, therefore, competent evidence. But if proof of that declaration had been incompetent it would not have prejudiced substantial rights of defendant, because condition and character of coupling machinery of the two cars as described in the petition was otherwise fully proved.

It appears that plaintiff, at the time of his employment as brakeman, acknowledged in writing receipt from defendant of a coupling stick which he promised to use when coupling cars while in defendant's service. And it is now contended that his failure to use the stick for that purpose when injured should be treated such contributory negligence as to defeat recovery in this action.

The written agreement obviously was not binding on plaintiff unless the coupling stick was in fact indispensable, or at least clearly necessary for security of brakeman against danger incident to coupling cars, for defendant had no right otherwise to bind plaintiff to use the stick, or to make habitual use of it a condition of his right to maintain an action for personal injury received while engaged in coupling cars. The decisive question, then, is whether, but for plaintiff's failure to use the coupling stick on occasion of receiving the injury complained of, it would not have occurred.

It is proved that, although a coupling stick was, at the time plaintiff signed the writing, delivered to him, the conductor who delivered it told him the written undertaking was required as mere form.

It is further shown that in order to use the stick it is necessary for a brakeman to carry it about his person in a belt, which causes more danger of falling and being injured while running on top of a car or climbing hurriedly on or off it than is compensated for by any advantage or security against injury it may be. Besides, the coupling stick is proved to be generally discarded and not used at all by brakemen on freight cars of defendant, which fact is not only proper to be proved, as was done on trial of this case, but tends strongly to show the coupling stick does not answer the purpose for which it was apparently designed, for the opinion of brakemen in regard to utility of an implement such

as a coupling stick, which they only have use for, and must necessarily know more about than any other class of persons, is, of course, entitled to great weight, because their knowledge is derived from actual experience, and after an anxious effort to properly test its value—and no evidence could speak more decisively against the value of a coupling stick than the general disuse of it by brakemen. But it is competent for the jury in every case like this to consider the merit of the coupling stick in determining the question of contributory negligence, as was doubtless done on trial of this case, and we need not, therefore, consider the question further.

But it seems to us the amount of damages found in this case is so excessive and disproportioned to the actual injury sustained as to make it our duty under section 340, Civil Code, to set aside the verdict, for if $5,000 damages for loss of two fingers is not so excessive as to appear to have been given under inflence of passion or prejudice, it is hard to tell when a case would occur justifying interposition of the court for protection of a defendant against spoliation. This court has always been averse to disturbing the finding of a jury, and will not do so except when their verdict is palpably, or, in language sometimes used, flagrantly against the evidence, and we are not authorized to set it aside on account of excessive damages unless the condition provided for in the section referred to exists, which is clearly this case.

Wherefore, the judgment is reversed for a new trial consistent with this opinion.

COX v. HAZELIP, &c.

(Filed March 30, 1898—Not to be reported.)

Husband and wife—Liens—A postnuptial contract between a husband and wife, wherein the receipt of money from the wife by the husband is acknowledged, and certain personal property is conveyed to a trustee for her, and it is further stated by the husband: "I hereby declare and acknowledge to her in trust * * * a debt upon my estate for the said $1,500, but not payable during my natural life, and at my death the same * * * is to be paid to her out of first my personal property and estate, and whatever is yet left is to be paid out of my real estate." This contract was recorded in the proper office of the county where the husband owned lands. Held—That the contract did not create a lien in favor of the wife on the husband's land, which was sold under execution against him during her lifetime. The debt is enforcible against only such estate as the husband owned at the time of his death.

A. A. Sturgeon and D. W. Wright for appellant.

Settles & Rodes and Edward W. Hines for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Hazelrigg.

Cox, the appellant, by a writing of January 30, 1888, became the owner of the claim of Mrs. Souther in and to the real and personal estate of her husband, W. T. Souther, who died in 1886. That claim is alleged to be a lien on the lands of the decedent, owned by him at the time of the execution of the writing creating the claim.

The writing alleged, thus to create such a lien, was a postnuptial contract and was executed on June 1, 1870. After reciting the receipt of certain moneys from his wife, and conveying certain personal property to one Robt. Dishman, to be held in trust

for her separate use, Souther says in the instrument: "I hereby declare and acknowledge to her in trust, as aforesaid, a debt upon my estate for the said $1,500, but not payable during my natural lifetime, and at my death the same, with such additional amount of her money as shall hereafter come to my hands, is to be paid to her out of first my personal property and estate, and whatever is yet left is to be paid out of my real estate."

This instrument was recorded in the county clerk's office of Edmonson county. Souther was then the owner of three tracts of land in that county, the least valuable of which was the sixty-nine acres in contest.

This tract was levied on, sold and bought by an execution creditor, Settle, in 1879, and a deed therefor was made to Hazelip, the appellee, as the grantee, in 1882, some four years before Souther's death. The appellant in 1889, ten years after the levy and sale named, instituted this action to enforce his alleged lien, and the question is, does the writing between Souther and wife give such lien to the wife? We think not.

A fair construction of this contract is to regard it as an enforcible obligation against such estate only of Souther as he owned at the time of his death. The demand was not payable until then, and hence not enforcible until then, and it is fair to conclude that the estate, out of which to pay it, was such as might then be on hand.

The vague and indefinite description of the terms of the trust, or of the property sought to be placed in trust (if such result was accomplished at all), precludes the possibility of its being treated as a mortgage, giving notice to purchasers of Souther's property of the existence thereon of any lien. It was a liberal construction to consider it a mortgage, as between the husband and his wife, on such estate as was on hand at his death.

This was done, and the appellant, as the assignee of the widow, got the benefit of a very liberal construction of the contract.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

PADUCAH LAND, COAL & IRON CO. v. MULHOLLAND, JR.

(Filed March 22, 1893.)

Corporations—Fraud of original incorporators—Purchaser with notice—Parties from the time they begin to form an association stand in a confidential relation, not only to each other, but to all who may subsequently become members thereof; and none of them can purchase property for the company and sell to it at an advance without disclosing the fact. The original incorporators of a corporation purchased land for the company for $55,000, but in order to make for themselves a profit out of the other stockholders they had the deed to the company recite that the consideration for the land was $100,000, paid by the delivery to the grantors of 10,000 shares of its capital stock, whereas only 5,500 shares of stock were issued to the grantors, the other 4,500 shares being divided among the incorporators.

In this action by the corporation to recover the value of one hundred shares of this stock from one to whom the incorporators transferred it in payment for services, Held—That the evidence is sufficient to charge defendant with notice of the fraud by which the stock was obtained, and, therefore, the plaintiff is entitled to recover.

W. D. Greer and J. W. Bloomfield for appellant.

Appeal from McCracken Circuit Court.

Opinion of the court by Presiding Judge Yost.

On the 18th day of April, 1887, the Paducah Land, Coal & Iron Company was incorporated under the provisions of the 56th chapter of the General Statutes. H. H. Tharpe, M. Livingstone, W. M. Jones, S. W. Cooley, Elbridge Palmer, I. Nauheim, V. R. Harris, R. E. Ashbrook, W. W. Powell, M. Bloom and Geo. C. Thompson being the original incorporators. The authorized capital stock of this concern was $3,000,000, divided into shares of $100 each.

At this time Tharpe and certain others of the incorporators owned and had options upon a large body of land in Kentucky and Tennessee which they desired to sell to the corporation. This land had and was to cost them about $25,000, and was not really worth, as the evidence in this record tends to show, more than that sum. These men agreed to sell this property to the company for $55,000, to be paid in 5,500 shares of its capital stock, which was then worth ten cents on the dollar. Desiring, however, to make for themselves a handsome profit on this transaction out of the other stockholders, these incorporators fraudulently agreed with each other that the deed to the company should recite that the consideration for the land was $100,000, paid by the delivery to the grantors of 10,000 shares of its capital stock.

Carrying out this scheme, two certificates of stock were issued to Tharpe, one for 5,500 and the other for 4,500 shares. The number of this latter certificate was 169, and was issued on the 12th day of July, 1887. On the next day it was delivered to Palmer, who executed this receipt therefor: "Received this day certificate No. 169, of 4,500 shares of the capital stock of the Paducah Land, Coal & Iron Company, which was issued to H. H. Tharpe and by him transferred and assigned in blank, and which I now hold as trustee or agent for said H. H. Tharpe, S. W. Cooley, V. P. Harris, W. M. Jones, M. Bloom, Geo. C. Thompson, W. W. Powell, R. E. Ashbrook, I. Nauheim, M. Livingstone, Henry Burnett and myself, all of the above named being equally interested therein, and I agree and promise to hold said stock as such trustee until instructed in writing by a majority of said owners as to a disposition thereof."

These parties, other than Burnett, whose only connection with the matter was that he was the attorney of the company, were, during all this time, the directors of the corporation, Tharpe being its president. Between the date of the organization of the corporation and this transaction a large amount of stock had been placed upon the market and sold to parties who had no knowledge of these fraudulent acts of the board of directors and president of the corporation in which they had invested their means.

By an agreement reduced to writing and signed by the above-named incorporators on the 29th day of August, 1887, certificate No. 169 was cancelled, and in lieu thereof certificates for 323 shares were delivered to each of the owners, a certificate for a like number of shares was delivered to one Thos. H. Hayes, who was

on that day elected president of the company, vice Tharpe, resigned, and certificates of 100 shares each were delivered to Chas. Reed, Hugh Mulholland, Jr., and C. E. Sears, respectively.

Some time after this the stockholders elected a new board of directors, who, upon investigating the books and affairs of the company, found that the concern had been in great measure wrecked. The corporation then brought several suits seeking to recover the value of the 4,500 shares which had been originally issued to Tharpe and divided out by him as hereinabove recited. Among these suits this action against Mulholland was instituted, in which it was sought to recover from him the value of the 100 shares, fixed at $1,000, so received by him.

Parties, from the time they begin to form an association, stand in a confidential relation, not only to each other, but to all who may subsequently become members thereof. None of them can purchase property for the company and sell to it at an advance without disclosing the fact.

As was said by the court, in Simms v. Mining Co., 61 Fa., State, 202 (100 American Decisions, 628), many transactions like this under consideration have taken place without being subject to judicial investigation, and parties have enjoyed rich returns while others have suffered disastrous diminution of their means. But the impunity with which many have speculated by unjustifiable means and escaped a call to account to those wronged does not impair the efficiency of the law to redress such a wrong when it is made judicially to appear.

It is undoubtedly true that hundreds have done as in the case before us. It has become a common thing, and men of fair standing do not hesitate to represent property as having cost sums much beyond that paid by them as inducements to purchasers. In Pittsburg Mining Company v. Spooner, 74 Wis., 307, the promotors of the corporation purchased the mining option, which they represented to persons who subscribed for the stock would cost $90,000, and sold it to the company for that sum, although it in fact only cost them $20,000, court held that if promoters of a corporation obtained property at a certain price and sold to the company at a profit it could sustain an action against them to recover the difference between the two prices.

That this company had a cause of action against Tharpe and the other incorporators for the value of these 4,500 shares can not be questioned; that they can follow them, or any part of them, into the hands of Mulholland, unless he became their bona fide owner without notice of their fraudulent procurement by Tharpe, is equally clear.

Did Mulholland purchase the 100 shares sued for for a valuable consideration without notice of the fraud? The court below, holding that he did, dismissed the petition, and from that judgment this appeal is prosecuted.

After a careful review of the testimony contained in this voluminous record, we are constrained to differ from the learned judge below in his conclusion.

Mulholland, in his testimony, swears that he knew nothing of the manner in which Tharpe and the others became the holders of the certificates of stock. He says that he was approached by Thompson, one of the directors, some time in July, 1887, and offered 300 shares of the stock if he would go from Paducah to Louisville and get the consent of Hayes to act as president of the company; that he did go to Louisville, had an interview with Hayes, obtained his conditional consent to act in that capacity for the company, and returned to Paducah, when the

directors delivered to him in pay for these services, which it took him three days to perform, 100 shares of stock which were then worth on the market $1,000. The sequel to this action was that Hayes served the company as president at a salary of $5,000 per annum, and Mulholland was employed as his private secretary at a salary of $100 per month for duties merely nominal in their nature.

Thompson, in his testimony, says that he did not know whether Mulholland knew of the manner of the issual of the stock or not; that he did not promise him any certain number of shares for any services he might render, and that he never knew how much stock was given to him until afterwards. Said the witness: "These shares of stock were originally to be divided by Tharpe between the eleven directors and the attorney, but he wanted to bring in a new president, with Reed as a new director and Mulholland as a boomer, as he was active and considered a hustler. It was, therefore, agreed between us that the stock should be divided in that way."

It is always hard to bring knowledge of a fraud directly home to the bosom of the parties sought to be charged therewith. It is not shown here that Mulholland had actual notice of the fraudulent conduct of the officers of the corporation. All the circumstances in the case, however, seem to us to point with unerring fingers to the conclusion that he not only knew of the fraud, but was an active participant therein. He was present, often going in and out of the rooms where the directors were wont to meet, was actually present part of the time on the day when the agreement of division was reduced to writing, and was taking an interest generally in the affairs of the company.

What was there about Hayes that rendered him so unapproachable that the directors, all men of fine business capacity, dared not approach him with an offer of a $5,000 per annum salary without this intercessary work of Mulholland's? The very price paid him for the character of services rendered was enough to put him upon inquiry. He might well, it seems to us, know that prudent men would not be so prodigal of their own means. It is only the latter-day boomer, crazed with the fever of speculation, who can afford to pay so large a sum for so little labor. It is incredible that Mulholland, selected for his activity and intelligence, and wanted in the company because "he was a hustler" in putting stock upon the market, did not know of the fraudulent manner in which the stock which came into his hands almost without consideration was procured by Tharpe. We think the record shows that he did know it. He should, therefore, in our opinion, be held to account for it.

The judgment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. HOWARD.

(Filed March 22, 1893.)

1. Purchase of property of one corporation by another—Liability of stockholder—Two corporations can not be consolidated, or one purchase the property and franchises of the other, without the unanimous consent of the shareholders, even though the legislature should authorize the consolidation or purchase to be made. Nor can a corporation become a stockholder in an-

other corporation for the purpose of controlling the business or affecting the management of the latter unless such power is conferred by statute.

2. Same—A stockholder can not ordinarily be sued for the liabilities of the corporation. Therefore, when stock is killed on the track of a railroad company the fact that another company owns the controlling stock of the company to which the road belongs, and in whose name it is operated, and has elected the directors and managers of that corporation, does not render it liable for the damages sustained, as the party injured must look to the corporation and not the stockholder. And in this case testimony tending to show that the defendant railroad company paid the employes on the road upon which plaintiff's horse was killed, and that engines and cars with defendant's name on them were run over the road, and that bills for goods shipped over the road were made out in defendant's name, did not contradict defendant's written evidence showing that it merely owned the controlling stock in the corporation and elected the officers and managers of the road.

J. I. Blanton for appellant.

Swinford & Evans for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Barbour.

It is well settled that two corporations can not be consolidated or one purchase the property and franchises of the other without the unanimous consent of their shareholders, even though the legislature should authorize the consolidation or purchase to be made, for the consolidation or purchase (which are in effect the same things) would work a fundamental change in the contract of the shareholders (Morawitz on Private Corporations, section 646); nor can a corporation become a stockholder in another corporation for the purpose of controlling the business or affecting the management of the latter unless such power is conferred by statute. (Pearson v. Concord R. R. Co., 62 N. H., 537; 13 Am. St. Rep., 590; People v. Chicago Gas Trust Co., 130 Ills., 268, 17 Am. St. Rep., 319.)

We will assume—it seems to be conceded—that the L. & N. R. R. Co. had legislative authority to become a shareholder in the Kentucky Central Railway Co. by the purchase of its stock or to purchase its railroad and operate its trains over it.

But the fact that the L. & N. R. R. Co. was the owner of the controlling stock in the Kentucky Central Railway Co., and elected the officers and managers of the railway company who were in control of it when the plaintiff's horse was killed, did not render it liable to the plaintiff for the damage he sustained. The plaintiff's remedy was against the railway company, not against the stockholder, the L. & N. R. R. Co. (Atchison, Topeka & Santa Fe R. R. Co. v. Cochran, 43 Kansas, 225, 19 Am. St. Rep., 129.)

The plaintiff's horse was killed in June, 1891, on the track of the Kentucky Central Railway Co., unless it be a fact that it was then the property of the L. & N. R. R. Co. by purchase from the Kentucky Central Railway Co. The uncontradicted written and record evidence (and the L. & N. R. R Co. could only acquire its right to the road in that way) shows these facts: In December, 1890, the L. & N. N. R. R. Co. purchased of George Bliss and C. P. Huntington "all of the stock of the Kentucky Central Railway Co. owned or controlled by them, and, as far as they can influence or control it, all of said capital stock outstanding. It is agreed that the stock owned and controlled by

said vendors, and the subject of the absolute sale, shall amount to at least two-thirds of the entire stock so outstanding."

In September, 1891, the Kentucky Central Railway Co. executed to the L. & N. R. R. Co. a deed of conveyance in which it recited that as the grantee is now the owner of the entire capital stock of the company the grantor conveys all its road and all the other property, rights and franchise of said railway company, "except the franchise to be a corporation." The defendant further proves, and the evidence can scarcely be doubted, that while the defendant was the owner of the majority of the stock of the Kentucky Central Railway Co., and elected the officers and managers of the road, that the road was operated in the name of and by the Kentucky Central Railway Co. at the time, and for some time, after the defendant's horse was killed.

Plaintiff's evidence shows that the defendant's paycar, before plaintiff's horse was killed, run over the road and the employes were paid by the L. & N. R. R. Co., and that engines and cars with the name L. & N. R. R. Co. upon them run over the road. The plaintiff also says bills for goods shipped to him were made out in the name of the L. & N. R. R. Co., but he does not fix the time.

This evidence, though, is not material. It does not contradict the defendant's evidence.

In the case of the Pullman Palace Car Co. v. Mo. Pacific R. R. Co., 115 U. S. S. C. R., 587, the court says: "The Missouri Pacific Co. has bought the stock of the St. L., I. M. & S. Co., and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Co. owns enough of the stock of the St. L., I. M. & S. to control the election of directors, and that it has done. The directors now control the road through their agents and executive officers, and their agents and officers are in no way under the direction of the Missouri Pacific Co. If they or the directors act contrary to the wishes of the Missouri Pacific Co. it has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation in the sense of that term as applied to the management of the corporate business or the control of the corporate property." It seems to us there is nothing further to say. It has been too often decided in this State that a stockholder can not ordinarily be sued for the liabilities of the corporation to require a citation of authorities. Upon the facts—the uncontradicted written evidence—the court should have instructed the jury to find for the defendant.

The judgment is, therefore, reversed and the cause is remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

BANK OF BIG STONE GAP v. CRAFT.

Filed April 19, 1898. Appeal from Letcher Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Pleading—Anticipation of defense—As a general rule the plaintiff ought not, in his petition, attempt to anticipate matters of defense, but when, as in this case, the name of the surety to the note was, by his verbal authority, signed by an agent, and the holder of the note relies upon a subsequent written ratification by the surety, it is proper in the petition to set up the facts—the manner of the execution of the note and the subsequent ratification.

2. Ratification by surety of act of agent in signing name—While one is not bound by the act of another in signing his name as surety upon his mere verbal authority, he may, without any new consideration, bind himself by a written ratification of the act of his agent in thus signing his name. Nor is any special form of ratification required; if it appears from the writing that the person executing it recognizes his liability under the act of his agent it is sufficient.

Marrs & Marrs and John L. Scott & Son for appellant; S. B. Dishman, Wilson & Rawlings and W. P. Bentley for appellee.

DEMPSEY v. COYLE, &c.

Filed April 19, 1898. Appeal from Boone Circuit Court. Opinion of the court by Judge Barbour, reversing.

Payment—Instructions to jury—In this action upon a note executed by defendant to plaintiff and C. jointly, and with defendant's knowledge indorsed at the time by C. to plaintiff, upon a plea of payment by defendant it was error to give an instruction authorizing the jury to find for defendant if they believed that he had paid the note either to C. or to plaintiff. As C. had no interest in the note and defendant knew the fact, such an instruction was confusing to the jury, and in view of the evidence was prejudicial.

S. W. Tobin and J. M. Lassing for appellant.

SLAYDEN, &c. v. McDONALD.

Filed April 19, 1898. Appeal from Graves Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Limitation—Pleading—If, as a matter of law arising on the facts stated in the petition, it appears when the cause of action accrued the defendant, in relying on the statute of limitation, need not state when the right accrued. But when he relies on facts other than those stated in the petition to show that the right accrued at another time, he must plead them.

2. Bond of special commissioner—Limitation—Where a special commissioner, after he had sold property and received the proceeds, executed a new bond, by which the obligors undertook that he would "faithfully discharge every duty of said office and pay over in due time to the proper persons any money which may be received by him as such special commissioner," the purpose of the bond being to enable the commissioner to hold the money until a contest as to the fund could be decided by the court, a right of action upon the bond did not accrue until the commissioner was ordered to pay the money into court or to the parties in interest. And in this action upon the bond by one to whom the commissioner was ordered to pay a stated part of

the fund, the plaintiff's right of action, so far as the petition shows, did not accrue until the date of the order directing the payment to him, and if the cause of action had in fact accrued before that time, as by an order directing the payment of the fund into court, the defendant should, in pleading limitation, have averred it and then pleaded that more than seven years had elapsed from that time to the institution of the suit. The averment that "more than fifteen years had elapsed after the execution of the bond and since the accrual of the cause of action" is not good as a plea of limitation.

3. Conclusiveness of judgment—The defendants are in no position to question the validity of the judgment determining plaintiff's right to the fund.

Smith & Robbins for appellants; D. G. Park for appellee.

OHIO, &c., R. R. CO. v. FINNEY.

Filed April 19, 1893. Appeal from Boyd Circuit Court. Opinion of the court by Judge Brent, affirming.

1. Contradiction of witnesses—In this action against a railroad company to recover damages for the killing of stock on the track by one of the defendant's trains, in which the particular negligence relied on was the failure of the defendant to have the headlight in proper condition, it was competent for plaintiff to show that the employes on the train had made statements at other times differing from those made on the trial concerning the condition of the headlight.

2. Instructions to jury—As the instructions as far as they went were not prejudicially erroneous the defendant can not complain that they did not present all the law of the case.

3. Same—The court properly refused an instruction which directed the jury's attention to a single fact in evidence so as to give it undue weight.

F. T. D. Wallace and Stewart & Stewart for appellant; Thomas R. Brown for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. DEATHERAGE.

Filed April 19, 1893. Appeal from Carroll Circuit Court. Opinion of the court by Judge Brent, affirming.

Railroads—Flooding of lands of adjoining proprietors—Although a railroad company, by means of a culvert under its track, may have the right to drain the water from its right of way on one side of its track upon the land of an adjoining proprietor on the other side, the natural flow of the surface water being in that direction, yet it has no right to allow the culvert to become choked up and then by the opening of the culvert discharge upon the adjoining land the water which has accumulated, and if it does so it is liable in damages to the owner of the land.

Winslow & Winslow, Wm. Lindsay and Edward W. Hines for appellant; Gaunt & Downs and J. A. Donaldson for appellee.

KING, &c. v. TOMPKINS' ADM'R, &c.

Filed April 26, 1893. Appeal from Cumberland Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. Husband and wife—Rights of wife as against husband's creditors—It is competent for husband and wife to agree that personal property of the wife, whether acquired by her before or after marriage, shall be held by her as her separate estate, and such an agreement, if free from fraud, will be upheld as against creditors.

2. Same—Where the wife, with money procured from her mother as an advancement, paid off a debt of the husband secured by mortgage on the homestead, the husband promising at the time to pay it back to her and agreeing that she might have a lien on the land to secure her, the subse-

quent assignment by the husband to the wife, in discharge of that agreement, of certain notes held by him, was valid as against his creditors, and in this action by creditors seeking to subject the notes the court erred in rejecting the wife's claim to them.

3. The sale by a debtor of exempted property violates no legal right of any creditor, and, therefore, the fact that the notes in controversy here are the proceeds of the sale of a part of the debtor's homestead gives creditors no right to subject them.

Allen & Allen for appellants; John L. Scott for appellees.

GESS v. TRUSTEES OF COMMON SCHOOL DISTRICT, &c.

Filed April 26, 1893. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. Common schools—Tax to build schoolhouse—Donation of land on condition—The trustees of a common school district have the power to accept a donation of land upon condition that it shall revert to the donor in the event it shall cease to be used for school purposes, and it is no objection to a tax levied to build a schoolhouse on the land that it is held upon such a condition.

2. Same—In consideration of the donation of land upon which to build a schoolhouse the trustees of a school district have the power to release the donor from the payment of taxes levied to build the schoolhouse.

R. A. Thornton for appellant; W. J. Hendrick and R. Reid Rogers for appellees.

McKINNEY v. TRADERS DEPOSIT BANK.

Filed April 26, 1893. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Brent, affirming.

Where money deposited in bank by one person is by mistake credited to another person and drawn out by him, it may be recovered by the bank from the person to whom it was thus paid by mistake.

J. J. Cornelison for appellant; O'Rear & Bigstaff for appellee.

CRANE & CO. v. BROOKE CO.

Filed April 26, 1893. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

Premature judgment—In this action to vacate a judgment the plaintiff by amended petition asked for an injunction against a proceeding based upon the judgment until the proceedings to vacate were determined, and upon the hearing of a motion for a temporary injunction the court not only overruled the motion, but dismissed the petition to vacate. Held—That the court erred in dismissing the petition, as it does not appear that there was any preparation of the case except upon the motion for an injunction.

Judge Barbour, in a separate opinion, concurs in the reversal upon the ground that the court erred in dismissing the petition without giving plaintiff an opportunity to amend.

W. H. McKoy and C. W. Baker for appellants; Tarvin & Hall for appellee.

VANCE v. BURNETT.

Filed April 26, 1893. Appeal from Bell Court of Common Pleas. Opinion of the court by Judge Brent, affirming, Presiding Judge Yost not sitting.

Failure to separate conclusions of law and fact—In this ordinary action, in which the law and facts were submitted to the court without the interven-

tion of a jury, as there was no separation by the court of its conclusions of law and fact, the judgment being authorized by the pleadings, must be affirmed.

Weller & Hays and W. H. Holt for appellant; J. R. Sampson and William Low for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. WILLIAMS.

Filed April 26, 1893. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Injury to brakeman from improper speed—A brakeman on a freight train, who fell from the top of a car while attempting to reach the brakes for the purpose of setting them in obedience to an order of the conductor, is entitled to recover of the company for the injuries received, if the train was running at an unusual and improper speed, and this speed was the proximate cause of his fall.

2. Same—Pleading—The allegation of the petition that as soon as plaintiff "stepped upon the running board he discovered that the train was going at such a rate of speed that he could not maintain his footing," does not authorize the inference that he could have saved himself after discovering his peril, even asuming that he ought to have abandoned his duty upon making such a discovery.

3. Same—Matters of evidence alleged in the answer were not admitted by a failure to reply.

4. Instructions to jury—Although one of the instructions is abstract, and, considered alone, would be objectionable, yet as appellant has no reason to complain when the instructions are considered as a whole, the court will not reverse for the error.

Joe McCarroll for appellant; Wood & Bell, Clark & Howell and Edward W. Hines for appellee.

TAMPLET & WASHBURN v. SAFFELL.

Filed June 1, 1893. Appeal from Louisville Law and Equity Court. Response by Presiding Judge Yost to petition for rehearing.

Custom—No custom or usage, however well established, can be incorporated into a contract if it is inconsistent with the clear intention of the parties. An express exclusion is not necessary; it is sufficient that the custom is excluded by necessary implication.

Barnett, Miller & Barnett for appellants; Gibson, Marshall & Loehre for appellee.

BEDFORD v. KESLER.

Filed June 14, 1893. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. Executions—Levy on personal property owned jointly—In order to create an enforcible lien by the levy of an execution upon personal property owned jointly by the execution defendant with another person who is in possession, the return of the officer must show not only the levy, but also the inventory and appraisement as provided by section 660 of the Civil Code.

2. Same—Where an execution is levied upon personal property owned by the execution defendant jointly with another person who is in possession, the promise of the latter to take care of and be responsible for the property is binding on him, and if, after making such a promise, he allows the property to be sold by the debtor he is liable to the plaintiff in the execution.

3. Peremptory instruction—Where the defendant relies upon an affirmative plea, which is not supported by his evidence, the court may, upon plaintiff's motion, made at the close of defendant's evidence, instruct the jury to find for plaintiff. And, where the evidence sustaining plaintiff's claim is wholly uncontradicted, the court may instruct the jury to find for plaintiff

"if they believe the evidence." But as the burden in this case was upon the plaintiffs, and the defense, which was negative, was supported by defendant's testimony, it was error to give a peremptory instruction to find for plaintiff. And, even if defendant had not testified, the only instruction peremptory in its nature which it would have been proper to give would have been for the jury to find for plaintiff "if they believed the evidence."

Frank Chinn for appellant; D. W. Lindsey for appellee.

ANDERSON v. PURYEAR.

Filed June 14, 1893. Appeal from Graves Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming on original and cross appeal.

1. Sales of personal property—Damages for failure to receive—In this action by the sellers of a crop of tobacco to recover of the purchaser the loss which they allege they had sustained by the refusal of the defendant to receive a large part of the tobacco at the contract price, the court properly instructed the jury that if they believed from the evidence that the plaintiffs were able, ready and willing to deliver the tobacco according to the terms of the contract and offered to do so, when the defendant refused to receive it under the contract and notified them "that he would not receive any more of the tobacco at the contract price," the law was for the plaintiffs.

2. Same—Instructions to jury—An instruction telling the jury that the defendant could not require of plaintiffs "that said tobacco should be delivered on any other understanding or condition than as set out in the contract of sale" is not subject to the criticism that it permitted the jury to construe the contract.

3. Same—Defects waived—The defendant was not entitled to recover anything by way of counterclaim on account of the alleged damaged condition of the tobacco delivered to him, as he accepted and paid for it without complaint; and the court properly so instructed the jury.

D. G. Park for appellant; Smith & Robbins and W. P. Lee for appellee.

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 15. JULY 15, 1893. No. 2

KENTUCKY COURT OF APPEALS.

BYRNE, SOLICITOR, v. CITY OF COVINGTON.

(*Filed April* 1, 1893—*Not to be reported.*)

1. *The new Constitution does not divest municipal corporations of their powers concerning taxation* under their existing charters, or suspend such powers until the Legislature shall have enacted charters in accordance with its provisions.

2. *Repeal of charter—Municipal taxation*—An amendment to the charter of a city does not repeal any of its provisions except there be express words of repeal or it arises as a necessary implication.

The provision of the charter of Covington, enacted in 1860, authorizing the imposition of a general tax for the construction of sewers for the preservation of the public health is not inconsistent with any of the subsequent amendments to the charter concerning the construction of sewers or the imposition of taxation, and is not expressly repealed. Therefore, it is still in force.

3. *The imposition of a general tax on a municipal corporation for the construction of a sewer* can not be upheld by reason of the inherent power of the city government to impose taxation for the preservation of the public health or safety.

W. A. Byrne for appellant.

Joel Baker for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

The common council of the city of Covington passed an ordinance on the 6th of September, 1892, providing for the submission to the vote of the people at the regular city election to be held in the month of October of the same year, the question "whether or not

a general tax of 7 cents on each $100 valuation for a period of ten years shall be assessed for the purpose of constructing a sewer along the Willow Run Valley, the sum collected to constitute a special fund for that purpose," etc.

The ordinance was properly passed and the vote regularly taken on the proposition, resulting in a vote of 2,074 votes for and 890 votes against it. The committee on elections reporting the result to the council, both boards confirmed the report, and on the 25th of October, 1892, an ordinance was properly passed ordering the construction of the sewer and providing for the payment.

There seems to be no question as to the proper passage of these ordinances, and the sole question arises as to the power of the city legislature to authorize this general taxation for the specific improvement.

Under a provision of the city charter the city solicitors, where such questions are incurred, may raise the point by a proper proceeding in a court of equity, and this having been done, the inquiry arises as to the right of the city to impose this tax.

It seems from the agreed facts that this sewer does not border continuously on any street or streets, but much of it is an open common, with a depression in the ground into which is emptied the refuse and offal of a great portion of the city; and while it does not appear on the face of the ordinance or by an averment in the petition, or any answer of the city, that this is an improvement necessarily required for the health of the city population, the court must so assume, and particularly when the agreed facts concede this to have moved the council to action in the premises.

We are not disposed to adjudge that the imposition of this tax, as contended by counsel, can be maintained by reason of the inherent power of the city government in cases where the public health and safety requires it, and will, therefore, proceed to consider the provisions of the city charter with reference to the powers of the city council. That it has the exclusive control of the streets, lanes, market spaces and other public grounds within the city can not be doubted, but to enable the council to impose a specific tax of this description some express authority must be shown. By an act of April 28, 1884, the council is empowered to construct sewers along its streets, alleys, public landing and commons and to assess the abutting lands in a sum not exceeding $1 per front foot, the owner of the abutting property to pay for the improvement. This act authorizes the taxation of the land abutting and nothing more, and, therefore, no general taxation for such a purpose can be imposed under that act; it is local, and the abutting property must pay for the improvement. But when you go back to the act of March, 1868, the second section gives to the council power to construct such sewers, etc., as it may deem the general wellfare of the city requires, and to pay for the same out of any moneys belonging to the general revenue fund. This act is in conflict with the act of April, 1884, only to the extent that the right to tax the general public for such an improvement is taken away and placed in the property abutting on the streets, etc., that are to be drained by the sewer.

The act of 1868 is, therefore, in force, as there is no direct repeal of that act only to the extent that the one conflicts with the other. The city is met, however, with the argument that neither act authorizes this general tax for the specific purpose, and to meet this view of the question attention is called to the act of March 1, 1860, that provides: "The city council shall have power from time to time to assess and collect taxes for specific purposes, and for limited periods of time, upon whatever now is or from time to time may be taxable

under this charter for general revenue purposes for such sum on each $100 of valuation and for such a period of time as the council may designate: *Provided*, That no tax shall be levied under this section unless a majority of the qualified voters of the city, at a general election within city or State, shall have cast their votes in favor of the same in such form as the same may be prescribed and submitted by the city council: *And provided further*, That no such special tax shall exceed 40 cents in one year on each $100."

This act stands unrepealed, although it is insisted by the city solicitor that the act of April 9, 1873, has that effect. That act (April 9, 1873) is an act providing for the general revenue of the city, fixing the amount of tax, how much is to be applied to the general fund, how much to pay interest on the bonded debt and how much to go to the sinking fund. There is no repeal by implication in any of these acts, because if such a construction is given them there is then no power vested in the city legislature in cases of emergency, or where infectious or contagious diseases are apprehended, to provide means by which the causes of disease may be removed.

Here is a case where no abutting property can be made liable for draining this land bordering on Willow Run for two reasons: first, because the expense would exceed the value of the property, and, second, it presents a state of fact where the power to tax the abutting property is not applicable.

The general doctrine as to repeals laid down by the text-books is, that one statute will not be held to repeal another unless by express words or necessary implication; and here the implication, if any, is in favor of sustaining the vitality of the act of March, 1860, for without it the city is powerless to protect its people against contagious diseases, or to impose any general tax for a specific purpose. There is no inconsistency between the acts, and, therefore, no repeal by the one of the other.

This vote was taken in October, 1892, and it is insisted that as the present Constitution was adopted on the 28th of September, 1892, it suspended all the powers of the city government on the subject of taxation; if not, the legislation of the city should be in accordance with its provisions. The charters of cities must have been left with some vitality, and it could not have been the purpose of the framers of the Constitution to divest them of all the powers conferred by existing charters, or to suspend them until the Legislature passed laws for their regulation in accordance with the provisions of the Constitution. Whether this legislation in regard to taxation must have been in accordance with its provisions is an important one and not necessary to be decided, as in either view of the case the ordinances passed were proper, authorized by the charter and not in violation of either the old or new Constitution.

The framers of the present Constitution, in adopting the provision in relation to the creation of indebtedness by cities and towns, and fixing a maximum to which taxation might be imposed, classified the cities and towns, and where the population exceeded 15,000 the limit is 10 per centum on the valuation of the taxable property therein; but seeing that an indebtedness had likely already been created by cities and towns, and in a sum exceeding the maximum limit, allowed by section 178 of the Constitution the city of the population referred to, to increase its indebtedness 2 per cent. on the value of the taxable property, and this could be continued until the aggregate of the indebtedness shall have been reduced below the

limit, and thereafter not to exceed it, except in cases of emergency, the public health or safety should so require.

The valuation of the property within the city is $18,448,890, and 2 per centum on this would double the amount of the cost of constructing this sewer, and so, in any aspect of the case, this taxation was properly imposed. It is authorized by the charter and in accord with both the old and new Constitution; and if not looking to the present Constitution, it is difficult to perceive how these provisions in regard to taxation can be self-operative until classified and regulated as provided by section 188, new Constitution.

The judgment below is affirmed.

THOMPSON v. BRANNIN, BRAND & GLOVER.

(*Filed April* 1, 1893—*Not to be reported.*)

1. *Sale of personal property—When title passes*—As soon as a bargain of sale of personal property is struck the contract becomes absolute, even without actual payment or delivery, and the right of property and risk of accident vests in the buyer.

But if by the terms of the contract anything is to be done by the vendor for ascertaining the weight, etc., of the property sold, and there is no stipulation for the passing of title before the doing of such thing, then the right of property and possession remain in the vendor until after he shall have ascertained the weight or done the thing mentioned.

Whether the contract of sale vests the title in the vendee immediately or not until the weight shall have been ascertained by the vendor depends upon the intention of the parties as manifested by the character of the contract and the circumstances attending its making, which question may sometimes be determined by the custom of trade.

2. *Same—Evidence of custom*—In an action to recover the price of 68 hogsheads of tobacco sold by a warehouseman at Louisville to defendant, in the absence of an express agreement between the parties as to the mode of ascertaining the net weight of the tobacco sold, evidence concerning the custom of the Louisville market that the purchaser was required to take the tobacco at the last ascertained weight was competent.

3. *Same*—Where the tobacco was sold on a credit of four months it is immaterial whether or not the buyer was to execute his note for the purchase money where the only question is as to the time when the title passed.

4. *Same—Evidence*—Entries made in the books of the warehouse concerning the sale made contemporaneously with it and the unsigned notes and invoice of that date were properly admitted as competent evidence to show the terms of such sale.

5. *Same*—Statements of witnesses as to their opinion of the legal effect of what occurred between the seller and the purchaser at the time of the making of the alleged contract of sale were incompetent.

6. *Same—Insurance*—Where the tobacco was destroyed by fire after it was sold and before its delivery to the buyer and the defendant collected money on open policies of insurance on "tobacco in hogsheads, their own, or held by them on account of others which they are legally liable for, or *sold but not delivered*, contained in their * * warehouse," the buyer is entitled to his *pro rata* part of such insurance as a credit on the purchase price he agreed to pay.

Wm. Lindsay, B. F. Buckner, Stone & Sudduth and W. M. Beckner for appellant.

Dodd & Dodd, O'Neal, Jackson & Phelps and Chas. S. Grubbs for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

Brannin, Brand & Glover, tobacco warehousemen and factors in the city of Louisville, brought this action to recover of H. P. Thompson price of 68 hogsheads of tobacco, containing 6,175 pounds, their individual property, alleged to have been purchased by him June 22, 1887, at 11 cents per pound, on a credit of four months, interest being added, also amount of buyers' fees, at $2 per hogshead, less salvage of $4 per hogshead, the warehouse in which the tobacco was stored and its contents having been, June 24, destroyed by fire; and the appeal is from judgment against him for $7,363.25, amount claimed and interest from June 23, 1887.

It is stated in the petition substantially that when said sale was made exact amount of purchase price had to be ascertained by procuring weights of the 68 hogsheads, which plaintiffs did do on that day in this manner: Several months prior to said sale all the tobacco had been sampled and regularly inspected, and the weights ascertained and separately entered on the books of plaintiffs; and on the morning of June 22d ten hogsheads of the 68 had been again weighed and placed upon their brakes for auction sale, but withdrawn therefrom upon communication of the sale to defendant, and by his order; that thereafter, on the same day, a number of other hogsheads of the lot of 68 were again weighed, for the purpose of seeing whether there had been any shrinkage or increase of the original weights; and finding the weights of all the hogsheads so weighed on that day corresponded substantially with former weights, and being by custom of the trade guarantors of correctness of said weights, they did not actually weigh all the remaining hogsheads, nor were they required to do so by the contract with defendant nor by the custom of the trade; but they thereafter took the former weights and therefrom made out the purchase price, together with memorandum and invoice notes of each hogshead, and charged amount of purchase price so ascertained to defendant upon their books, and placed all said tobacco in control and subject to the order of defendant. All which was done according to custom of the trade and in compliance with their contract with defendant.

The defendant denying in his answer plaintiffs sold to him said tobacco, or that he agreed to pay them therefor, states that the samples thereof, except those of five hogsheads missing, were by plaintiffs, on June 22d, exhibited and the tobacco priced to him at 11 cents per pound, net weight, all of which was to be reweighed; that they proposed to wait four months for payment, taking his note for purchase price, and holding the tobacco in their warehouse to be sold by them as commission merchants on his account, as other tobacco shipped by him to them, and also retain a lien for the price thereof and their fees, insurance and commission. But they then stated to him they could not weigh up said tobacco for several days; and that, without closing the contract, defendant expressed his willingness to take said tobacco at the price named and on terms mentioned, provided he could inspect the missing samples, the tobacco could be weighed up, the net weights ascertained, and the invoice of the net weight and tare delivered to him.

He further states that by law and custom of the tobacco trade in Louisville it was the duty of plaintiffs to insure and keep insured tobacco in their warehouse for its full value, and the same was, on June 22d, covered by policies of insurance for its value, or should have been; that after the warehouse and contents were destroyed

plaintiffs collected, or with reasonable diligence could have collected, the full value of said tobacco under policies of insurance thereon held by them; and he prayed that in case of judgment in favor of plaintiffs for amount claimed, he recover judgment over against them on account of said insurance for amount of full value of the tobacco on the day it was destroyed, his answer being, for that purpose, made a counterclaim.

The general rule that as soon as a bargain of sale of personal property is struck the contract becomes absolute, even without actual payment or delivery, and the property and risk of accidents vests in the buyer, has been often sanctioned by this court. (Willis v. Willis, 6 Dana, 48; Buffington v. Ulen, 7 Bush, 231; Newcomb, Buchannan & Co. v. Cabell, 10 Bush, 460.)

"But if by the contract of sale any thing is to be done by the vendor for ascertaining the weight or extent or price of property sold by him, and there be no stipulation for passing the title before such thing shall have been done, then the law adjudges the right of property, as well as that of possession, to be in the vendor until after he shall have ascertained the weight, extent or price of the property contracted to be sold. Thus a sale of tobacco at a fixed price per hundred weight, to be ascertained by weighing, will not constructively vest the right of property in the vendee until after the tobacco shall have been weighed, and the entire quantity and price of it thus rendered certain, according to the intention of the parties. But as soon as the weight of the tobacco shall have been properly ascertained the property will, *eo instanti*, vest in the purchaser, even though he may not yet be entitled to the possession of it without paying the price, or assuming the payment of it according to the terms of sale." (Crawford v. Smith, 6 Dana, 59.)

But whether a sale vests the right of property in the vendee presently, or not until the thing has been done by the vendor for ascertaining the weight, extent or price of such property, must of course depend upon intention of the parties, manifested by the character of the contract or circumstances under which it was made; and the question may be sometimes determined by the custom of the trade in respect to a particular commodity.

Accordingly, in Newcomb, Buchannan & Co. v. Cabell, where the question being as to title of a certain number of barrels of whisky sold but not regauged, the sale was decided to be absolute, and regauging to be done was merely to enable the parties to make a final adjustment of their accounts, the court holding it not to be true that in all cases of sales of personal property without delivery the right of property remained in the vendor until the quantity is ascertained.

The defendant in this case substantially admits he agreed to take the tobacco upon the terms and at the price proposed by plaintiff, with a reservation of the right to inspect the five missing samples, and proviso that the tobacco was to be weighed and the invoice of the net weights delivered to him.

The plaintiffs in their reply deny there was such reservation in respect to the samples or agreement to reweigh the tobacco, and both issues of fact were properly presented to the jury by instructions of the court and found against the defendant. Moreover, the evidence shows that defendant had previously seen the lot of tobacco, and was well acquainted with all of it; and strong evidence he purchased the tobacco without such reservation is afforded by the fact of 10 of the hogsheads prepared for auction sale that day, being at defendant's request taken off the brakes and put back with residue of the lot of

63; and though the tobacco in question was individual property of plaintiffs and sold privately, it is manifest, from the pleadings of both parties, the contract was made with reference to and, as we think may be fairly presumed, with knowledge by them of the general and uniform custom of the tobacco trade in Louisville, and that they intended the transaction to be governed thereby, as if the tobacco had been sold by plaintiffs as commission merchants instead of owners, and at public auction instead of at private sale. Consequently, in absence of an express agreement between the parties in regard to the manner of ascertaining net weight of tobacco it was competent for plaintiffs to show that, according to such custom, defendant, as purchaser, was required to take it at the last ascertained weight, looking to plaintiffs to make good any loss or diminution, and duty of the court to instruct the jury upon that hypothesis, as was done.

It appears from the evidence that on the day of sale the net weight of each of the 68 hogsheads, and all of them, was ascertained and entries thereof on the books of plaintiffs made, as well as invoices prepared ready for defendant, which latter, being in the nature of warehouse receipts, would have entitled him to delivery of the tobacco upon presentation of them.

There, however, seems some discrepancy between the version of the parties respectively as to whether a note was to be executed by defendant for the tobacco, as he contends, or whether, as stated by plaintiffs, there was an absence of any agreement in that particular, though they agree the tobacco was sold on a credit of four months. It does not, however, make any difference which version be true, as regards the question of title to the tobacco, for plaintiffs would have had a right to protect themselves in case of nonpayment of the purchase price.

But counsel contends it was not competent for plaintiffs to read to the jury extracts from their warehouse books, showing the original entries on June 22d, in reference to the alleged sale, nor to exhibit the unsigned sale notes or invoices of the same date. It seems to us, independent of subsection 7, section 606, Civil Code, authorizing a person to testify for himself as to correctness of original entries, it was competent for plaintiff to show in that manner they had complied with the conditions or terms of the contract of sale required of them, or were ready to do so.

It seems to us clear that the parties intended the transaction to be an absolute sale of the tobacco, and defendant was thereby vested with title to the property; but even if the title was, according to fair construction of the contract, not to vest until the quantity of tobacco and certain amount of purchase price were ascertained, it was so vested when those things were done by plaintiffs in the manner mentioned.

It was error in the court to permit witnesses to give their opinion as to the legal effect of what occurred between the parties, as it was to instruct the jury to find whether plaintiffs had done all that it was material for them to do by terms of the contract.

Although we think the evidence in this case shows a sale of the tobacco was made, and title was thereby vested in defendant, and he was entitled to his private share of the money collected on open policies of insurance which plaintiffs had obtained prior to their sale to defendant, and were in force at the time the warehouse was destroyed by fire, the amonnt of which, it appears, was $45,000. For, in language of the several policies, the insurance was obtained by plaintiffs on "tobacco in hogsheads, their own, or held by them on

account of others where they are legally liable, or *sold but not delivered*, contained in their metal-roof brick warehouse."

Whether the tobacco in question was such as plaintiffs was legally liable for or not, it certainly was tobacco "sold but not delivered," in meaning as well as language of the different policies. For that tobacco, though sold, had not been delivered, either constructively or actually, and according to the contract, as interpreted by plaintiffs themselves, they could not deliver it until the weights were ascertained and invoices and notes made out and tendered to defendant, nor were they bound to deliver it until payment of the purchase price or execution of a note therefor by defendant.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

NISCHEN, &C. V. HAWES, &C.

(*Filed April* 6, 1893—*Not to be reported.*)

1. *Opening of public roads—Pleadings*—The order appointing viewers for a proposed new road is fatally defective unless it states the existence of one or more of the reasons for its opening required by the statute; and the statement of such reasons in the written petition filed for the opening of such road does not cure or aid the defective order.

2. *Same—Road through orchard*—The county court can not order a road open through an orchard without the consent of the owner.

An orchard, within the meaning of the law, is a collection of fruit trees set out for the use of a farm or other purposes. It may consist of only fifteen or twenty trees.

H. M. Haskins and Sweeney, Ellis & Sweeney for appellants.

Joe Haycraft for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

Jacob Young and others, living in Daviess county, filed a petition in the Daviess County Court asking for the establishment of a new road from the neighborhood in which they live to the city of Owensboro.

On the filing of the petition an order was made appointing viewers, and in that order is omitted the statement of one or more of the reasons for opening a new road as required by the statute. It must appear that it will be for the convenience of traveling to the county seat, public warehouse, ferry, etc., and a failure to make such a statement in the order is fatal to the application, as has been repeatedly decided by this court. It is contended that the petition filed by the applicants is sufficient, and must be regarded as a part of the order, and when considered together the statute is complied with.

The order is the foundation of the complaint. It presents the cause of action, and the record must show that the application was made in pursuance of the statute. The application may be made orally or in writing; and if orally, it will not do to say that the applicants stated in open court that the road was necessary to enable them to reach their county seat, or that it would be of great convenience to travel; nor will a writing filed with the application stating

these facts be sufficient—it must appear in the order. If the petition is regarded as an ordinary action for relief, there is a failure to show or aver that these parties live in the neighborhood of this road or have any greater interest than one in a remote part of the county; and while the proof shows them to be directly interested, there is no cause of action stated in the petition. If fully stated, however, there is no compliance with the statute, and the order appointing viewers is defective. Besides, this record shows that the road, if established, will run through the appellant's lot and cuts off a part of his orchard. What constitutes an orchard may be defined to be a collection of fruit trees set out for the use of the farm or for any other purpose. It is not necessary that there should be fifty or one hundred trees. The owner may not have land enough to justify an orchard of more than fifteen or twenty trees, still it is an orchard, and by the express letter of the statute a road can not be opened through it without the owner's consent.

This judgment must be reversed on both grounds and remanded, with directions to dismiss the proceedings without prejudice, that another application may be made if desired. (Abney v. Brant, 1 Bibb, 557; Fletcher v. Fugate, 3 J. J. Marshall, 631.)

BILL v. BURGESS, &C.

(*Filed April* 8, 1893—*Not to be reported.*)

Sale of infants' real estate—Jurisdiction—Where land held by a father for life, remainder to his children, is sold at public auction by the father for an adequate price, a court of chancery has no authority or jurisdiction to enter an order confirming such sale on petition filed by the father for the purpose, to which the children were parties, although it is alleged that a confirmation of the sale was to the interest of the children, and that the price obtained was an advantageous one. The title of the infants can not be conveyed by such a sale or proceeding. It can be conveyed only by a sale made by order of a court of equity in the manner authorized by statute.

H. C. Phiessen for appellant.

Leslie T. Applegate for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

Samuel Burgess owned a life estate in a lot of ground in the city of Covington, the remainder interest being vested in his children. He sold the lot to J. L. Bill for a specified price, and, so far as this record shows, for its full value

The sale was made at public outcry to the highest bidder, but whether or not there was any competition in the bidding does not appear. After this sale the life tenant, the father, filed his petition in equity against his children and the purchaser, asking that the sale be confirmed on the ground that it sold for its full value, and that it was to the interest of his children that the purchase by Bill should be sanctioned by the chancellor, and a judgment was so entered.

We know of no provision of the statute authorizing such a proceeding, and if approved by this court it would, in effect, repeal the statutes regulating the sale of infants real estate and remainder interests.

It is never difficult, and particularly where the life tenant is the parent, to show that his action in selling is for the interest of all parties, and the children divested of title without having the supervision of the chancellor in the direction and disposal of the infants, estate.

While this is a remainder interest, and a reinvestment is sought of the proceeds, still it is a proceeding authorized by statute, and its provisions must be followed. The chancellor has the power to sell by reason of the statute, but he has no right to approve a sale already made, for then the court becomes subordinate in its power or jurisdiction to that of the life tenant, and surrenders the mode and terms of sale to him, and while subject to the court's approval it is such a loose and anomalous proceeding as can not be authorized, for if it was the only controversy, where the life tenant sells, will be—as between himself and the infants—was the sale beneficial.

The chancellor must render the judgment of sale. It must be made by his commissioner or some one appointed to sell, over whom the court has control, and with whom the court can advise as to the propriety of confirming the order of sale.

The judgment is reversed and remanded, with directions to dismiss the petition.

SWOPE, &C. V. SHAFER.

(*Filed April* 11, 1893—*Not to be reported.*)

Ejectment—Evidence—The finding of the jury in this action of ejectment, that the plaintiffs had neither a paper nor a possessory title to the land involved, is supported by some evidence and will not be disturbed, there being no error in the instructions.

E. W. Hawkins and O'Hara & Bryan for appellants.

Nelson & Desha for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Lewis.

This is an action of ejectment, plaintiffs claiming under a patent to Reuben Taylor, the south line of which calls to run with the north line of two tracts previously patented to Mosby, under which defendant claims. Therefore, whether the parcel of land in dispute lies within the Mosby patent boundery is a material question, and upon that single issue the jury at the first trial found for defendant. But on appeal the judgment then rendered was reversed upon the ground that plaintiffs were entitled to an instruction based upon their alleged possession long enough to give them title, irrespective of the actual location of the Mosby line. (12 KY. LAW REP., 851.) So that if the jury was fully and properly instructed in that respect the judgment now appealed from, being again in favor of defendants, will have to be affirmed.

The transcript is so badly made out there is some difficulty in determining certainly which of the instructions asked by the parties were given and which were refused, and indeed as to the one marked H we are wholly unable to say whether it was given or not. However, we conclude instructions numbered from one to five were given, inasmuch as that fact was made a ground for new trial. And

such being the case, we are of the opinion the issue whether plaintiffs held possession and claimed up to a boundary, including the land in controversy, long enough to acquire a possessory title, was so fully presented to the jury they could not have misunderstood it. And as they found by the verdict that plaintiffs had neither a paper nor possessory title to the land, and there is evidence conducing to support that verdict, the judgment is affirmed.

PRICE V. COMMONWEALTH.

(*Filed April* 8, 1893—*Not to be reported.*)

1. *Criminal law—Instructions*—On the trial of appellant for willful and felonious shooting and wounding, an instruction following the language of the indictment was not erroneous because it failed to embody the law of self-defense, when the right of the defendant in that respect was fully set out in other instructions given.

2. *Same—Even if the language used by the Commonwealth's attorney in his argument to the jury* was improper, it could not have inflamed the passion or aroused the prejudice of the jury, since they imposed upon the defendant the lowest penalty allowed under the instructions, and their verdict of guilty is sustained by the evidence.

A. E. Cole & Sons for appellant.

W. J. Hendrick for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted of the crime of willfully and feloniously shooting and wounding one Stockdale, and complains of two errors committed to his prejudice and affecting his substantial rights: First, the court erred in giving instruction No. 1; and, second, it was misconduct in the attorney for the State to have made certain statements to the jury in his argument.

With regard to the instruction complained of it will be observed that it is in the language of the indictment. The law of self-defense was not given therein, but the conditions upon which the jury were allowed to find the defendant guilty made it impossible to so find if they believe he acted in self-defense; and, moreover, in instruction No. 7 the accused was given the right "to stand and defend himself, and the right to act on appearances, and although the danger to him was not real, yet if, at the time he shot Stockdale, he believed, or had reasonable grounds to believe, that he was in immediate danger of loss of life or great bodily harm at the hands of Stockdale, he had the right to shoot," etc.

In No. 8 this is substantially repeated and at greater detail.

In other instructions the question of sudden heat and passion, or wounding in sudden affray, were properly submitted to the jury, and we think the whole law of the case was properly given.

The language of the attorney for the Commonwealth, in his speech to the jury, is: "That the accused was a terror to all the citizens of Maysville; that he ought to be sent to the penitentiary; that he was an assassin; that Stockdale had been elected chief of police after the death of the lamented Capt. Heflin in preference to all others."

This language was objected to, but what action, if any, was taken by the court is not stated in the record.

The proof discloses that Stockdale was sitting in a chair near his door opening on the street, late at night, when the accused passed him going toward his own house, a few yards further on. The prosecuting witness swears that after the defendant passed he turned and fired two shots, one of which took effect in his body; witness then returned the fire.

The accused says he passed Stockdale, and after going a short distance he turned his head round over his shoulder, for he was afraid of him, when Stockdale raised out of his chair and fired; he then turned round and fired back, when Stockdale fired again, striking accused in the chin.

The accused was somewhat corroborated by his mother and another witness, but the jury heard and were the judges of the testimony, and doubtless believed from the circumstance that the accused was wounded in front; that he turned and first shot at Stockdale; and we can not say that the testimony does not justify this conclusion. If so, he was guilty from the proof, and as he got the lowest penalty allowed under the instructions and the law, we do not see that the speech of the Commonwealth's attorney had the effect of inflaming the passion or of arousing the prejudice of the jury.

Judgment affirmed.

TINSLEY V. ROSS.

(Filed April 27, 1893—Not to be reported.)

1. *Pleadings—Failure to rejoin*—In an action by plaintiff to recover logs alleged to have been taken by defendant, the defendant claimed that the logs were his, having been cut from land belonging to him. The plaintiff in his reply alleged that he and those under whom he claimed had held possession of said land for forty years. The defendant filed no rejoinder to this reply. *Held*—That the failure of defendant to deny the plaintiff's alleged adverse possession of the land by rejoinder was no admission of the truth of such allegation.

2. *Interference between patents—Special findings by jury*—On the trial below, involving title to land covered by a senior and a junior patent, the court asked the jury to make two findings: No. 1. "Is the land * * * covered by the junior patent?" No. 2. "Is it covered by the senior patent?" The response was yes to each question, and thereupon the court rendered a judgment in accordance with the finding. *Held*—That while special findings have been abolished by the Code, there was no error in the judgment rendered, since it was clearly authorized by the proof.

Edward W. Hines and E. R. Weir, jr., for appellant.

Wm. Lindsay for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted to recover certain logs alleged to have been taken from the plaintiff by the defendant. The defense was that the land upon which the logs were cut belonged to defendant, and he had the right to the logs. The reply is, that it belonged to the plaintiff, and that he and those under whom he claimed had

held the possession adversely to all the world for forty years. There was no rejoinder to the reply and the case went to trial, resulting in a verdict for the defendant.

It is insisted that the failure to rejoin and denying the adverse possession entitled the plaintiff to recover. We think not. This was not an action for breaking the close, but an action to recover certain logs in the possession of the defendant, to which the plaintiff claimed title.

It is true the right of property was finally determined by showing that the land belonged to the defendant, and this could have been done on a simple denial of plaintiff's right to recover, averring title in the defendant, and regarding the action as one of trespass *quare clausum fregit*, the defendant alleged that he took the logs from his own land, and the plaintiff traversed this allegation by saying only that it was his land. The fact that he pleaded the character of his title, whether by adverse possession or by a deed from another, did not require a rejoinder. It was an averment of ownership by one and a denial by the other, and on this issue the case was tried.

On the trial it appears that the land from which the logs were cut was covered by a patent junior in date to the patent under which the defendant claimed, both patents covering the land from which the timber was taken.

The plaintiff proved a possession of an adjoining tract by himself and those under whom he claimed for forty years, and that the land in dispute was claimed and held as a part of this tract for near the same period. There is about fifty acres of land in the lap, and if there had never been any possession under the elder patent the claim of the plaintiff might be sustained.

The fifty acres, or the land from which the timber was taken, is uninclosed land and covered by the elder patent. In testing the title to the defendant it clearly appears that one Lechers, from whom or through whom the defendant claims, had the actual possession of the land within this elder patent, and claimed it as his.

The claim of Lechers is sustained by several witnesses, who had lived near the land for half a century, and about this claim there is no controversy except the assertion of claim by the plaintiff and the occasional use of timber from the disputed territory. On this proof the court asked the jury to make two findings: No. 1. Is the land from which the timber was cut covered by the junior patent? The jury responded "yes." Is it covered by the senior patent? The response was "yes." Whereupon the court adjudged for the defendant.

It is claimed that as special findings have been abolished this was error. While the provision of the Code in regard to special findings has been repealed, we see no error in this judgment when it clearly appears that the land from which the timber was cut was covered by the elder patent, and that improvements were made and possession held by the vendors of the defendant within the elder patent, and the land being uninclosed the title of the defendant must prevail.

Judgment affirmed.

RILEY v. COMMONWEALTH.

(*Filed April 27, 1893.*)

1. *Criminal law—Instruction restricting defendant's right of self-defense*—The evidence in this case did not authorize the court to give any instruction restricting defendant's right to rely upon the plea of self-defense on the ground that he "provoked" the difficulty.

The instruction given by the court so restricting defendant's right to plead self-defense was erroneous and misleading in that it clearly intimates, if it does not in fact assume, that the acts of the defendant immediately before the shooting by him of deceased were "wrongful acts then and there done by him."

2. *Same—Evidence*—Where the evidence shows that the deceased had used threatening language towards the accused, of which the latter had been informed, and there was evidence tending to show that he had sought the accused in anger, and the Commonwealth was allowed to show that he had no pistol on his person when shot by the accused, evidence showing a well-known habit of deceased of carrying a pistol, and his reputation as a man of a violent and ugly temper, was competent.

Butler Hawkins, Nelson & Desha and John S. Roebuck for appellant.

W. J. Hendrick for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

Upon an indictment against him for murder Thomas Riley was convicted of manslaughter and sentenced to confinement in the penitentiary for the term of five years.

On appeal to this court he complains, *first*, of so much of instruction No. 4 as sought to restrict and, as he alleges, destroy his right of self-defense.

After giving the usual instructions on that subject the court added this modification: "If the jury, however, believe from all the evidence that immediately before the shooting the defendant, by his own wrongful acts, then and there done by him to the said Chas. J. Jungerman, caused the said Jungerman to believe and give him reasonable grounds to in good faith believe that the said Jungerman was in immediate danger of losing his life or of suffering great bodily harm at the hands of said defendant, and that said Jungerman, while so believing, used toward defendant such necessary, or apparently necessary, means as were at hand to protect himself from such impending peril, and in so doing put the defendant in danger, or apparent danger, then the defendant may not avail himself of such danger, or apparent danger, to excuse himself in taking the life of said Jungerman."

Even if this were a case in which an instruction of this character should have been given, the form of it is objectionable and misleading. It clearly intimates, if it does not in fact assume, that the acts of the defendant, immediately before the shooting, were "wrongful acts then and there done by him" to the deceased, and, moreover, the state of case in which he is deprived of the right to defend himself from impending danger is made to depend on the jury's belief from the evidence, or a preponderance thereof, and not on the evidence to the exclusion of a reasonable doubt. (Allen v. Commonwealth, 86 Ky., 642.)

But this is decidedly not a case in which such an instruction should have been given in any form. There is no evidence whatever to justify it. The defendant did not seek or bring on the difficulty or "provoke" it. So far as the proof on this trial shows he committed no act by which he robbed himself of the right of self-defense.

We do not think that in this case the instruction asked for by the defendant and refused by the court, on the subject of defendant's right to pursue the deceased, should have been given. The testimony does not in fact show pursuit. It, however, appears that the defendant came out of the hallway, where he had been violently assaulted and seriously wounded on the head by the deceased, after the deceased came out, but after coming out and before drawing his pistol he stopped and was standing still, when the deceased rushed on him from behind a base. The whole transaction occupied but a few moments of time; nor do we think that this is a case in which the instruction should have been given requiring the defendant to seek some "reasonable means of escape from the impending peril" before using the necessary, or apparently necessary, means at hand to protect himself.

The undisputed fact is that the deceased first assaulted the accused with a cane and seriously wounded him. When he became conscious after the blow he came forward and out of the house, as he had the right to do. It might have occurred to the jury that the instruction required the defendant to flee, or do some equally cowardly act not in keeping with the right of self-defense, and not in fact required by any just principle of law.

The defendant complains also because he was not allowed to show the well-known habit of deceased as to carrying a pistol just prior to the shooting, and that his reputation was that of a violent man with an ugly temper.

On the authority of Payne v. Commonwealth, 1 Met., 379, we think this testimony was admissible. The deceased had used threatening language toward the defendant, of which he had been informed, and there was some proof tending to show that he had sought him in anger, and the Commonwealth was allowed to show that he had no pistol on his person at the time of the fatal rencounter.

In view of all the facts in this case we think it was competent to show that the deceased was a man of violent temper, and was in the habit of carrying concealed weapons just prior to the shooting.

We think that the testimony of Helm, showing the feeling and mental condition of the deceased at or near the time he had the talk with Blakely, brought out by the defendant, was competent. It was closely interwoven with the Blakely interview, and formed a part of the transaction.

For the error in giving the instruction named, and in excluding the testimony indicated, the judgment is reversed and cause remanded, with instructions to proceed in accordance with this opinion.

MOORE, &C. v. REYNOLDS.

(*Filed April* 29, 1893—*Not to be reported.*)

Homestead—Evidence—The evidence shows that the appellee made only a very small payment on land he is now claiming as his homestead before appellants became bound as his sureties on a note, which they were required to pay as such; that subsequently he made a larger payment on it and erected

improvements thereon, and that he did not remove to or occupy it as a homestead until long after the sureties' liability was incurred; therefore, he can not claim that the land is exempt as a homestead against the debt he owes appellants.

J. A. Violett for appellants.

Jno. W. & Harry Rodman for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

Moore & McDonald brought this action to recover of Reynolds $489.75, amount of a note they had been compelled to pay as his sureties; and upon grounds stated in their petition an attachment was issued and levied upon a tract of land containing forty-eight acres as security for satisfaction of the judgment sued for. Though upon final hearing judgment was rendered for amount of the demand, the attachment was discharged, and whether properly done is the main question on this appeal.

The evidence is entirely satisfactory to us that Reynolds had, previous to commencement of the action, sold, conveyed or otherwise disposed of his property with fraudulent intent to cheat, hinder or delay his creditors; and as that ground of the attachment was established the lower court, we suppose, made the order discharging it upon the belief the land levied upon was exempt as a homestead.

It appears that in September, 1889, Reynolds purchased the land, agreeing to pay therefor $375, and as shown by a receipt of the vendors' attorneys he paid on the 9th of that month $90 of the purchase price. The original note, in which Moore & McDonald were his sureties, was executed also in September, 1889, probably subsequent to purchase of the land and payment of the $90; and Reynolds alleges in his answer, and also testifies as a witness, he put improvements on the land of the value of $75 prior to execution of the note by himself and sureties. But a disinterested witness testifies the improvements were not made until November, 1889, and for obvious reasons he must be believed.

It appears from a receipt of the same attorneys that Reynolds made another payment on the land of $100 in December, 1889. The balance of the purchase price is, however, yet unpaid, and a superior lien therefor of course exists on the land which has not been conveyed by the vendor.

It is fully shown that Reynolds did not remove to and occupy the land as a homestead until November or December after creation of the debt to the bank, for which Moore & McDonald became bound as his sureties.

The evidence makes it very plain that the predetermined purpose and scheme of Reynolds was to purchase the forty-eight acres of land and pay for it, not with proceeds of a homestead sold by him, but, to a great extent if not altogether, with the money borrowed from the bank, the burden of repaying which he intended to fall on his sureties.

They both testify he informed them he intended to so apply the money, and induced them to become bound as his sureties by an assurance he had about $2,000 worth of goods and other assets which he would apply to pay off the bank debt when due; but instead of doing so he fraudulently sold and disposed of all of his personal property subject to execution, so that the only means they have of reimbursing themselves at all is by subjecting the forty-eight acres of land to the

extent it will be sufficient for that purpose. To deny them that relief would, it seems to us, be making the homestead law a pretext and means for perpetration of barefaced fraud.

In our opinion the land in question should be subjected to pay the debt of the plaintiff in this case, after the purchase money has been paid to the vendor, and the judgment is reversed and cause remanded for such proceeding.

WHITE, JR.'S, ADM'R V. L. & N. R. R. CO.

(Filed April 29, 1893—Not to be reported.)

Neglect—Pleadings—Peremptory instructions—Where the answer of the railroad alleges that the death of plaintiff's intestate was not caused by its neglect, but by the contributory neglect of the deceased, and the plea of contributory neglect is admitted by the plaintiff's failure to reply, a peremptory instruction for defendant is proper.

Thos. H. Hines and J. A. Scott for appellant.

John W. Rodman for appellee.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellant, as administrator of John White, deceased, brought suit against the appellee, charging it with having killed his intestate by willful neglect, caused by running over him, from which he died immediately. The answer denied that the deceased was killed by the willful neglect or any neglect of the appellee. It also alleged that the deceased had no wife or child. The appellant did not deny this allegation, but amended his petition, relying on ordinary neglect. The answer also alleged that said White's death was caused by his contributory negligence.

The facts alleged constitute a clear case of contributory negligence and that the deceased come to his death thereby and that the alleged facts are true is admitted by the failure to deny them, and which prevents a recovery by the appellant. Therefore, the peremptory instruction to find for the appellee was correct.

The judgment is affirmed.

TAYLOR, &C. V. COMMONWEALTH.

(Filed April 29, 1893.)

Obtaining money by false statement or token—The appellant, by using a letter with a letter head on which he was falsely represented as a dealer in merchandise, and on which he wrote an order for flour, falsely pretended to be a regular and established dealer in merchandise, and thereby fraudulently obtained property of another on credit, which he could not have done otherwise, and is, therefore, guilty of the offense of obtaining property by a false statement or token, etc.

The subsequent payment for the flour by appellant's father did not condone the offense.

Ewell & Smith for appellants.

W. J. Hendrick for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

In the indictment under which he was convicted appellant is charged with the offense of obtaining money and property under false pretenses, committed in the following manner: That he, John Storms, and E. B. Storms conspired and confederated to defraud and obtain flour and meal from the firm of Galloway & Burnam, dealing by wholesale therein at Paint Lick, and for that purpose did make, forge and print the following words and figures on paper in the style of a business letter head, viz:

"Office of E. B. Taylor,
Dealer in
Dry Goods, Clothing, Boots and Shoes, Family Groceries, Furniture, Etc.,
Six Miles West on Laurel River, Corbin, Ky.,"

When in fact no such firm as E B. Taylor existed at the time, and said E. B. Taylor was not a dealer in any of the articles named in the letter head; that after said false letter head was made the defendants did, on February 2, 1893, and in furtherance of said conspiracy, willfully and feloniously, and for the purpose of fraudulently obtaining money and property from Galloway & Burnam, with an order to them as follows:

"Office of E. B. Taylor,
Dealer in
Dry Goods, Clothing, Boots and Shoes, Family Groceries, Furniture, Etc.,
Six Miles West on Laurel River, Corbin, Ky.

"KEARY, KY., 4-2, 1892.

"*Messrs. Galloway & Burnam:*

"You will please send me the following: 500 pounds best flour and 10 bushels of corn meal. Ship to Lilly, Ky.

"Yours respectfully,
"E. B. TAYLOR.

"I will refer you to W. W. Storms, Keary. Please send on 30 days' time."

It is further charged that said order was forwarded by mail to Galloway & Burnam, at Paint Lick, for the purpose aforesaid, and thereby defendants obtained and Galloway & Burnam were induced and did send to the address of E. B. Taylor the quantity of flour and meal, as requested in said order and of the value of $17.25.

The evidence fully supports the statements contained in the indictment; and the only question is whether the facts so alleged and proved constitute an offense for which appellant can be punished.

Section 2, article 13, chapter 29, General Statutes, provides as follows: "If any person, by any false pretense, statement or token, with intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny, or if he obtain, by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof

would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

"A false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value." (Section 151, volume 1, Bishop on Criminal Law.)

The fact falsely represented in this case, and which was intended and adapted to and did induce Galloway & Burnam to part with their flour and meal, was that E. B. Taylor had an establishment for the purpose and was then and there a merchant and dealer in the articles mentioned in the letter head. Without that letter head Galloway & Burnam would not have parted with their property, nor could the defendants have obtained it, as was done, without a cash payment. For, by that token or statement, either of which may be regarded as within meaning of the statute, Galloway & Burnam were induced to believe E. B. Taylor, a stranger to them, would pay them for their property at the time indicated, and, consequently, to give him credit therefor, which it fully appears they would not have otherwise done. We have thus a case where a person, by falsely pretending to be a regular and established dealer in dry goods and other articles usually kept by a regular merchant, has fraudulently obtained the property of another, and is, therefore, guilty of the offense described in the statute quoted, for the letter head, independent of the mercantile style in which the order for the flour and meal was written, did accomplish the fraudulent purpose intended just as effectually as if there had been a plain and direct statement of the fact, of which the letter head was a token.

There is evidence that the father of appellant afterwards paid to Galloway & Burnam price of the flour and meal, but that did not operate to condone the offense, which was completed when the property was parted with by Galloway & Burnam and obtained by the defendants.

Judgment affirmed.

BARNARD V. COMMONWEALTH.

(*Filed April* 29, 1893.)

The crime of assault and battery is a lower degree of the offense of "an assault with intent to rob," and on the trial of one indicted for the latter offense, if the evidence authorizes it, an instruction concerning the former offense must be given.

W. H. Holt and Ewell & Smith for appellant.

W. J. Hendrick for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant, Barnard, was indicted, tried and convicted of the crime of assaulting Patrick D. Casey with intent to rob him. The court, upon the trial of the case, instructed the jury correctly as to the crime of an "assault with intent to rob," but the appellant contends as the offense of a common assault and battery a mere breach of the peace, is a degree of crime of an "assault with intent to rob," it is included in that charge; and that the court, the evidence au-

thorizing it, should have instructed the jury that they might find him guilty of the misdemeanor.

There was some evidence before the jury that tended to show that the offense of the appellant was that of a common assault and battery only. Therefore, the question is, should the court have given an instruction authorizing the jury to find the appellant guilty of that offense only?

Section 264, Criminal Code, seems to settle that question: "If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense, without the circumstances, or with part only, is included in the offense, although that charged may be a felony, and the offense, without the circumstances, a misdemeanor only."

Here the crime of assaulting with intent to rob can not be made out without establishing an assault or assault and battery with such intent; and if the assault is committed without the additional circumstance of an intention to rob, then the assault is but a mere misdemeanor; but the intent to rob and a conviction for it absorbs the misdemeanor into the higher crime of felony. So, likewise, the higher crime of murder absorbs the offense of the mere assault and battery. But if the murder be not established, the party may be punished for the assault and battery; and if the person was not convicted of the assault with intent to rob, but committed a common assault and battery, he may be found guilty of misdemeanor, because it is but a degree of the crime of assault with intent to rob included in it.

As the case must be remanded for a new trial, we will make no remarks upon the evidence further than indicated.

The judgment is reversed and the cause is remanded for a new trial.

ALLEN, &C. V. POLLAD'S ADM'R.

(*Filed April* 29, 1893—*Not to be reported.*)

Continuance—Absence of attorney—When an action to set aside a conveyance of land to infant defendants is called for trial, and the father of the infants, also a defendant, makes affidavit that his attorney has been and is absent, a continuance should be granted in order that the rights of the infants may be fully protected.

Jno. P. Salyer for appellants.

W. W. McGuire and W. H. Holt for appellee.

Appeal from Morgan Court of Common Pleas.

Opinion of the court by Judge Pryor.

The purpose of this action was to set aside a deed made by Ambrose Allen to his two children, in August, 1875, on the ground of fraud, and to subject the land to the payment of the debt.

The action was instituted in April, 1885, near ten years after the deed was recorded.

The defense made by the grantor is that the money purchasing the land belonged to his wife and was invested for the children. The children, one of them an infant and the other a nonresident, appear

by their warning order attorney and guardian. On the calling of the cause the father made affidavit that his lawyer had been or was absent, and he wanted time to prepare the defense. It was such an affidavit that where the rights of infants were involved authorized a continuance that proof might be taken, nor are we prepared to say that the appellee was entitled to recover on the record as presented. We think, however, the case should go back for further preparation.

Judgment reversed and remanded for that purpose.

CARTER V. MITHELL, ASS'EE, &C.

(*Filed April* 8, 1893.)

Bills and notes—Partnership—A note signed by one member of a partnership as maker and indorsed by the partnership, must be regarded as a firm debt for which the partnership is primarily liable, when it appears that both of the partners represented to the bank, at the time it was executed and money obtained on it, that it was a partnership debt, executed for partnership purposes, and when its proceeds were placed by the bank to the credit of the partnership and paid out on checks of the partnership; whether the partnership name is signed as maker, assignee or indorser is immaterial.

Geo. L. Husbands for appellant.

J. C. Flournoy for appellees.

Appeal from Hickman Court of Common Pleas.

Opinion of the court by Judge Pryor.

This action was instituted by R. A. Mitchell, as assignee of the Fulton Bank, against C. T. Bowers and the firm of Bowers & Carter on a note executed to the bank for $5,000 on the 18th of March, 1890, and payable six months after date. The note is signed by C. T. Bowers and indorsed by the firm of Bowers & Carter. The blank indorsement was filled up by a promise to pay on the part of the firm if not paid at maturity.

John Carter, a member of the firm, is denying the right of the cashier to fill up the blank by an appropriate pleading, and in this case we will consider the writing as it was indorsed originally by the firm.

Carter's defense is that the note was the debt of Bowers; that there was no protest of the paper, and that the firm of Bowers & Carter indorsed the paper as assignor only and is not liable for the debt.

By amended pleadings it is alleged that the debt was primarily that of the firm. The money borrowed for firm purposes, placed to the firm's credit and checked out by Carter to pay the firm debts; that the paper was drawn in the manner suggested by the cashier at the time and a mortgage taken on some land of Bowers as security, the firm being in no condition or at least offering no other surety on the paper.

The testimony, it seems to us, is conclusive of the fact that it was a firm debt, and the proceeds of the note, except a small sum appropriated by Carter, the appellant, were by his checks on the bank to pay the firm debts. The bank had been honoring their paper, and the note for $5,000 was to enable them to pay off debts then in bank already due and other debts owing by the firm.

Carter's testimony is to the effect that this was a borrowing by Bowers to enable him to furnish his part of the capital for the proper conduct of the firm's business; but this view of the case is repelled by the letters of Carter, written after the note fell due, recognizing his obligation to pay, and in fact is contradicted by every fact and circumstance connected with the transaction.

It is insisted, however, that the writing speaks for itself, and to make this a firm debt is to change the nature of the obligation it imposes on the parties to it.

The case of Macklin's ex'ors v. Crutcher, 6 Bush, 402, is relied on as sustaining this contention. In that case Macklin & Ferguson were partners in cultivating cotton, Ferguson acting as manager of the plantation. Ferguson purchased some mules, stating at the time they were for the use of the plantation and executed his individual note for the price. Macklin having died, his executors were sued on the note, the plaintiff alleging that the stock was used on the plantation, and that the name of the firm was "*W. F. Ferguson.*" The averments of the petition were controverted, and upon the hearing it appeared that Ferguson bought mules on his own account, and that the firm name was Macklin & Ferguson, and no authority had been given Ferguson to bind Macklin in any other way than under the firm name; that he had never ratified the notes or offered to pay them. This note did not purport to bind Macklin or the firm, and it may be that, in the entire absence of any proof authorizing the firm name to be signed as Ferguson signed it, with no testimony showing a ratification or approval by Macklin of the right of Ferguson to make the firm liable in that mode, the proper remedy was an action against the firm on the original consideration for the sale and delivery of the mules for the use of the firm and upon the credit of the firm.

Such was the decision in Macklin v. Crutcher, and that case is not in conflict with the view taken of this case in the trial below.

In the overruled case of Hikes v. Crawford & Long it was held that a note signed by one of the partners made it a firm obligation, if the note or its proceeds was used for the firm; and this is no longer the law, for in that case the partner sought to be made liable never assented to its execution in that mode or ratified the act of his copartner.

In the present case, when this note was executed, both of the partners were present, and both not only represented that the note was a partnership transaction, but the proceeds were to be used for partnership purposes, and were in fact applied in that way by Carter, the appellant, who is now resisting the recovery on the ground that the paper fixes the liability of the parties; and, while this is generally so, the rule does not apply to a case where one partner signs a paper on the representation to the bank or the lender that it is for the partnership, and the other partner present assents to the signing for that purpose; that is, to enable the partnership to get the money.

It is immaterial, therefore, whether the firm name was on the note as obligor or indorser, the instrument was executed for the firm and in the presence of both members, and the proceeds used for that purpose, and so declared by both parties when the money was obtained.

The liability of partners upon paper signed by one in the name of the firm arises from an implied consent or authority to use the firm name for that purpose, and if there is an express assent by all the members of a firm that the name of an individual member shall be used, and not that of the firm, to raise money for the use of the firm,

we see no reason why the partnership is not liable where the credit is given to the firm.

This paper was drawn up to answer the purposes of the firm, and if there had been no indorsement by the firm, but the paper signed only by Bowers, Carter consenting thereto, and the bank letting out its money on the credit of and to the firm, evidenced by the note signed in that manner, the firm would be liable; and to make it stronger they place on the back of the note the firm name, and say to the cashier, we want this money for firm purposes, and upon the faith of these statements the proceeds are placed to the firm's credit.

The name of Bowers gave no additional strength to the paper. The firm was composed of two persons only, Bowers and Carter, and the mortgage given by Bowers was to secure the firm debt, not the individual debt of Bowers.

The instructions properly presented the case to the jury, and the verdict and judgment is sustained by the testimony.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

STAMP, GD'N V. PARRISH, EX'OR.

(*Filed May* 10, 1893.)

Executors—Duties as trustees—Liability for interest—Where an executor was directed by the will to "manage and control" the estate, "after collection for the benefit" of the testator's two infant sons, with "full power to act and do by them as he would by his own children," this duty devolved upon him as trustee and not as executor, and after the settlement of the estate and the ascertainment of the net amount to be held and used for the infants, he was chargeable with interest thereon, although the will provided that he should act as executor "without interest or being required to give security for the performance of his duties," that provision being intended to exempt him from the payment of interest only while he was settling the estate and performing duties strictly executorial.

H. C. Martin and Wm. H. Holt for appellant.

Lewis McQuown for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Presiding Judge Yost.

This appeal involves the question of the correctness of the ruling of the court below in refusing to charge the executor of S. W. Parrish with interest on the funds in his hands belonging to the estate which was managed and controlled by him under the provisions of the will for the benefit of the legatees, two infant children of the testator.

The clauses of the will bearing upon this question, directly or indirectly, are as follows:

"I give * * * my real and personal estate in the town of Horse Cave, and county of Hart, together with all cash, cash notes, life policies, &c., * * * to my two sons, William Woodson and David Abner. I direct that my executor shall manage and control said several amounts after collections *for the benefit* of my two sons. I desire that my executor shall have them well educated, using as much of their means as may be required for that purpose. * * * I give to him the full power to act and do by them as he would by his own children. I would further direct, as to my personal estate situated in the town of Horse Cave, that my executor manage and control same in such a manner as to most benefit my children. I constitute and appoint my brother, William Sidney Parrish, to be the executor of this my last will and testament, without interest or being required to give security for the performance of his duties."

The testator died in July, 1884, and the executor qualified and at once assumed the duties of his trust. On the 17th of September, 1887, he made a settlement of his accounts with the county court, and there was found to be in his hands belonging to the devisees $6,027.45. His next settlement was made on the 17th day of November, 1891. In the meantime he had held this fund for the benefit of the children, and had collected in rents, etc., the additional sum of about $900, and paid out for the heirs and other expenses, such as taxes on the realty belonging to the estate, etc., $1,655.66.

In this latter settlement the county judge charged the executor with interest on the $6,027.45 from the 17th of September, 1887, to the 17th of November, 1891, amounting to $1,506.86, and allowed him interest on his disbursements.

The circuit court, on appeal, adjudged that he should not be charged interest on the funds in his hands nor credited therewith on his payments; and from that judgment the children, by their guardian *ad litem*, prosecute this appeal.

The argument that, unless the executor is charged with interest, the legitimate living expenses of the children will swallow up their estate before they arrive at the age of maturity ought to have no bearing upon this question.

In the construction of wills the only safe rule is to adhere to the words of the instrument without looking to extrinsic circumstances or the amount of the property or the consequences of any particular construction.

It is clearly manifest from the wording of the last clause of the will that the testator intended to relieve his brother, when he should become his executor, of two burdens imposed upon him by the law, one, his accountability for interest on the moneys in his hands, and the other, the necessity of his giving bond for the faithful performance of his duties; that is, that he should not be required to give bond nor pay interest *as executor*. There can be no other rational construction of the instrument.

While performing his legal and statutory duties as executor in collecting the assets belonging to and paying off the debts against the estate he should not and can not be charged with interest, and a reasonable time should be given him for this purpose; and we presume from the record that this had been about accomplished during the time intervening between his qualification and his settlement in September, 1887.

Now, after all this has been done, and he holds in his hands a certain sum of money, not to be used in paying the debts of the testator nor to be paid directly to the distributees, but to be held by him during the time of their minority and applied as their necessities

required to their use and benefit, is he acting as executor or as trustee under the will? If these were the proper duties of an executor, he can not be charged with interest. If not, the language of the will does not relieve him of this burden.

What are the distinctions between those duties of an executor which pertain to him as executor and those which are merely trust duties?

Mr. Redfield, in his work on the Law of Wills, 77, says that an executor is always in some sense a trustee, but not in the distinctive sense, as contrasted with the ordinary functions of settling the estate and executing the directions of the will, unless where duties are imposed which clearly extend beyond the ordinary duties of the executor. Ordinarily, in this country, where duties are devolved upon executors extending in time and scope entirely and distinctly beyond those of the mere settlement of the estate and distribution of the assets, it is considered that the functions of the executor cease with the fulfillment of those duties.

This distinction is more clearly and tersely drawn in the case of Brougham v. Bonlett, 19 Beavan, 133, cited with approval in Warfield v. Brund's administrator, 13 Bush, 77. Speaking of the offices of executor and trustee, the court said: Their characters are frequently as they are in this will, united in the same person, but they are themselves distinct, and the executorial character, which begins at the death of the testator, may merge into the character of trustee, which begins at a later period, and for the most part when the executorial duties relative to the trust fund have ceased. Executorial duties consist mainly in ascertaining the amount of the testator's estate after paying debts and expenses and distributing the surplus among the persons entitled thereto.

Says the Court of Appeals in the Warfield case referred to *supra*: A devisor may require some act to be done in future in order to the vesting of the estate or for the preservation or control of a fund to be applied to a designated purpose, and may and often does appoint some friend to receive, manage and control money or property to be applied to specified uses; but, quoting from Conklin v. Egesten, 21 Wend., 436, in this his friend does not act as executor; the law does not consider him such. His powers are regulated by distinct departments of the statute or common law.

It seems to us that when Parrish's executor had ascertained the net amount of the estate, after the payment of the demands against it and the expenses incurred, and, as ascertained by the settlement, held $6,027.45 to be used for the infant children of the testator as their needs required, his duties as executor merge into those of trustee. We gather from briefs of counsel that one of the boys is eleven and the other fifteen years of age at this time. The testator died, as we have stated, in 1884. Can it be possible that he intended that his brother should use and control the funds belonging to his estate free of interest for a period of from fifteen to nineteen years? Such a construction is utterly repugnant to and contradictory of the provision that he should manage the estate "*for the benefit*" of his sons. This money must be used profitably before benefit can accrue to these children. What profit comes to them? What benefit do they derive if no interest is paid them during their minority on their funds in the hands of their trustee?

The executor should be charged with interest from the time of the settlement of the estate and allowed interest on his disbursements. In this way every portion of the will has its just operation. The executor acting as trustee will manage and control the estate for the

real benefit of the legatees, and he will have acted as executor in the discharge of his proper and legal duties as such without interest and without security.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

DUNCAN, &C. V. SMITH'S GD'N, &C.

(*Filed May* 24, 1893.)

Liability of sureties of county judge—It is not the duty of a county judge in any state of case to receive money from fiduciaries with whom he is required to make settlements; and if he does so, the sureties in his bond are not liable therefor.

John M. Galloway, C. U. McElroy, John E. DuBose, John M. Wilkins and Edward W. Hines for appellants.

B. F. Proctor for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barbour.

The question in this case is whether the sureties of a county judge in his official bond are liable for money paid to him by the guardian of an infant.

The facts are these: G. C. Cooksey, county judge of Warren county, in 1885 made a settlement with G. W. Campbell, the guardian of R. O. Smith, which showed that he owed his ward $1,469. This sum he paid over to Cooksey, who thereupon accepted his resignation and shortly afterwards appointed the appellee, James F. Ewing, guardian in his place. Cooksey paid to Ewing $1,250 of the money received by him of Campbell, but failing to pay the balance this suit was brought by Ewing against the appellants, the sureties in his official bond. By the terms of the bond the sureties covenant that Cooksey "shall faithfully discharge his duties as county judge, and pay to the proper person any money that he shall receive as county judge."

It is undoubtedly the duty of the county judge to make settlements with guardians, and it is argued that it was Cooksey's duty upon the settlement with and resignation of Campbell to at once appoint a curator or new guardian for the purpose of receiving the money. Conceding this and admitting that the sureties would be responsible to a party who sustained loss by reason of the failure of the judge to perform this duty, the action is not based upon the failure of the judge to do his duty in this respect, nor are facts alleged which would authorize a recovery upon that hypothesis.

The argument is, that not having appointed a curator or new guardian, Cooksey, by receiving the money, in effect selected himself as the person to whom the money should be paid. The *gravamen* of the complaint is, that the judge, after receiving the money, as it was his duty to do, afterwards failed in his duty in not paying it over when demanded.

The whole theory of the case is, that the county judge has failed, after proper demand, "to pay to the proper person money received by him as county judge." If under the law the county judge was

not the proper person to receive it, his selection of himself as the party to whom it should be paid did not legalize the payment or release the guardian who made it. Therefore, the question at last is, was the county judge, in his official capacity, authorized by law to receive this money; *i. e.*, was its receipt within the scope of his official duty? We can not think that it was.

That he "will pay to the proper person any money that he shall receive as county judge," means only such money as the law makes it his duty to receive. It is not his duty, in any state of case, to receive money from *fiduciaries* with whom he is required to make settlements. If for no other reason, public policy would forbid it.

Under chapter 109, General Statutes, "any person who wishes to appropriate any vacant lands may, on application to the county court where the land lies, and paying therefor such price as the court may allow, not less, etc., obtain an order of the court authorizing him to enter," etc.

In Helster v. Pike county, 13 KY. LAW REP., 494 (a case arising under this statute), where the sureties of a county judge were sought to be made liable for money received by him for vacant lands, this court said: "The sureties in the bond of a county judge are not responsible for money received by him which it was not his duty to receive. The county judge has no right to receive money due the county for land warrants. The mere fact that the law does not provide who shall receive the money does not cast the duty on him."

There the reason for holding the sureties of the county judge liable were much stronger than they are here. The following cases are also in point, and are conclusive against the appellee: Duncan v. Gabley, 2 Met., 91; Hardin v. Carrico, 3 Met., 289, and Hammond v. Crawford, 9 Bush, 75.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

PILKINGTON v. FAYETTE NATIONAL BANK.

Filed May 31, 1893. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Separation of conclusions of law and fact—Where a common law action is submitted to the court without the intervention of a jury in the absence of a separation by the court of its conclusions of law and fact, the only question presented upon appeal is the sufficiency of the pleadings to authorize the judgment.

Thomas H. Hines for appellant; Breckinridge & Shelby for appellee.

WARE v. MCCORMICK.

Filed May 31, 1893. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Cross appeal*—Where the plaintiff recovers judgment for the full amount claimed by him upon appeal from the judgment he has no ground of cross-

appeal, although the lower court may improperly have dismissed a paragraph of his petition, and, if the judgment is reversed, the fact that he did not upon the appeal question the correctness of the action of the lower court in dismissing a part of his petition does not preclude him upon the return of the case to the lower court from filing an amended petition, setting up the cause of action contained in the paragraph of his original petition which was improperly dismissed.

2. *The assignee of a forged note*, immediately upon discovering that the note is a forgery, has the right to repudiate the contract and sue the assignor for the recovery of the money obtained from him without consideration; and in order to recover in such an action he is not bound to show that he has exercised the diligence required to render an assignor liable upon his contract of assignment, as his cause of action does not arise from the contract of assignment, but from the fact that there was not a valid contract.

3. *Failure to verify pleading*—Where a party objects to a pleading which is offered because it is not verified, the specific objection should be made known or it should be treated as waived. A general objection will not suffice.

4. *Reversal of judgment—Restitution*—Although the court may have been premature in requiring plaintiff, before the filing of the mandate, to refund money collected under the reversed judgment, she is not entitled to have it restored to her, as she has no judgment against the defendant.

G. G. Gilbert for appellant; Pryor J. Foree and W. H. Anderson for appellee.

Potter & Co. v. Wait.

Filed May 31, 1893. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

The good will of a business is the benefit which arises from its having been carried on for some time in a particular place or by a particular person, or from the use of a particular trade-mark, and its value consists in the probability that the customers of the old firm will continue to be customers of the new.

Where a note was given in part for the good will of a coal business (which is in a great measure local and does not exist independently of the place in which it is kept), the obligor having been evicted from the premises at the end of six weeks, and thus forced, if she desired to continue in business, to find another location and customers of her own, there was a failure of consideration to the extent the note was given for the good will of the business.

Galloway & Gaines for appellants; Clark & Clark for appellee.

C. & O. R. R. Co. v. Bradford.

Filed May 31, 1893. Appeal from Bracken Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Carriers—Verbal contract—In this action against a railroad company to recover damages on account of the loss resulting from defendant's delay in delivering perishable goods which it undertook to carry for plaintiff, as no bill of lading was delivered to plaintiff upon receipt of his freight, and he sued upon a verbal contract made by him with defendant's agent whereby the agent agreed to deliver the goods within four days from the date of their shipment, and the defendant in its answer did not rely upon the bill of lading, subsequently delivered to plaintiff, the rule that oral testimony can not, in the absence of an allegation of fraud or mistake, be introduced to change or vary the terms of a written contract has no application. The issue was, was there a verbal contract made between plaintiff and the agent.

Wadsworth & Cochran for appellant; William H. Holt and George Dunlphan for appellee.

CARTER COUNTY v. CASTNER.

Filed May 31, 1893. Appeal from Carter Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

In a proceeding under the statute against a delinquent taxpayer the summons issued by the clerk of the county court must show that the taxpayer proceeded against has been reported as delinquent.

J. D. Jones and T. G. Poore for appellant; W. J. Hendrick, Attorney-General, for Commonwealth; R. C. Burns, for appellee.

CLARK, &C. v. GOODLOE'S EX'OR.

Filed May 31, 1893. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

Evidence as to contract with decedent—Peremptory instruction—In this action against an executrix to recover the price of a portrait of her intestate which the plaintiff alleges he was painting at the time of said intestate's death at his special instance and request, and afterward completed and offered to deliver to defendant, the widow and executrix of the decedent, testimony introduced by plaintiff tending to show that he painted the portrait, that the decedent visited his room while he was engaged in the work, for the purpose of examining it, and said that plaintiff was painting his picture, was sufficient to authorize the court to submit the case to the jury, and made it incumbent on defendant to show, as alleged by her in her answer, that the portrait was painted upon condition that it was not to be taken or paid for unless it suited her and the rest of the family, and that it was in fact not satisfactory to them.

Tanner & Forman for appellants; Bronston & Allen for appellee.

COOPER, &C. v. NEWCOMB.

Filed May 31, 1893. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Failure to allow admitted credits—In this action upon a promissory note the court erred in giving judgment without allowing credits admitted by plaintiff in his testimony.

John D. Fogle for appellants; S. A. Russell for appellee.

BRADFORD v. BRADFORD.

Filed June 14, 1893. Appeal from Pendleton Chancery Court. Opinion of the court by Presiding Judge Yost, affirming.

Partial transcript—This court can not say that the lower court erred in construing a will which, although filed as an exhibit with the petition, is not copied in the record.

John H. Barker for appellant; Leslie T. Applegate for appellee.

ROACH & WEILL v. HOUSTON, &C.

Filed June 14, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. *Bill of exceptions*—As the bill of exceptions was not filed within the time allowed by the court, it can not be considered.

2. *Damages for detention of personal property*—In an action to recover personal property and damages for its detention, the plaintiff is not limited in the recovery of damages to the depreciation in value and to interest on the amount of the value of the property from the time of its detention, provided the property had a usable value, as in the case of horses, cows, carriages, etc.

In this action for the recovery of two mules and damages for their detention, in the absence of a bill of exceptions, this court must assume that the evidence authorized the damages awarded by the jury, although there may have been no depreciation in value, and the amount awarded exceeds the interest on the value.

3. *Cross petition*—The defendants having made their answer, a cross petition against J., from whom they claimed to have purchased the mules in controversy, an answer filed by J., which he made a cross petition against plaintiffs, alleging that he was a partner of one of them in the ownership of the mules, and asking for a settlement of the partnership, was properly stricken from the files, as it could have no bearing upon the issues raised by the pleadings of plaintiffs and defendants.

4. *Amendment of petition*—The plaintiff was entitled to damages for the detention up to the time of the judgment of restitution, and if the amount claimed in the petition was not enough he had the right by amendment to his petition to ask for a greater sum.

Marc Mundy for appellants; Griffith & Potts and John Barrett for appellees.

HEATON, &c. v. TIMMONS.

Filed June 14, 1893. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, reversing.

Vendor and vendee—Compensation for deficit—Under a sale in gross of land described in the deed as "containing between 350 and 400 acres," the vendee could not complain if the tract contained only 350 acres, and the vendor could not complain if it contained 400 acres. But as the tract contained only 267¾ acres the deficiency is so great that the vendee should have an abatement of the purchase price to the extent of his loss. The abatement, however, should not be at the average price agreed to be paid for the whole farm, as the farm was supposed to be about half bottom and half hill land, and the deficit was altogether in the hill land, which was less valuable than the bottom land, the exact number of acres of which was known to the vendee. And as it appears that the bottom land was worth three times as much as the hill land, and the average price for the whole farm was a fraction over $12 per acre, the one would be worth approximately $18 and the other $6 per acre. Therefore, for the deficiency of 82 acres in the hill land, the vendee should be allowed an abatement of $500.

John D. Carroll and John L. Scott for appellants; Lane & Burnett for appellee.

TUCK, &c. v. DEWEESE & MANTLE.

Filed June 14, 1893. Appeal from Carlisle Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Garnishment*—Where a debtor agreed to deliver to the agent of his creditor his wheat crop in payment of certain notes which the agent held against him for collection, the fact that some of the notes were not then due did not deprive the agent of the right to apply the wheat to the payment of the debts when it was delivered, and another creditor who seeks by process of garnishment to subject the proceeds of the wheat in the hands of the agent is entitled to subject only what remains after satisfying the debts, in payment of which the wheat was delivered to the garnishee.

2. *Same—Costs*—The garnishee is entitled to retain out of the amount in his hands belonging to the debtor his costs incurred, including a reasonable attorney's fee.

3. *Same*—As the amount sued for was only $51.20, and the costs could not have exceeded $15, it was error to require the garnishee to pay into court $174,89, even conceding that he owed the debtor that much.

Z. W. Bugg & Sons for appellants.

CITY OF MAYFIELD v. ANDERSON & TICE.

Filed June 14, 1893. Appeal from Graves Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Taxation—Appointment by city council of one of its members as assessor—Where a statute confers the appointing power and does not expressly authorize self appointment the appointment of some other than self is always contemplated.

Where a city council is authorized by statute to appoint an assessor the appointment by that body of one of its own members is void, as is also any assessment made by him, and this is true, although the member thus appointed may not have participated in his own election, or in the subsequent action of the board in passing upon the assessments made by him.

Park & Lee and W. J. Webb for appellant; Webb & Johnson for appellee.

NEWBY v. MILLION.

Filed June 14, 1893. Appeal from Madison Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Defect in pleading cured*—Although the reply in this case might have been insufficient upon demurrer, yet, as the parties treated the case as if the issues had all been properly pleaded, and have, without objection, introduced evidence in support of and against the different items claimed as credits in the answer, without calling attention, either by demurrer or motion, to the defects in the reply, they should be treated as having been cured by the judgment.

2. *Presumption as to items embraced in settlement*—The evidence is not sufficient to overcome the presumption that the settlement between the parties resulting in the execution of the note sued on embraced the credits claimed by defendant in his answer.

C. F. Burnam for appellant; Stephen D. Parrish for appellee.

CAUDELL v. WOODWARD, &C.

Filed June 14, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Benefit societies—Right of member to change beneficiary*—Under the charter of a benefit society establishing a benefit fund, from which a sum not to exceed a certain amount "shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct," the member has no power to name as a beneficiary of the fund any person other than a member of his family. Nor were the rights of the member in this regard intended to be enlarged by a provision in the constitution adopted by the society declaring that the fund shall be paid as the member "may have directed while living, and as contained in the benefit certificate."

2. *Same—Constitution*—A benefit society has no right or power to adopt a constitution in conflict with the provisions of its charter.

3. *Where the designated beneficiary can not take* there is no reversion to the society, but the persons for whose benefit the charter declared the fund was created take the place of the person named in the certificate and are entitled to the fund.

John W. Barr, jr., for appellant; M. A., D. A. & J. G. Sachs for appellees

CALLENDER v. CALLENDER.

Filed June 14, 1893. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Divorce and alimony*—In actions for a separation the relief sought may be granted for any cause which the court, in its discretion, may deem sufficient.

In this action by the wife for a divorce from bed and board and for alimony, the co urt finds no cause, sufficient or otherwise, for the decree prayed for.

2. *Same—Costs*—In actions for divorce and alimony, no matter what the result of the suit may be, or by what cause it may have been terminated, the husband is bound to pay the costs of each party, including a reasonable compensation to the attorneys of the wife for their professional services rendered to her in the action, unless the wife is in fault and has ample estate to pay the costs.

E. E. Settle and J. H. Dorman for appellant; J. W. Greene and M. D. Gray for appellee.

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 15. AUGUST 1, 1893. No. 3

KENTUCKY COURT OF APPEALS.

LONG & CO., &C. v. KERRIGAN.

(*Filed April* 8, 1893—*Not to be reported.*)

1. *Filing of depositions—What constitutes the record on appeal*—Where depositions have been regularly taken and actually lodged in a case, and acted on by the chancellor and treated as a part of the record, they must be considered on appeal as a part of the record of the case, and should be embodied in it as such by the clerk below, although he may have failed to note or indorse them as filed.

2. *Same—Practice*—On the former appeal of a case this court reversed the chancellor's judgment because the record did not contain any depositions or evidence to support the finding of facts in appellee's favor; on a petition for rehearing it appeared from the certificate of the chancellor that appellee's depositions were lodged in the case below and considered as a part of the record, but the clerk failed to copy them into the record because he had not noted or indorsed them as filed. The case, on the petition for rehearing, was reversed, with directions to the lower court to examine the depositions and ascertain if they were actually a part of the record in the first trial below. *Held*—That said depositions were a part of the record, should have been made a part of the record on the first appeal and sustained the chancellor's judgment.

O'Neal, Phelps & Pryor for appellants.

Kohn, Baird & Speckert and Albert A. Stoll for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

The appellants bought an entire block of ground lying and being in the city of Louisville from General Preston's executors. They made said firm a deed to the land, which was acknowledged and recorded.

It thereafter turns out that the appellee, Kerrigan, claimed to be the owner of thirty feet of said ground and to have the actual posses-

sion of it by virtue of a title bond executed by General Preston to him.

The chancellor adjudged that inasmuch as the appellee's title bond was older than the appellants' deed, and inasmuch as he was in the actual possession of said lot at the time the appellants made the purchase and took the deed, which was duly recorded, such possession was sufficient notice to them to put them upon inquiry as to the character of the appellee's right to hold the possession, and as that right was by virtue of a title bond from General Preston, his title was the older and better to said lot; that the title by deed, duly recorded did not protect the vendee against an older unrecorded title unless the vendee acquired his title as an innocent purchaser; then, in such case, the recording of the title protected him; but if he had notice of the elder unrecorded title before he received and recorded his title he took the same subject to the elder unrecorded title; and that, if the holder of the elder title was in the actual possession of the land at the time of the junior purchase, such possession was sufficient notice to the junior purchaser to put him upon inquiry as to the manner of the others holding, and he purchased at his peril. Therefore, the chancellor having found that General Preston did execute and deliver to the appellee said bond, and that he was in the actual possession of said land at the time of the appellants' purchase, he was entitled to it.

This court, in reviewing the decision of the chancellor, agreed with him as to the view of the law just expressed, but differed as to the facts. We held that there was no evidence in the record then before us that General Preston ever executed the bond to the appellee, that fact being denied, or that he, the appellee, was in the actual possession of the lot, that fact being denied. The case, for these reasons, was reversed.

Kerrigan petitioned for a rehearing, and accompanied the petition with the certificate of the chancellor who tried the case, stating in substance that there were depositions in the case that had been regularly and properly taken, proving the execution of the bond for a title by General Preston, and the actual possession of the land by appellee; that these depositions had been treated as a part of the record, and they had been read and considered by him, and which influenced the judgment rendered for Kerrigan.

Now, when papers or depositions have been actually lodged in a case and used, treated and acted on by the court as a part of the record, they must be considered here as a part of the record, and they should be copied as a part of the record to be sent here for review, although they were not actually noted as filed by the clerk, his failure in that regard should not prejudice the rights of litigants who had the right to rely on his performing that simple official duty upon the presentation of such papers to be filed in the case. It was upon the said official certificate of the chancellor to the effect that said depositions were considered by him and which influenced his judgment in favor of Kerrigan, and which ought to have thus directed his judgment, that induced us to grant the rehearing and remand the case to the chancellor to consider about said depositions again, and their contents, and to render another judgment according to his finding in that regard, which he did, and his judgment as to the said facts is fully sustained by them. Indeed there is no contradictory evidence in that regard. We repeat that it was upon the certification of the chancellor that influenced our action at that particular stage of the proceedings here. We think that justice to all parties required it, and it turns out that had we acted otherwise, absolute injustice

would have been done the appellee, for the evidence is conclusive that said depositions were taken upon proper notice, witnesses cross-examined and the depositions given to the clerk to be filed, and were in the papers all the time and considered by the chancellor that tried the case, but by some oversight the clerk failed to mark them filed, etc., and the depositions fully prove the two points at issue.

The judgment is affirmed.

MIZE V. TURNER.

(*Filed April* 8, 1893—*Not to be reported.*)

Mortgages—Attachments—Evidence—Where the attaching plaintiff creditor alleges that the prior mortgage on the land attached was executed in contemplation of insolvency and with a design to prefer, all of which averments are denied and no proof is taken, the mortgage can not be held constructively fraudulent, and a judgment subjecting the property to satisfy first the attaching creditor's debt and ignoring the rights of the mortgagee is erroneous.

W. W. McGuire for appellant.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

In this action Turner, the appellee, was a judgment creditor of one Cockerill, and having alleged grounds for an attachment prior to his judgment the land of Cockerill was levied on by the writ and adjudged to be sold to pay the debt.

During the progress of the action the appellant, W. O. Mize, holding a mortgage on this land, the appellee filed an amended petition, alleging that the execution of the mortgage was in contemplation of insolvency and with a design to prefer, and, therefore, the estate of Cockerill passed under the statute to creditors. Mize answered the amended petition, denying the facts alleged as to insolvency and the design to prefer, and no proof whatever was taken on that issue, and it must, therefore, be assumed that no constructive fraud existed; still the court below ignored the claim of Mize, although his mortgage was prior to the attachment, and ordered the land sold to satisfy Turner's debt. This was error. The land should have been sold to satisfy first the debt of Mize and then the debt of Turner, or to satisfy both debts; and, if it failed to bring enough to satisfy both claims, then Mize should have the preference. On the return of the case such should be the judgment, if the parties are all before the court on the cross petition of Mize to foreclose his mortgage, and, if not, they should be brought before the court and the land sold, unless there is some other defenses than those contained in this record, to satisfy the debts in the order mentioned.

Judgment reversed and remanded for proceedings consistent with this opinion.

DOTY, &C. V. COX.

(Filed April 27, 1898—Not to be reported.)

1. *Personal representatives—Subrogation*—An administrator, with the will annexed, being the husband of one of two children of the testator, who, with a grandchild, were his only devisees, undertook to pay the testator's debts without incurring the expense of an action, and furnished a considerable amount of his own means, and his wife and her sister undertook to indemnify him by conveying to him a tract of land received by them from their father. The wife of the administrator having died, her estate vested by descent in her sister and the grandchild.

Upon an action instituted to perfect his title to the land deeded to the administrator, *Held*—That the conveyance from his wife passed no title, but the administrator having in good faith advanced his own means to pay debts which the testator's land was bound for, he was entitled to have his title to it perfected by a conveyance from the commissioner of the interest of the grandchild.

2. *Same—Compensation*—An administrator, with the will annexed, having undertaken to perform his duties without compensation, he will not be permitted to charge the estate for same.

J. A. Sullivan, W. O. Bradley and C. F. & A. R. Burnam for appellants.

Jno. Bennett and Smith & Moberly for appellee.

Appeal from Madison Common Pleas Court.

Opinion of the court by Judge Pryor.

The personal estate of John W. Francis being insufficient to pay his debts, it became necessary to sell his land for that purpose, and the parties in interest, being desirous of avoiding the expense of resorting to an action for that purpose, agreed to sell and did sell a part of the landed estate, applying the proceeds to the payment of the debts.

The decedent left his widow surviving him and two children and one grandchild. He made a will by which he devised his estate to his widow and the two surviving children, giving to his grandchild a small legacy.

The appellee, Jefferson Cox, and one Terrell qualified as administrators under the will annexed, and the active administrator, Jefferson Cox, paid out of his own means a large sum of money in discharging the debts of the testator. He agreed to take a small tract of land at a fixed price that was a fair equivalent and more than the land is now worth. His wife, who was a daughter of the testator, and her sister (now Mrs. Doty), being of full age, executed a joint deed to Cox for this tract of land, the deed being executed directly by the wife to her husband. The proceeds of the land was paid on the debts, and still left other debts owing by the estate that were paid by Cox, the administrator, and, as he alleges, under an agreement with his wife that she would convey to him other land that she had inherited or received by devise from her father. The deed from his wife for the tract purchased passed no title, and the only title he obtained was that of his wife's sister, nor can the agreement between the husband and wife be enforced as to the other land devised to her. Both transactions were nullities.

After these transactions, and before the estate was finally settled, the wife of Cox died childless, and her land descended to her heirs at law,

and among them was John W. Walker, the grandchild, who is an infant, and who had, in effect, been disinherited by his grandfather.

Cox filed his petition asking that the contracts with his wife be enforced, and, if not, that the deed to the land made to him jointly by his wife and her sister be cancelled and the money paid refunded to him, with interest, and also the additional amount he had paid in discharge of the testator's debts, as evidenced by his settlement with the county court.

The heirs at law of his wife, including the grandchild, were made defendants, and on the hearing the court below cancelled the deed made to Cox by his wife and her sister, and subjected the estate of the decedent to the payment of the debts, and refused to make any allowance to Cox for his services as administrator.

The heirs at law appeal from the judgment, and Cox asks for a cross appeal, insisting that the court erred in refusing an allowance for his services.

Cox took possession of the land under the deed from his wife and her sister, made improvements upon it and paid its full value. The land was liable for the debts of the testator, was sold to pay those debts, and the proof conduces to show that if again sold it would bring less than the price paid by the appellee. The sister (now Mrs. Doty) has parted with her title, and if the appellee failed to obtain the title of his wife it was his fault and not that of his sister, and, therefore, the latter should not be compelled to take her interest back that it may again be sold to pay testator's debts. If the land had already been sold, and for its full value, and sold for the same purpose that it is now ordered to be resold for, we see no reason why the sale should not be confirmed and the commissioner ordered to make a deed for the infant's interest, particularly where it is to the interest of all parties that the deed should remain uncancelled. The appellee can not complain if the land is of less value, because this whole trouble originates from his own laches. He should, therefore, be compelled to take the land attempted to be conveyed by the wife and his title perfected by the deed of the infant through a commissioner.

As to the balance of the debts remaining unpaid and discharged by the administrators, the land devised to the wife, Mrs. Cox, and to Mrs. Doty should be sold to indemnify him.

It is contended on the appeal that the administrator, having voluntarily paid the debts when he was not compelled to do so, can not recover; that the appellee has made the estate his debtor without the consent of the heirs.

We can not see how such a doctrine applies to a personal representative who stands in the shoes of the testator, and who may be compelled to pay as long as there are assets in his hands, and by statute may resort to an action, sell the realty for that purpose. What debts he has paid, with proper vouchers annexed, he should be credited by.

If Mrs. Doty should pay her part of the debts, then no sale of her land should be ordered unless the land left to Mrs. Cox is insufficient in value to pay her part of the indebtedness.

We must concur with the court below in his refusal to make an allowance to the administrator, except his actual cost and expenses. It was, we think, understood and agreed that no charge was to be made. Terrell, the coadministrator, made no charge, and, while he was not as active in the management of the estate as the appellee, he rendered valuable services, and for which he would be entitled but for the agreement not to charge. Besides, the neglect of the ap-

pellee, in failing to take proper advice, has placed the heirs in a condition where they must pay attorneys' fees and incur other expenses that would have been unnecessary but for his action.

The judgment is reversed on the original and affirmed on the cross appeal.

THE MERCANTILE TRUST CO. OF NEW YORK v. THE SOUTH PARK RESIDENCE CO.

(*Filed April 27*, 1893.)

1. *Nonresident defendants—Constructive service—Void judgment*—Under United States statutes of March 3, 1875, publication of warning order against nonresident defendants in a daily paper for *ten successive days* was not a compliance with the statute requiring such publication to be made not less than *once a week for six consecutive weeks*, and a sale of nonresident's property under such publication was void.

2. *Covenant of warranty—Mortgages*—A covenant of seisin is broken as soon as made, and a suit for damages for the breach may be instituted by the grantee without waiting to be evicted. A mortgagee is not vested with the legal title and is not seized in fee.

3. *Measure of damages—Attorney's fee*—In an action to recover damages for the breach of a covenant of seisin, there having been no expenses incurred in resisting an eviction, the measure of damages is the restitution of the purchase money, with interest. No attorney's fee can be allowed as a part of damages in such cases without an eviction.

Marc Mundy for appellant.

Stone & Sudduth for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

Mrs. Dorcas White was the owner of a tract of some 380 acres of land near Louisville, Ky.

In 1875 her son, Theodore S. White, borrowed from the Mercantile Trust Company of New York the sum of $5,000, and Dorcas and her husband, by way of mortgage, conveyed the land named to the trust company to secure the payment of this debt.

The loan was made on five years' time, but interest not being paid in March, 1878, the company instituted proceedings in the Circuit Court of the United States of the District of Kentucky, seeking to subject the lands to the payment of its debt. Prior to this suit Dorcas White had died, and the action was against her children, *eight* in number, six of whom were residents of the State of Arkansas. Only two of them were found in the district, and thereupon an order of warning was made against the six children, and, after publication for *ten successive days* in a daily paper in Louisville, a judgment of sale was obtained. A receiver had theretofore been appointed by the court, who had taken charge of the property.

At the commissioner's sale in September, 1878, the company became the purchaser at the price of $4,400, and in November, 1888, the sale was confirmed and a deed made to the company.

On November 17, 1888, the trust company sold and conveyed the property to Peddicord in consideration of the sum of $4,000, and, thereafter, in August, 1889, Peddicord sold and conveyed the same

property to the South Park Residence Company in consideration of the sum of $19,456.56.

In the deeds from the trust company to Peddicord, and from Peddicord to the South Park Residence Company, these covenants are found: "And the said first party further covenants with the said second party, his heirs and assigns, that they are lawfully seized in fee simple of the property herein conveyed; that they have good right and full power to convey the same; that said property is free from incumbrance, and the said first parties and heirs shall make all further assurance of the lands as shall be lawfully and reasonably required by said second party, his heirs or assigns."

The only title that the trust company had to the property was by virtue of the commissioner's deed obtained in the United States Circuit Court proceeding named above, and in that suit the Federal Statute of March 3, 1875 (sup. to U. S. Rev. Stat., vol. 1, page 176), requiring orders of warning to be published in such manner as the court may direct, not less than *once a week for six consecutive weeks*, was ignored, and publication was made for only ten successive days. It follows, therefore, that the interest of six out of the eight children of Dorcas White was sold, or attempted to be sold, when they were not before the court.

Upon the authority of Hunt v. Wickliffe, 2 Peters 214-15, and other cases of the United States Supreme Court to the same effect, we are of opinion that this jurisdictional fact not appearing of record —that is, the publication required by law—the decree and sale thereunder did not divest the title of the six children in and to the land sold, but that as to them the judgment was absolutely void.

Therefore, at the time of the conveyances from the trust company to Peddicord, and from the latter to the residence company, these six children, as heirs of their mother, Dorcas, were the owners of six-eighths of this property, and hence the covenants of the first parties to said deeds, that "they were lawfully seized in fee simple of the property therein conveyed, and that they had good right and full power to convey the same," were broken immediately upon the making of them.

In Fitzhugh, &c. v. Croghan, 2 J. J. Mar., 429, it is said: "In a suit on a covenent of *seisin*, the only question is, was the covenantor *seized* of the legal title at the instant when he made the covenant? If he were his covenant is not broken. It is a covenant 'in *presenti*' and can not be affected by supervenient facts or events. * * The covenant of *seisin* is broken the instant it is made or never."

Mr. Rawle, in his work on Covenants for Title, page 81, says that the weight of authority is to the effect that a "covenant of seisin is satisfied only by the transfer of an *indefeasible title*," and is "technically broken as soon as it is made if the title be from any cause defeasible."

Mere possession, we think, does not satisfy the covenants of the grantors. The *right* of possession must also have been in them as well as the fee and the right to convey.

It is insisted that the mortgage of the Whites passed the fee to the trust company, and that it was thus seized in fee and empowered to convey in satisfaction of its covenant.

It is true that in some comparatively late cases (Stewart v. Barrow, 7 Bush, 368), it is said that "a mortgage passes the legal title to real estate to the mortgagee," which follows the old doctrine. But in all the late cases (Talliaferro, &c. v. Gay, &c., 78 Ky., 496, the principle is announced that "substantially under the adjudications in this State the legal title to the mortgaged premises, both at law and in

equity, remains in the mortgagor during the life of the mortgage." "A mortgage is a mere security for debt, and substantially, both at law and in equity, the mortgagor is the real owner of the property mortgaged." (Wooley v. Holt, 14 Bush, 790.)

In Douglass, &c. v. Cline, &c., 12 Bush, 612, it is said: "Hence, mortgages are now treated in this State as mere securities; and, although, strictly speaking, the mortgagee is invested with the legal title, he holds it only in pledge, and the mortgagor is considered, both at law and in equity, the real owner of the property."

It is manifest, therefore, that the trust company was not the real owner of six-eights of the property in question, was not "lawfully seized in fee" thereto, and had not the good right and full power to convey the same, either by virtue of its mortgage from the Whites or by reason of its commissioner's deed in the foreclosure proceedings aforesaid, nor need an eviction first be had before an action was maintenable.

This follows from the very nature of the covenants. If ever broken they are broken as soon as made, and an action for the breach lies at once and before eviction.

In Fitzhugh, &c. v. Croghan, *supra*, it is said: "A suit may be maintained, therefore, for a breach of a covenant of *seisin* before and without any eviction." See also Rawle, *supra*, page 77, to the same effect.

In Marvell on Vendors, volume 2, page 988, it is said: "The grantee is not bound to wait until he has been disturbed in his possession, however, but may purchase in the outstanding title and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same."

We conclude, therefore, that the South Park Residence Company had the right to institute this action against the trust company, the covenantor in the deed of November 17, 1888, and do so before actual eviction.

This brings us to the consideration of the question, what is the measure of damages in the case? Upon discovering the defect of title, which was in the latter part of the year 1889, the appellee, the South Park Residence Company, at once notified the trust company, and upon the latter company taking no steps to perfect the title, it proceeded to buy in the outstanding title of the six White heirs. The land had greatly advanced in value, as is shown by the fact that Peddicord sold it for nearly five times as much as he paid for it, and, besides, extensive improvements had been erected thereon.

This title was finally bought in at the price of $7,200, paid by the South Park Residence Company, and the proof is abundant that the price paid was reasonable. Peddicord, the immediate grantor of the appellee, consented to this purchase, and immediately paid to his grantee one-half of the sum it thus had to pay to the Whites, namely, $3,600, and transferred to the appellee all interest and claim he might have growing out of the trust company's covenant to him in the deed of November, 1888.

The latter company, declining to make good the remainder of the loss growing out of the purchase of this outstanding title, the South Park Residence Company brought this suit, in which Peddicord nominally joins against the trust company. It recovered a judgment on the sum claimed, to-wit, $3,600, with interest from January 25, 1890, and for $550 for attorneys' fees and expenses incurred and paid in the obtention of the outstanding title of the White heirs.

In Cox's heirs v. Strode, 2 Bibb, 273, it is said: "The Supreme Courts of New York and of Pennsylvania have determined that on

a covenant of *seisin* the rule of compensation is the value of the land at the time of entering into the covenant, to be ascertained by the consideration paid, with interest and costs attending the eviction."

This rule is unqualifiedly endorsed, and has since been invariably followed. (Cosby v. West, 2 Bibb, 568; Thompson's heirs v. Jones, 11 Bush, 365.)

In Robertson v. Lemon and wife, 2 Bush, 301, where there was an eviction and a suit on a breach of general warranty, the same rule is announced and it was said: "The appellant is certainly liable for the legal costs incurred in resisting the eviction, and also for a reasonable fee paid to caunsel for defending the action; * * that the legal effect of such a warranty as that in this case is the liability of the warrantor for a restitution *pro tanto* of the consideration is indisputably established by preponderating authority and by this court."

In Rawle, *supra*, page 992, it is said that "the doctrine is well established that where the breach of a covenant is only partial the covenantee recovers *pro tanto* only."

Warvelle, in his work on Vendors, page 1011, says that "it has been held in some instances that the allowance of a counsel fee is conditional upon the action of the covenantor, and the covenantee can not recovor the fees paid by him in voluntarily defending the ejectment suit as part of his damages in an action against the covenantor on the covenants of title."

Rawle, *supra*, page 310, says: "In some cases, however, counsel fees have been denied under any circumstances, it being considered that these expenses incurred by the party for his satisfaction vary so much with the character and eminence of counsel that it would be dangerous to impose such a charge upon an opponent."

Whatever may be the rule elsewhere, we think it is authoritatively settled in Kentucky that in suits for a breach of covenants of this character the necessary costs and expenses incurred in defending the title, including a reasonable attorney's fee, can be recovered, but we think these expenses must have been incurred in actually defending the suit for eviction and after notice of the suit to the covenantor. If he is to be made liable he must at least be given the opportunity to employ his own counsel and provide the defense, the costs of which he is to pay.

In this case there was no suit for eviction; the covenantee voluntarily undertook to buy in the paramount title of the Whites. Notice of the defect was first given the trust company in New York the latter part of November, 1889, and even then negotiations were pending between the park company and the Whites respecting the purchase of their claim, and was very shortly closed. The park company was evidently greatly alarmed at having expended some $40,000 or $50,000 on property, to only two-eights of which they had title. It was evidence of business capacity to hurry the trade through, but we do not think the trust company should be held liable to this expense.

It is contended by the appellant that from whatever sum is fixed the compensation due to the appellee should be deducted from the balance of the unpaid White mortgage, as in no event could they have obtained an eviction without paying this unpaid balance. This is probably true, but it does not follow that this sum should be deducted from damages incurred by the appellee. The Whites probably estimated this unpaid balance as paid or satisfied in selling their interest at less than the market value of the property, and such view is borne out by the proof.

We conclude, therefore, that the limit of the damages recoverable in this action is six-eights of the consideration received by the trust company from Peddicord on November 17, 1888, that being the proportionate loss or defect in the lands conveyed, which is $3,000, with interest, upon the last named date.

The judgment of the lower court being in excess of this sum is reversed and cause remanded, with directions to enter judgment in accordance with this opinion.

QUINN'S ADM'R V. N. N. & M. V. CO.

(Filed April 29, 1893—Not to be reported.)

1. *Negligence—Bodily suffering of intestate*—A personal representative may recover for the suffering of his intestate after receiving personal injuries resulting in his death.

2. *Pleading—Caption*—The fact that the caption fails to state that plaintiff sues in a representative capacity is immaterial if the fact that he sues in such capacity is stated in the body of the petition.

Lane & Burnett for appellant.

Bullitt and Shields for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

This is an action by the Germania Safety Vault & Trust Company as the administrator of one Quinn, seeking to recover damages for the mental and bodily suffering of the intestate, caused by the gross negligence of the employes of the railroad company while in the course of their employment.

The appellant's intestate was a brakeman at the time, and in the employ of the company, and the bodily injury resulting in death caused by those superior in authority, if the averments of the petition are true. This is not an action to recover for the loss of life but for the suffering of the intestate for days and weeks after the injury, and the right of action is sustained by the case of the same appellee against Ditzler, 12 KY. LAW. REP., 626.

It is said, however, that the appellant fails to sue as administrator, and that the trust company, as such, is seeking to recover damages for an injury to one with whom it has no connection in any way. The petition, in its caption, fails to style itself as administrator, but this is not required; but the fiducial character in which the party sues must be stated in the body of the petition, and in this case, after reciting the facts constituting the cause of action, the plaintiff alleges that Quinn died intestate a resident of the county of Jefferson, and the plaintiff was appointed by the county court to be, that it accepted and qualified as, and became and now is, the administrator of the estate of Joseph Quinn, deceased, and by reason of which the defendant has become liable and bound to pay it the sum of $20,000.

In our opinion this is a sufficient statement of facts showing the recovery is sought by the administrator and not in its individual right.

The demurrer should have been overruled and cause remanded for that purpose.

LACHAT, BY, &C. V. LUTZ.

(*Filed April* 29, 1893.)

Negligence—Duty to strangers—The plaintiff visited the premises of defendant to deliver a message from an employe of defendant, but who was not so employed on that day, and was by some one directed to pass through a dark room, where he was injured by having his leg caught in a large wheel which he could not see. In an action to recover damages, *Held*—That defendant owed no duty to plaintiff; besides, plaintiff contributed to his own injury by going into the dark room.

Kohn, Baird & Speckert for appellants.

M. A., D. A. and J. G. Sachs for appellee.

Appeal from Jefferson Court of Common Pleas.

Opion of the court by Judge Lewis.

A general demurrer to the petition having been sustained, the plaintiff in this case, who is an infant suing by his next friend, has appealed.

The cause of action is stated substantially thus: That on the —— day of August, 1890, one Stoker, who was foreman or superintendent of defendant, Lutz, requested plaintiff, Lachat, to go to defendant's place of business and inform him that his (Stoker's) child was dead and he would not come to work on that day; that while on his way to the building owned by defendant for the purpose of delivering said message he (plaintiff) was directed to go into a small room where the person could be found who would convey said message to the defendant; that said room was very dark, and while he was attempting to make a step his leg was caught in an opening or hole that had been negligently left so, and a large revolving wheel crushed his leg; that he did not know of the danger to which he was exposed, and could not discover it on account of darkness of the room. It is further stated that plaintiff had no notice or warning of the danger, but defendant, his agents or servants negligently directed him into said room.

It is not alleged plaintiff, when injured, was in performance of any duty to defendant, or that he was at the place of defendant with his knowledge or consent. On the contrary, a fair inference from statements of the petition is, that he went there at instance and for accommodation of only Stoker, who was, for that day at least, not in service of the defendant.

It is not alleged that the room in which plaintiff received the injury was designed or used as a passageway for strangers or was ever in fact entered by any other than employes of defendant.

The defendant, therefore, owed to plaintiff no other duty or care than any other stranger or person intruding upon his premises without his consent or knowledge; and as the actual condition of the room in question was not a subject affecting the rights or interests of any others than defendant and his employes, we have the case of a plaintiff, not alleged to be deficient in intelligence, voluntarily going where he need not have gone, and the exercise of ordinary care would have kept him from going.

It is true it is in general terms alleged that plaintiff was directed by some one to go into that room where he could find a person who would convey the message to defendant; but even assuming the person who gave the direction was an employe of defendant, though it

is not so alleged, still if the room was too dark for him to see his way, he need not have gone, and ordinary prudence would have kept him from going there. Whether the person who gave the direction was or was not an employe of defendant, he alone, if any person, can be made liable for the injury, because he was not then acting in the line of his duty, or by the direct or implied authority of defendant.

Judgment affirmed.

RUSSELL V. PHILLIPS, JR.

(Filed May 2, 1893—Not to be reported.)

Vendor and vendee—Deficiency in land—Sale in gross—A vendor having for a gross sum conveyed a tract of land, describing it by metes and bounds and purporting to contain 181½ acres, was sued by the vendee for an abatement of the purchase money for an alleged deficiency of nearly three acres. *Held*—That the sale was in gross and the vendee was not entitled to the relief prayed for. A statement as to the number of acres following a description by metes and bounds in the absence of fraud or mistake is generally regarded as matter of description merely.

C. C. McChord for appellant.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hazelrigg.

As a defense to this action against him on his promissory note executed for a tract of land, Russell, the appellant, pleaded that there was a deficiency of land, to the extent of nearly three acres, held adversely by others at the time of the sale and conveyance. The tract conveyed contained 181½ acres, or so purported to contain. The description was by metes and bounds. The consideration was $1,500, all of which the appellant paid as it fell due, save the interest on the last purchase money note. There is no fraud or deceit set up, and it is evident that it was a sale in gross.

The particularity of the description makes it evident that the tract was sold by the prescribed limits and not by the number of acres it might contain, and that the purchaser got the distinct thing for which he contracted. The quantity was stated merely as an addenda to the other and more specific description. "Mere enumeration of quantity at the end of a particular description of the premises, where there has been no fraud or gross mistake, has ever been regarded as matter of description only, and not of the essence of the contract; and in such cases the purchaser is not entitled to an abatement of price because, on survey, the tract is found to contain a less number of acres than that specified." (Warvelle on Vendors, volume 2, page 925.)

The price was also an amount certain, and it is apparent that if the alleged deficiency had been known it would have made no difference in the price.

The appellant contends that he is specially damaged because of the loss of the portion held adversely by Young, a valuable water supply being cut off at this point. If such a claim is assertable at all it would be in the nature of a counterclaim or set-off, and the caption of the answer does not contain these necessary words. (Sec-

tion 97, Civil Code.) For the reason stated the answer did not present a state of case which entitles the defendant to any relief. Hence the failure of the plaintiff to file a reply was immaterial.

Judgment affirmed.

DAWSON V. SHAFER.

(*Filed May* 2, 1893—*Not to be reported.*)

Finding of facts by the chancellor—In a controversy concerning the location of a division line between two litigants the finding of facts by the chancellor will not be disturbed.

Fairleigh & Straus for appellant.

N. J. Weller for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

The location of the division line between the farms of the appellant and the appellee is the only question on this appeal.

Dawson insists that Shafer has wrongfully set his fence over on his (Dawson's) land, and establishes this fact by the testimony of Wm. H. Lee, John Dodd and others, who prove that the original line was formerly further west than it now is. None of these witnesses, however, precisely located the old line, and they are contradicted by Shafer, J. W. Lee, J. R. Hill, David L. Lee and several others, who prove that the old lane established prior to 1861 was the old dividing line, and that the fence now there is where it always was or substantially so.

In 1861 John H. Lee, then owning the Dawson land, and David L. Lee, then owning the Shafer land, made the dividing line between these two tracts of land, John H. Lee setting the stones, one at the north end of the lane and the other at the south end, on the bank of the creek. Each one was to have his own fence and the center of the lane was to be the dividing line. They both so testify; moreover, the plainly visible site of the old Harry Lee house and the washes of the old lane furnish them, appellee's witnesses contend, with indisputable and unerring landmarks conclusively corroborative of the accuracy of their recollection.

This view was adopted by the chancellor, and Dawson's petition to compel Shafer to remove his fence was dismissed. The appellant has no brief on file, but on a careful examination of the record we think the finding is supported by a preponderance of the testimony, and the judgment is, therefore, affirmed.

NORRIS V. EVANS.

(*Filed May* 2, 1893—*Not to be reported.*)

Breach of warranty—No damages can be recovered on a claim of breach of warranty by one who has been evicted from his land if his own laches has enabled a party to dispossess him. No recovery should be had for the further reason that the record discloses the fact that the suit is being prosecuted as a speculation by the attorney.

W. H. Holt and L. M. Day for appellant.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Lewis.

In July, 1866, in consideration of $520 paid appellee, Evans, in writing covenanted to convey by deed to H. H. Stamper a described lot of land in Campton, Ky. The title bond thus executed was assigned by Stamper in 1868 to Duff; in 1871 by Duff to Little; on — day of —— by Little to L. M. Day, and July 16, 1879, by Day to appellant, Norris.

Norris brought this action in April, 1883, to recover of Evans $2,000 damages for alleged breach of the covenant, it being alleged in the petition that plaintiff, under the assignment of the bond to him, took possession of the lot July 15, 1879, but that by virtue of legal authority he was, on the — day of —, dispossessed in favor of one Thomas B. Keeton, who has since and is now in possession of the lot of land.

The defence set up in the answer is that Stamper and his assignees by negligence permitted another to get and hold possession of the lot in question and thereby prevented defendant making a deed with covenant of general warranty, but denies that plaintiff was dispossessed in the manner stated in the petition. The defence of fifteen years limitation can not avail defendant if in fact the plaintiff or any one of his assignors was, as alleged, in possession within that period after execution of the bond, and evicted by a person adjudged to have a superior title.

But the obstacle in the way of the plaintiff's recovery is that he does not satisfactorily show he or any one of his assignors ever did take possession of the lot; and if by their failure to do so they eventually lost the right to possession, the plaintiff did not, in 1883, which was more than fifteen years after execution of the bond, have any cause of action against defendant; for there is nothing in this record to show want of title in defendant at date of the title bond or inability of Stamper and his vendees to enter and take possession of the lot.

It is true an allegation is made that some time after assignment of the bond to him plaintiff was evicted by the sheriff in favor of Keeton. But he could not have been evicted if never in possession. Besides there is not sufficient evidence, record or otherwise, to show upon what claim of right, if any, in behalf of Keeton, plaintiff was evicted; for the nature of the action, under which judgment for eviction was rendered in favor of Keeton, if any such judgment was ever rendered, does not appear. It is true the court records had been burned when this action was instituted, but if there had been any action or judgment therein, in pursuance of which the plaintiff was, by judicial process, evicted, it might have been definitely and satisfactorily shown.

But there is another reason for sustaining judgment of the lower court dismissing the action. Norris, the nominal plaintiff, has not been heard from by Day, who is prosecuting this action in his name since it was instituted, and refusal of the latter to answer questions as a witness on cross-examination touching his knowledge of the present residence of Norris, and other circumstances show that the action was institued and is now prosecuted, not at instance or for benefit of Norris, but rather as a speculation or experiment that is to inure for benefit of Day, the attorney; for the evidence shows that the consideration paid by Norris to his assignor was a merely worthless washing machine.

Judgment affirmed.

LOCKETT, &C. V. LOCKETT, &C.

(*Filed May* 2, 1893.)

Construction of will—A testator having by the terms of his will given a tract of land to his daughter "*and her lineage*," in a controversy as to whether she was given the fee simple or only a life estate the word *lineage* is construed to be a word of limitation equivalent to *heirs*.

Wm. P. Cooper for appellants.

Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

The question on this appeal is whether Hebe Lockett, who, with her husband, brought the action to quiet her title against her children, acquired by will of her father, Milan Hancock, a fee simple or life estate in the land in controversy.

That part of the will necessary to be quoted is as follows: "I give to my wife, Hebe A. Hancock, my tract of land situated on Ohio river, to have for her benefit during life; also all the stock, farming utensils and furniture I may die possessed of. And I give to my wife and daughter, Susan O. Hancock, all the money and what may be owing to me at my death, to be equally divided between them. I also give to my daughter Susan my farm of 206 acres on which I reside. I give to my daughter, Hebe H. Lockett, *and her lineage* 226 acres, being a portion of the tract I purchased of Hart. I leave in trust to my friend and brother-in-law, H. W. Grigsby, for the benefit of my son, Milan Hancock, jr., and his children, 236 acres, being land I purchased of Hart. Said land, at the death of my son, Milan Hancock, jr., I wish equally divided between his children; and in case of the death of any of his children, they leaving children, said children are to receive a father's or mother's interest. It is also my wish that said farm be cultivated annually, and that my friend and brother-in-law, H. W. Grigsby, shall see that the proceeds are judiciously appropriated for the support of my son Milan and his family, and in educating his children. I wish that at the death of my wife, Hebe A. Hancock, the farm that I have given her shall be sold and the proceeds equally divided between my three children, Susan Hancock, Milan Hancock, jr., and Hebe H. Lockett."

There is nothing in the language or context of the will even suggestive of an intention of the testator to give to his daughter, Hebe H. Lockett, less than a fee simple estate in the 226 acres of land mentioned unless the term *lineage*, used in connection with the devise to her, be interpreted to restrict her interest to that of a life estate, remainder to her children or to a joint tenancy with them.

Lineage is not a legal term, but means, according to Webster's Dictionary, "race; progeny; descendants in a line from a common progenitor."

It seems to us plain that the term "lineage" was intended by the testator to be used and understood in the sense of heirs, and as simply a word of limitation; for if the testator had intended either for his daughter to have a mere life estate in the land, or that her children should take as joint tenants with her, he would have used the word "children," as was done in describing the estate he devised his son to have in the tract of 236 acres, and would have been as ex-

plicit and particular in providing for grandchildren, in case of death of any of her children, as he was in respect to those of his son.

It is true the devise of 206 acres was made to his daughter, Susan Hancock, absolutely and without use of the term lineage, or any other word of either limitation or purchase. But as Susan was then unmarried the idea of children or heirs may not have occurred to the testator in respect to her; but be that as it may, there is no apparent reason for a devise by the testator of a less estate in the land to his daughter Hebe than that given to his daughter Susan; and it seems to us if the testator had intended to make such discrimination between his two daughters he would have used additional language, or at least a term more apt, expressive and definite than the single word lineage.

The judgment of the lower court according with our views is, therefore, affirmed.

McCain v. L. & N. R. R. Co.

(*Filed May* 4, 1893.—*Not to be reported.*)

Negligence—Res adjudicata—Appellant having heretofore instituted an action against appellee to recover damages caused by his being thrown from a buggy, charging in the petition that its train approached a public road crossing at a dangerous rate of speed without giving the usual and customary notice of its approach, whereby the appellant was decoyed so near the crossing that his horse became frightened and ran away and the appellant injured.

After judgment had been rendered for appellee and affirmed by the Court of Appeals, appellant instituted this action, alleging the negligence of defendant's agents in giving an unusual and loud whistle of its engine after appellant had crossed the track in safety and thus frightening the horse and causing the injury.

Held—That a plea of *res adjudicata* was properly sustained.

H. P. Cooper for appellant.

W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

In December, 1890, the appellant and one Greene were in a top buggy, and without listening or looking out for the train—both being engaged in conversation and driving along in a "careless sort of way"—drove close up to railroad crossing of the appellee, when they discovered that the train was right at them. The horse they were driving became unruly and ran across the track. When across and in apparent safety the whistle was very sharply blown, frightening the horse so that he turned around. The buggy was thus upturned, and McCain severely injured. He thereupon sued the company, charging that its train approached a public road crossing at a dangerous rate of speed, without giving the usual and customary notice of its approach, whereby the appellant was decoyed so near the crossing that his horse became frightened and ran away, and the appellant injured.

The defendant company answered, denying not only the specific charges of negligence set forth in the petition, but also denying gen-

erally that by any negligence on its part it frightened the plaintiff's horse, caused it to run away, or caused or inflicted any injury to the plaintiff.

Upon the close of the plaintiff's testimony the court instructed the jury to find for the defendant. Upon appeal to this court that judgment was affirmed.

Thereafter the appellant instituted this action against the defendant, setting up as his cause of action the negligence of defendant's agents in giving an unusual and loud whistle of its engine, after plaintiff had crossed the track in safety, and thus frightening the horse and causing the injury.

The injury thus complained of in this action is confessedly the same as that in the former suit, and we think the plea of *res adjudicata* was properly sustained by the lower court. The whole transaction was put in proof in the first action, and each and every act of the defendant company on the occasion of the accident was alleged in the answer not to be negligently done. The whole question of negligence, involving each and every act of the defendant, was in fact involved in the pleadings. But, if not, they should have been put in issue by proper averments and pleadings. There was but a single transaction, a single cause of action, and there can be but one action.

Moreover, the plaintiff does not show himself entitled to any relief on the merits of his case. He shows no negligence on the part of the defendant, and, as said in the former opinion in the case involving the same testimony, the appellant and his companion showed an utter want of precaution in approaching the crossing.

The judgment is affirmed.

WYNN V. KELLEY.

(*Filed May* 4, 1893—*Not to be reported.*)

Verbal partition—Joint tenants having in 1862 made a partition of land by oral agreement, a partial memorandum of which is found of record in the county clerk's office, the court will not, more than twenty years afterwards, disturb it on the allegation of unfairness in the original partition.

John L. Scott & Son and G. W. French for appellant.

G. A. Eversole, Tinsley & Tinsley and W. T. Hall for appellee.

Appeal from Harlan Court of Common Pleas.

Opinion of the court by Judge Pryor.

This controversy is over an alleged partition of a large boundary of land located on the Black Hill Mountain in Harlan county, and was instituted by Elkanah Wynn and wife against John P. Kelley. The action was instituted in the year 1889, claiming a partition of the land and alleging an interest of two-thirds at that time of the entire tract in the plaintiffs and the remaining one-third in the defendant.

The defense to the action by Kelley was that a division of this land had taken place between the parties in the year 1862 and was of record in the Harlan county clerk's office, and that since that time each party has held and claimed possession of the parcel allotted to them.

There is a writing of record, dated on the 9th of August, in the year 1862, purporting to be an article of agreement between the *three* owners of the land, reciting that Josiah D. Wynn, Elkanah Wynn and John Kelley, all partners in a certain tract of land lying on the waters of Clover Fork, in the county of Harlan, "beginning on the lower corner of William P. Kelley's survey and then continuing the boundary as is usual in deeds to a line on the north side of Big Black Mountain."

The writing is witnessed by J. K. Bailey, John Bailey and David Hughes. The writing does nothing more than recite this boundary or division line, neither conveys the land to the other, nor does the writing recite that it was the partition line between the parties. They owned jointly a tract of 3,500 acres of land at the time this division line was made, John Kelly, the defendant, and appellee owning the one-third.

It appears from the testimony of one of the attesting witnesses that he drafted this writing and that it was a partition of this land between the parties, John Kelly to have all on the east side of the line and the Wynns all on the west side, and that he delivered it to the clerk for record.

The appellant, Elkanah Wynn, afterwards acquired Josiah Wynn's interest and, as before stated, is the plaintiff in this action. He dedies that he ever executed such a writing; says that he could neither read nor write and that the appellee, Kelley, if it is the division line, gets the two-thirds of the land and more. The testimony shows that this land was wild mountain land, and its chief and, perhaps, only value was in the land about caves and hollows that was suited to farming purposes. The entire survey at that date could not have been sold for more than $600 or $700.

There is testimony to the effect that the appellee, Kelley, gets the larger portion of this land, and at the same time it appears that his portion had but little land upon it suitable for agricultural purposes, but this fact is controverted by the witnesses for the plaintiff, and if there was nothing else in this case the plaintiff would be entitled to relief. It appears, however, that the writing evidencing this division had been recorded, and the leaf of the record book torn out and, with the original paper, lost; there was no evidence of any division.

The plaintiff had sold a considerable quantity of land on his side of this division line to some investment company, and in looking up the title it was found that no partition of the land had been made. The demand for coal, iron ore and timber in this mountain land had increased its value, and the plaintiff, having made an advantageous sale, was desirous of perfecting it. He said the defendant, Kelley, and the plaintiff employed Tinsley to bring an action in the county court in the name of Kelley and the plaintiff, to supply this lost record making Wynn's heirs the defendants. That petition describes the division line as evidenced by this lost writing, and is sworn to by this plaintiff. He now says that he withdrew from that action, and had himself made a defendant, as it was Kelley's purpose to place him in a condition where he would be estopped from asserting his right. A copy of the writing of the division was, however, found and produced by the defendant, Kelley, and this ended that litigation.

We see no motive on the part of Kelley, the defendant, to mutilate or destroy this record of division, for by doing so he left himself as a joint tenant or tenant in common with the appellants of the whole tract, he having a one-third interest.

The saving of this record was to preserve his rights, and its de-

struction was to endanger them. That there was a division of this land is evident, and that the writing of record was entered into by the parties there is but little doubt.

When this was done the land was of but little value, and the appellee, Kelley, says he had, under the arrangement, to convey a part of his land to a third party, which he did, and while it was a small quantity it evidenced the fact that the division had been made, and if no division was ever made it is unreasonable to believe that the appellant would have made sales amounting to one-third of the entire tract without consulting his cotenant, Kelley, and not only so, but would swear that a division had been made and give almost the identical boundary found in the writing of 1862.

The judgment, in our opinion, should be affirmed.

Affirmed.

L. & N. R. R. Co. v. Quinn, &c.
Same v. Wallace.
Same v. Welch.

(*Filed May* 4, 1893.)

Adverse possession—Limitation—Mistake—A judgment of condemnation was rendered in favor of appellees, subsequent to which a survey of the land made, returned to court and confirmed, and the right of way for a railroad having been indicated by stakes, and the same fenced, and the adjoining property holder having taken possession of and held his land up to said fence for more than fifteen years, the court will not correct any mistake in the survey on petition of railroad company claiming additional ground now occupied by the adjoining owner.

Helm & Bruce for appellant.

Matt O'Doherty for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Bennett.

As the issues in these cases are similar they will be heard together and disposed of by one opinion.

Prior to 1872 the Louisville, Cincinnati & Lexington Railroad Company's depot was on Jefferson street. In 1872 the city of Louisville agreed with the Louisville, Cincinnati & Lexington Railroad Company that it would give said company a right of way along the old bed of Beargrass creek and grade and fit it for use in consideration of said company surrendering to the city its right of way on Jefferson street.

The city, pursuant to this agreement, by condemnation proceedings condemned the right of way along Beargrass creek. The jury that tried the condemnation proceedings did not specify the number of feet condemned, but condemned the land "described in the petition and included the lines designating the extention of the railroad tracks." The verdict was accepted and recorded as thus returned, and judgment was rendered condemning the land in the same terms. The land was surveyed by the city engineer, the lines were established and stakes set designing the lines, and the owners, the appellees, of the land, a part of which was condemned, were shown the lines and stakes as the lines of the right of way thus condemned. The engineer returned to court his survey, which was accepted; and

the appellees accepted the survey as correct, and built their fences, and one of them a house, on the line thus established by the engineer. Said fences have remained on said line ever since, and the appellees have held the actual adverse possession of said land up to said line and fences ever since, a period of more than twenty years. And the appellant, the vendee of the Louisville, Cincinnati & Lexington Railroad Company, as did its vendors, has held the land surveyed by said engineer ever since and claiming no more as its right of way until within the last few years, when it brought these suits.

It contends by these suits that the appellees had obstructed its right of way by building fences and the corner of a house about two feet on its right of way; but, as said, the evidence authorized the chancellor's opinion, that the fences, etc., were built on the line made by the engineer, and that they have remained on said line ever since; but it may be and it is probably true that the engineer did not include land enough in the survey by the quantity now claimed. Therefore, the question is, does the acquiescence of the appellant and its predecessors in said survey, and the adverse holding of the land up to said line by the applelees for fifteen years and more, bar the appellant's right to it and vest the appellees with the appellant's title? It will be borne in mind that the appellant, or those under whom it claims the easement or dominent estate, never had the strip of land in controversy in possession either actual or constructive; nor did it ever claim a right of easement therein until the present controversy arose—more than fifteen years after the condemnation proceeding. But the appellees all the time held the adverse possession of the strip and claimed it as their own and as not included in the land condemned, all of which the appellant and those under whom it claims conceded until this controversy.

Now, the appellees' land was sold by the judgment of a court; they were vendors *in invitum*. The court took so much land by metes and bounds, and said to the appellees, "this is the specified boundary of land that is taken from you; the balance of the tract up to this line is not taken; it is yours." The appellees accepted the survey and held the adverse possession of the land up to the line thus fixed for more than fifteen years, claiming it as their own, and the court's vendees all the time concede the right.

It seems that the error could only be corrected under the idea of mistake in the survey, and the time allowed for that has long since passed, and adverse possession for fifteen years has barred the appellant's right. It is well settled that the right to the dominant estate—the easement—may be extinguished by the renunciation of the party, either expressed or implied, or by permitting the owner of the servient estate to take the actual adverse possession of it, to build on it and to use it in other respects as his own for fifteen years. Mere nonuser will not be an abandonment of the easement if it is created by deed, but if the owner of the servient estate is permitted to hold the adverse possession of it fifteen years, the dominant interest will be extinguished. (See 4 McChord S. Car. Reports, 61, and other cases cited in note 2, 6 Encyclopedia of Law, 147, and Jewitt v. Jewitt, 16 Barbour [N. Y.], 150, cited in the same note on page 148.)

As said, admitting that there was a mistake in making the survey, nevertheless the time has passed for correcting the mistake, and the appellees have been permitted to hold the adverse possession of the land for fifteen years and more, claiming it as their own, and the appellant all that time conceding their claims of right, it, therefore, seems to us that their claim ought to prevail.

The judgment is affirmed.

MORSE V. LUCAS.

(*Filed May* 4, 1893—*Not to be reported.*)

The exchange of lands between the parties hereto was not secured by fraudulent representations on the part of appellee, and the appellant was credited on his notes for twenty-five acres of land which he bargained for but did not obtain, and, therefore, has no cause to complain.

A. K. Cook for appellant.

John L. Scott for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Pryor.

The plaintiff alleges that he exchanged lands with the defendant, and that the latter made fraudulent representations as to its value and as to the title.

There is no brief in this record for the appellant, and the case ought to be affirmed upon the idea that his silence is a confession that no error exists.

We have, however, examined the record, and find that his charge of fraud is not sustained by the testimony, and that he gets all the land he bargained for but about twenty-five acres of the land, and this of but little value, the price of which or its value was deducted from the purchase-money notes.

The only question in the case is whether or not the judgment should be reversed on the cross appeal for allowing this deduction from the purchase money? We are inclined, however, to affirm the judgment.

Judgment affirmed on the original and cross appeal.

TRIMBLE'S EX'TX V. LEBUS, &C.

(*Filed May* 4, 1893.)

Construction of statutes—Investment of trust funds—Act of April 29, 1890, entitled "An act prescribing duties of fiduciaries," does not deprive a testator of power to invest his executor with discretionary power to make sales of stocks nor to restrict the executor in the exercise of such power.

O'Hara & Bryan for appellant.

J. I. Blanton for Hedges' guardian.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Lewis.

Mary A. Trimble, executrix of the will of her husband, W. W. Trimble, who died in Kenton county, where said will was recorded, brought this action in the Harrison Circuit Court to recover of Lewis Lebus $5,500, price of fifty shares of stock of the Farmers' National Bank of Cynthiana, Ky., belonging to the estate of her deceased husband that she alleges she had previously sold to the defendant.

It is stated in the petition the plaintiff tendered to defendant certificates of the stock, in writing thereon assigned to him; but that

the officers of said bank declining to make a transfer of the stock on its books, defendant refused to pay the price he had agreed to give for the stock, or to accept the certificates thereof.

Subsequently plaintiff filed an amended petition, making the devisees of W. W. Trimble and the Farmers' National Bank of Cynthiana parties defendant, and asking a specific performance of her contract with Lebus, and to carry it out that the bank be required to make the necessary transfer on its books.

Upon transfer of the action to the Harrison Chancery Court, a special demurrer to jurisdiction of the court was filed by guardian of infant devisees of the testator, W. W. Trimble, and also by the Farmers' National Bank of Cynthiana; and this is an appeal from the judgment sustaining the demurrer and dismissing the action.

Clause 5 of the will of W. W. Trimble, after reciting the various banks, stock of which he owned, including 100 shares of the Farmers' Bank of Cynthiana, proceeds as follows: "My wife, Mary B. Trimble, I give the interest that may accrue on said bank stocks after my death as long as she lives, to do as she may please with."

Clause 13 of the will is as follows: "I appoint my wife, Mary B. Trimble, executrix of this my will, and request that no security be required of her by the county court. If necessary to change the bank stocks, or any or either, from any cause now unforseen that may arise, she is authorized to do so."

It seems to us appellant was by the will invested with discretionary power to sell the stock of Farmers' National Bank of Cynthiana, or of any other of those enumerated in clause 5 of the will; and in view of the fact alleged in her petition that bank had, for two years or more prior to the sale to Lebus, failed to pay dividends, as it was accustomed to do before and for some time after death of the testator, it was the right of appellant and manifestly intended by the testator the stock in question should be sold, and the proceeds invested in other stocks paying dividends; and as the action is transitory and not local, whether the remedy sought be for direct recovery of the purchase price, or for specific performance of the contract of sale, we are also satisfied the Harrison Circuit and also the chancery court, to which the action was transferred, had jurisdiction, and it was error to sustain the special demurrer.

It is, however, argued by counsel, and we suppose was assumed by the chancellor, that provisions of "an act prescribing duties of fiduciaries," approved April 29, 1890, operated not only to deprive appellant of the discretionary power to sell the stock, but to restrict jurisdiction to enforce a contract of sale to the chancery court of Kenton county, where the will of the testator was probated and appellant was qualified as executrix.

That part of said statute applicable to sale of stocks, bonds and other securities by a personal representative is as follows: "That no administrator or executor shall sell any dividend-paying stocks, bonds or other property which the decedent owned at his death until so ordered by a court of general equity, jurisdiction in the county where letters of administration were granted or will recorded."

That statute was, we think, intended to apply to and control exercise by an administrator or executor of their general authority to sell and dispose of stocks and bonds paying dividends, but not to take from a testator the power to invest his executor with discretionary power to make such sales, nor to restrict the executor in the exercise of such power.

Of course in such case as this an executor, though invested by the will with discretion to sell stocks and bonds left by the testator, may

be, independent of said statute, enjoined from an abuse of such discretion when it is affirmatively alleged and shown he has or is about to do so to the prejudice of other beneficiaries of the will. But no such state of case is set up or shown in this case, as might or may be done upon return of the cause, in the answer filed by such beneficiaries.

Wherefore the judgment is reversed and cause remanded for proceedings consistent with this opinion.

OATTS V. C., N. O. & T. P. RY. CO.

(*Filed May* 4, 1893—*Not to be reported.*)

Negligence—Trespasser—A trespasser on the track of a railroad at a point where there is no crossing or public way can recover no damages for injuries sustained by being run over by a train at a point where the company was entitled to the exclusive use of its track, and was under no obligation to look out for trespassers, and who was not seen by its employes.

Geo. Denny, jr., and James W. Tuttle for appellant.

C. B. Simrall for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action for personal injury alleged to have been done by the servants of appellee negligently causing a freight car to back against him; and as verdict of the jury was under peremptory instruction of the court rendered for defendant, the single inquiry on this appeal is whether the facts found constitute a cause of action.

The injury occurred December 25, 1890, at Burnside station, on appellee's road, about nightfall, under these circumstances: Appellant, being employed, had accompanied the owner of a drove of horses and mules carried to that station for shipment southward. The freight cars had been provided and placed on the side track, into which to put the animals, and there was sufficient time for loading them before arrival of the freight train to which they were to be attached, which was due a little after 4 P. M. Upon arrival of the train all the cars composing it were left some distance north of the switch, except two or three nearest the locomotive, which were taken along the main track a little south of the three on the side track in which were put the horses and mules. But after they were loaded the owner discovered that two or three mules in one of the cars were lying down; and as the station agent had sealed the side door, and they could not be otherwise made to get on their feet, he determined to go into the car, for that purpose, through a trap door on top, which had to be prized open with a plank.

After the trap door was opened appellant and two other employes of the owner of the animals left their positions between the two tracks, about twelve feet apart, and got upon the main track, north of and a short distance from the car by which he was injured, and was standing watching the owner when struck by the car being pushed northward by the locomotive.

It appears that in order to move the three cars from the side to the main track, and then made part of the train, a stiff pole was extended

across the intervening space from the rear one of them to one of the cars attached to the locomotive.

It is, we think, satisfactorily shown that no warning by bell or whistle was given of the intended movement of the locomotive and cars; and unless that omission be such negligence as renders appellee liable, there exists no cause of action.

The place where appellant went and remained until struck by the car is not a crossing, nor were persons, by license of appellee or otherwise, in the habit of passing upon or by side of the track at or in vicinity of that place, for it does not appear there was at that station a town or village. It is very clear, therefore, that appellee was entitled to exclusive and uninterrupted use of its track there for transaction of its business of putting on or taking cars from the side track, as was being done on that occasion; and as appellant had no business or right to go and remain upon the main track as he did do, appellee's servants were not required to look out for his presence, which was that of an intruder or trespasser, or to warn him by bell or whistle of the intended movement of the locomotive and cars. So that as it does not appear his peril was discovered by those in charge in time to prevent occurrence of the injury to him, no case of negligence has been made out. Besides, it is manifest that the exercise of ordinary care and attention by appellant to what was taking place in his sight and hearing would have not only deterred him going on the main track, but have enabled him to get out of the way of the approaching car.

Judgment affirmed.

PILE v. PILE.

(*Filed May* 4, 1893.)

Divorce—Lunacy—A husband is not entitled to an absolute divorce from his wife on the ground of abandonment where she has become a lunatic and been confined in the asylum for five years.

Lunacy is not one of the grounds for divorce provided by the statute.

Morris Eskridge for appellant.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Pryor.

The appellant filed his petition in equity seeking a divorce from his wife on the ground of lunacy and abandonment for five years, alleging that she is now confined in the lunatic asylum at Hopkinsville. He offers to surrender to the chancellor for the wife such part of his estate, real and personal, as may be deemed necessary for her support and maintenance; but wants an absolute divorce.

It is stated in his petition that after their marriage they lived happily together for several years, when an unfortunate condition of her mind developed, and she is now, and was at the institution of the action, a confirmed lunatic, with no hope of recovery.

The causes for divorce are to be found in the statute only, and lunacy is not, by express words or by any reasonable implication, made one of the grounds for severing the marital relation. It is argued that this mental disease is such as to prevent the wife from

discharging her conjugal duties and the husband from enjoying that intercourse with the wife resulting from the marriage relation.

We can not give such an enlarged meaning to the statute. Here the wife has a mind diseased without her fault. She lived happily with her husband for several years after the marriage, and discharged all the obligations and duties pertaining to the marriage relation.

This relation is presumed to have been entered into by reason of the love and affection the two had for each other; and to adjudge that the misfortunes of this life, originating from causes over which neither have control, depriving the husband of the right of enjoying his baser passions, is a ground for divorce would be placing mankind on a level with brute creation, and making the real virtues and happiness of married life subordinate to the enjoyment of mere animal propensities.

This man, when he took the unfortunate woman to be his wife, vowed at the altar to love, cherish and protect her in sickness and in health, and whether the wife is diseased in mind or body his marriage vow should and must be observed. The more helpless she becomes the greater his duty to love and protect her.

The wife has never abandoned the husband, but is now confined in the asylum for lunatics by his consent and direction.

The chancellor did right in dismissing his petition.

Judgment affirmed.

DAVIS, &C. V. JONES' ADM'R, &C.

(Filed May 6, 1898.)

Contract against public policy adopting an heir—Appellee's intestate agreed with the mother of appellant to make her his heir, but died without having done so. In an action for damages for failure to do so against his administrator, *Held*—That no such action can be maintained, as such contract is against the policy of the common law.

W. H. Holt and A. W. Cook for appellants.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellants allege in their petition that George Jones agreed with the mother of the appellant, Marinda Davis, that in consideration of the mother surrendering the custody, care and control of Marinda, then an infant, to him "he would clothe, support and educate her and make her his heir at law, so that she could inherit all his estate."

The appellants say that said Jones died without making Marinda his heir at law. They claim $5,000 damage for such failure.

The court sustained a demurrer to the petition, and the appellants have appealed.

Was the agreement to make appellant, Marinda, the heir of George Jones binding upon him? Such agreements are against the policy of the common law, hence unauthorized, because heirship is controlled by the law of descents, having for its basis the degrees in blood, etc.; and such agreements as that sued on in this case would

put the estate in a different channel from that fixed by the law of descents.

Such contracts being unauthorized by the common law, and as all common contracts in this State are generally either authorized by the common law or by statute, no contract in general is binding unless it is authorized by the common law or by statute; and, as the same reason exists in this State for forbidding such contracts as exist at common law, they are unauthorized and not binding. But the Legislature of this State has seen proper to authorize certain parties to make persons not related to them their legal heirs, upon certain conditions, by petition to the county court having jurisdiction; and it has been settled by this court that the authority thus given is the only authority existing in this State by which one person can make another his legal heir; and any agreement by one person to make another his legal heir not in accordance with said statute is not enforcible (Willaugh v. Motly, 83 Ky., 297; Powers v. Haffly, 85 Ky., 671), and no action will lie for its breach.

In the case of Allen v. Thomas, 3 Met., —, the father of a bastard child agreed with its mother, she being about to sue him, to contribute to the support of the mother and child and pay to the child $10,000 when requested. It was held that the agreement was binding, because it was based upon a compromise and adjustment of a claim that the mother had a right to make in behalf of herself and child. There is no principal of public policy or of statute forbidding a compromise of such claim.

In this case the agreement, not being in accordance with the statute *supra*, is not enforcible, and no action will lie for its breach.

The judgment is affirmed.

LOUISVILLE TRUST CO., &C. V. TODD, &C.

(*Filed May* 6, 1893—*Not to be reported.*)

Construction of will—Under the will of Samuel Todd his daughter-in-law, Mary L. Todd, takes the estate for life immediately after the death of testator's wife, with remainder in fee to the children of said Mary L. Todd.

Dodd & Dodd and James Andrew Scott for appellants.

Willis & Beard for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The only questions presented by this appeal are whether, under the provisions of Samuel Todd's will, Mrs. M. L. Todd and her children take the estate as joint tenants, or whether the mother takes for life, with remainder to her children, and whether the trust therein created terminates upon the death of the testator's widow, or upon the death of Mary L. Todd, designated also in the will as "Mary" and as "Dabney's wife." Such portions of the will as relate to these questions are as follows: "I do hereby give, devise and bequeath my whole estate to John T. Steffee, both real, personal and mixed, in trust and for the purposes hereinafter mentioned. * * * First, that he permit my wife to use and occupy the mansion house and farm, with all my furniture, household and kitchen, also all the

stock of horses, cows and hogs, plantation utensils, crops and provisions on hand, including my slaves, in fact everything on or pertinent to my farm, for and during her natural life, * * * and after her death to drop back to my daughter-in-law, Dabney's wife, and also his children, such as are now living or may be born hereafter. I also give to my daughter-in-law, Mary L. Todd, and her children, born and hereafter born, the whole of the property and rents above given to my wife, to take the same immediately after the death of my wife; the balance of the half of the rent not given to my wife, except the hundred dollars a year given Louisa, is to go to the use and benefit of Dabney's wife and children from time as same may be collected by my trustee, John T. Steffee.

"By way of explanation I will now again recapitulate what I think will make clear my meaning in the above devises. My intention is that my wife have the farm on which I reside, and everything thereon during her natural life; that my trustee pay her one-half the net rents on my house and lot in Louisville, the other half to Louisa, who is to have $100 a year for life, and the balance of this half to Mary and her children; and at the death of my wife Mary and the children get all the estate given to my wife, which was not consumed or used or sold; and the $100 given Louisa, after her death, becomes the property of Mary and her children or their representatives.

"After the death of my wife I give my said trustee full power and authority to sell and convey any of my estate with the consent of my daughter-in-law, Mary L. Todd; and if my wife consent he may sell during her lifetime.

"After the time and events shall have passed away, at which the trusts may cease to exist, all that remains undisposed of by this will shall be the property of Dabney's children in fee simple."

We are of opinion that the testator did not intend a division or distribution of the estate among the devisees and legatees during the lifetime of Mary L. Todd; and further, that the trust should continue until her death. *After the death* of the wife of the testator the trust is continued in *express terms*, and not only so, but no part of the estate is to be sold or conveyed, or, as we must conclude, set apart to the children save with the consent of the daughter-in-law. It was not until after the time for the termination of the trust—that is, the death of Mary L. as we have seen—that the children of Dabney were to have the estate "in fee simple." Their mother takes the estate for life immediately upon the death of the testator's wife, and the children the remainder in fee.

The word "immediately," as used in the will, is supposed by the appellees to indicate a different construction and as giving to the children the immediate right to the property, but such a right could certainly not accrue to the after-born children, contemplated by the testator and provided for by him; and we think the use of this term must be controlled by the manifest intention of the testator, as shown in the other clauses of the will. It is not necessary to notice the error or the method of distribution made by the chancellor.

The judgment of the lower court is reversed, with instructions to enter a judgment construing the will in accordance herewith, and for such other orders with respect to the trust property as may be proper.

SUPERIOR COURT ABSTRACTS.

McCallister v. Bridges, &c.

Filed April 26, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, reversing.

In this action to recover damages for the overflowing of plaintiff's land by the act of defendant in filling up a ditch which plaintiff and others had cut for the purpose of draining their lands, it was not necessary for plaintiff to allege in his petition, in order to state a cause of action, that the lands of defendants had not been overflowed or injured by the opening of the ditch, or that all persons interested in the cutting of the ditch had consented thereto. These are matters of defense and must be relied on as such.

Owen & Son and Sweeney, Ellis & Sweeney for appellant; Hill & Hill for appellees.

Gillum, &c. v. Jarvis.

Filed April 26, 1893. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Parties to actions—To this action against the trustees of a school district to recover a balance alleged to be due plaintiff upon a contract for building a schoolhouse, the appellants, taxpayers of the district, were not proper parties, and they should not upon their petition have been made parties. Nor are they affected by the judgment against the trustees for the amount claimed. Whether the trustees have the right to levy any further tax to pay the judgment it is not necessary to decide.

A. K. Cook and W. H. Holt for appellants; H. C. Faulkner for appellee.

L. & N. R. R. Co. v. Wilkinson.

Filed May 3, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Wrongful ejection of passenger from train—Punitive damages*—Gross negligence authorizes exemplary damages, and this rule applies in a case when a passenger is wrongfully ejected from a railroad car by the conductor.

2. *Same—Excessive verdict*—In cases proper for exemplary damages the courts are, and of right ought to be, extremely reluctant so interfere with the verdict upon the ground that it is excessive, it being impracticable to set any bounds to the discretion of the jury.

A verdict for "exemplary damages in the sum of $2,000" for the wrongful ejection of a passenger from a railroad train is not excessive, although the plaintiff was not subjected to any inconvenience, and suffered no injury except the humiliation and mortification on account of his forcible ejection from the car.

Wm. Lindsay, John S. Kelley and Edward W. Hines for appellant; Nat W. Halstead and Geo. S. Fulton for appellee.

Overman & Schrader v. Nelson Bros.

Filed May 3, 1893. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Sales of personal property—Defect in quality—Acceptance*—Where there is a contract to deliver goods of a particular quality at a future day, and the vendor tenders goods not of the agreed quality in discharge of the contract,

and the vendee, after inspecting or having a fair opportunity to inspect them, receives them, he can not thereafter sue the vendor for damages for breach of the contract.

2. *Same*—Where goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them. But receipt becomes acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were owner of the goods.

If the buyers of a large quantity of hemp discover for the first time upon opening the hemp at their factory that it was not of the quality contracted for they had the right then and there to reject it, and could not be held for the contract price. But if, after opening it, they used it or any part of it, notwithstanding its inferior quality, they must pay the contract price for the hemp thus accepted by them. But the fact that they accepted and used one carload of the hemp, with knowledge of its defective quality, did not bind them to accept another carload subsequently delivered, if they found upon examination that it was not of the agreed quality, as defendants were to receive the hemp in carload lots at different times and had the right to use each lot as received.

3. *Remote damages*—The defendants' claim for damages to their trade growing out of the plaintiffs' failure to furnish the desired quality of hemp is too remote.

B. F. Graziani and Twyman & Baker for appellants; J. W. Bryan, Cleary & Cleary and Geo. B. Nelson for appellees.

MULLINS & CRIGLER v. HUME & CO.

Filed May 3, 1893. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *A pleading is not to be rejected on demurrer because it is illy drawn*, or is voluminous or inconsistent or contains irrelevant matter or is indefinite. These objections can be reached by motion to strike out or to elect or to make more definite.

2. *Sales of personal property—Contract with agent*—In this action to recover damages for breach of an alleged contract by defendants for the sale of whisky to plaintiffs, if the person who assumed to act as agent for plaintiffs in making the purchase had no authority to buy, plaintiffs were not bound by his contract of purchase, and consequently the defendants could not be held bound by their promise to sell; and even if the agent had authority to buy, defendants had the right to stipulate that the contract should not be binding until agreed to by the principals, and in such a case there could be no contract until the principals had agreed, although the proposed contract was in writing, signed by defendants and the agent.

3. *Same—Delay of purchaser in making demand*—As it is apparent from the writing sued on that the transaction was intended to be a cash transaction, a demand for the whisky should have been accompanied with the money. And as the contract specified no particular time for the delivery of the whisky or the place at which it was to be delivered, the law fixes a reasonable time, and the place as defendant's place of business. And this rule applies, although the whisky was to be transferred by warehouse receipts.

As plaintiffs did not demand the whisky for a year after the contract was made, the court should, in the absence of proof of a custom or usage to the contrary, determine as matter of law that the demand was not made in a reasonable time and plaintiffs should be treated as having abandoned the contract.

Collins & Fenley for appellants; James W. Bryan for appellees.

HISLE v. OLDHAM.

Filed April 26, 1893. Appeal from Madison Circuit Court. Opinion of the court by Judge Barbour, affirming.

Note payable on condition—The owners of a patent fence and one whom they employed as their agent to sell the fence within a certain territory entered into a written contract by which the agent agreed "to use his endeavors" to sell the fence in the territory named and to pay the owners one-half the commission on the first one thousand rods sold, for which he executed the note sued on. It was further agreed that if five hundred rods of the fence should not be sold at the end of six months the owners might cancel the agency and appoint another agent, provided they should surrender said note after first being paid one-half the commission on the fence sold during the said six months. In this action on the note executed by the agent, *Held* —That as defendant shows he has not sold any of the fence, plaintiff can not, by virtue of the contract, recover any thing on the note. Whether he could, in an action for that purpose, recover damages for defendant's breach of contract, in failing to use reasonable efforts to sell, it is not necessary to determine.

Smith & Moberly for appellant; John Bennett and Crooke & Cobb for appellee.

LOUISVILLE WATER COMPANY v. CLARK.

Filed April 26, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. *Interest on judgment*—While the statute providing that judgments shall bear interest refers to judgments for money only, it does not follow because a judgment is for money that it must bear interest. In determining the right to interest the subject-matter of the demand and the character of the action, as well as that of the judgment, must be considered. The statute applies only to such judgments as are without further order of the court enforceable by execution or a like final process.

In this action by appellant against appellee, sheriff, to enjoin him from selling its property for taxes the court sustained the injunction upon the ground that appellant's property, for reasons of public policy, could not be sold by the sheriff, but adjudged that as the company had appealed to the chancellor for equity it should do equity, and required it to pay the amount of the taxes into court. Appellant refusing to pay, the court appointed a receiver to manage the property until from the net revenue the amount of the taxes and costs were paid. Upon appeal that judgment was affirmed, and thereupon the chancellor required appellant to pay into court not only the amount of the taxes and costs, but interest from the date of the judgment. *Held*—That the court erred in requiring the payment of interest.

2. *Same*—While by the statute judgments for money bear interest, still a judgment can only be enforced according to its terms, and if there is no provision for interest in the judgment, the judgment must, if interest is desired, be modified by the court which rendered it while it has the power to modify it, or by appeal. And for this reason also it was error to adjudge the payment of interest in this case.

3. *Same*—The fact that the Court of Appeals, in affirming the judgment ordering the plaintiff to pay the taxes into court awarded damages, can not be construed as an intimation by that court that the judgment should bear interest.

T. L. Burnett and Lane & Burnett for appellant; Helm & Bruce for appellee.

TAMPLET & WASHBURN v. SAFFELL.

Filed April 26, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Right of broker to commissions for sale of whisky*—If a broker employed to effect a sale finds a purchaser ready and willing to enter into a valid contract for the purchase upon the terms fixed by the principal, and then brings his principal and the purchaser together, he is not deprived of the right to

commissions by the principal negotiating the trade himself. But the fact that the owner has employed a broker to sell his property does not deprive him of the right to effect the trade himself, and if he does so without the assistance or agency of the broker he is not liable to the latter for a commission.

In this action by a firm of whisky brokers to recover commissions upon a sale of defendant's whisky alleged to have been made by them as defendant's agents, it appears that defendants, distillers at Frankfort, wrote to plaintiffs, who for several years had been acting as agents for the sale of defendants' whiskies in Louisville, informing them that they had resumed operations for the season of 1890, and that they had inquiries from other cities but preferred to give plaintiffs a chance to place their goods, and suggested that if J., to whom they had previously sold their whiskies through plaintiffs, wanted them again, they preferred he should have them. Plaintiffs wrote promising to see J. and report the interview. After they had had several interviews with J., but had failed to effect a sale, defendant wrote urging them to close the trade at once. After the plaintiffs failed to do any thing for more than three weeks, when J. himself, learning that defendants were about to sell to other parties, wrote for defendants to come and close the trade, which they did. *Held*—That plaintiffs are not entitled to commissions on the sale.

2. *Same*—The evidence fails to establish the claim of plaintiffs that they were employed as general agents for the sale of the crop of 1890. The fact that plaintiffs had been notified under former contracts that they were to receive no compensation except for goods actually sold by them should have warned them that if they desired a general agency for the crop of 1890 they would be compelled to make the contract so plain and explicit that there could be no misunderstanding about it.

Barnett, Miller & Barnett for appellant; Gibson, Marshall & Lochre for appellee.

LOUISVILLE, &C., R. R. CO. v. GARGAN.

Filed April 26, 1893. Appeal from Jefferson Court of Common Pleas Opinion of the court by Presiding Judge Yost, reversing.

Railroads—Injury to abutting property—Limitation—The cause of action against a railroad company for injuries to abutting property, resulting from the improper operation of the road, accrues whenever the wrongful act occurs and as often as it occurs; and the statute of limitations being interposed the plaintiff can not recover for the damages done more than five years before the commencement of the action. And in this action in which plaintiff sought by his original petition to recover damages for the closing of the street by defendant, an amended petition seeking to recover damages for the injuries resulting from the negligent and improper operation by defendant of its road set up a distinct cause of action, and the plea of limitation being interposed as to that cause of action, the court erred in giving an instruction authorizing the jury to find the damages plaintiff had sustained, growing out of the improper operation of the road for five years prior to the date of the filing of the original petition. The jury should have been confined to the five years prior to the date of the filing of the amended petition, as the latter date must be regarded as the date of the commencement of the action, so far as the cause of action set up in the amended petition is concerned.

Helm & Bruce for appellant; O'Neal, Phelps & Pryor and Dodd & Dodd for appellee.

THE PEERLESS MFG. CO. v. DENHAM, BY, &C.

Filed April 26, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Master and servant*—The master owes the servant other duties than to furnish him machinery in good condition with which to do his work. He

must, so far as he can by the use of ordinary care, avoid exposing his servants to extraordinary risks, and must notify them of the perils to which they will be exposed other than those which they, in the exercise of ordinary care, must have known of and foreseen as necessarily incident to the business.

2. *Care required of minor servant*—A boy near fifteen years of age, active and intelligent, must exercise a reasonable precaution for one of his years for his own safety.

3. *Duty of master to minor servant*—While the general rule limiting the liability of the master to his servants applies to infants as well as adults, yet the master owes a special duty to minors in his employment to warn them as often as may be necessary against all the dangers to which their employment exposes them, or else he will be liable in damages for injuries suffered by them from any perils, the nature of which they did not know, or by reason of the master's failure to do his duty did not properly appreciate, if they did know.

A boy between fourteen and fifteen years of age employed to "sweep out and clean" a foundry and machine shop, although warned not to touch the machines, put his hand upon a revolving spindle as he passed, resulting in the catching and mashing of his finger. *Held*—That the master is not liable for the injury.

O'Neal, Phelps & Pryor for appellant; Matt O'Doherty and R. C. Davis for appellees.

FARMERS BANK v. HENRY COUNTY TRUST CO.

Filed April 26, 1893. Appeal from Henry Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Usury—Where the holder of a note bearing 10 per cent. interest, executed when it was lawful to contract for interest at that rate, entered into an agreement with the debtor to reduce the rate of interest to 8 per cent. in consideration of his agreement to pay the interest semi-annually, this new agreement was not usurious, although at the time it was made it was unlawful to contract for the payment of a greater rate of interest than 6 per cent. In all cases of this kind the intention of the parties, as gathered from the contract and the attending circumstances, must govern in determining whether the contract is usurious.

John W. Rodman for appellant; Carroll & Jackson for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. AUGUST 15, 1893. No. 4

KENTUCKY COURT OF APPEALS.

WEBSTER'S TRUSTEE, &c. v. WEBSTER, &c.

(Filed January 28, 1893.)

Wills—Construction of—Under the will of A. R. Cunningham his daughter Euphemia is given an absolute estate in property devised to her, subject to be defeated by her death without leaving children at the time of distribution.

W. P. D. Bush and Hobson & O'Meara for appellants.

Hargis & Eastin, James Montgomery, Wm. J. Hendrick and T. G. Poore for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Bennett.

The will of A. R. Cunningham makes the following provisions in reference to his five children.

"3d. I have advanced to my son-in-law, William E. Curd, and my daughter, Lizzie Curd, his wife, the sum of $10,000, and they are not to receive anything further from my estate until my wife receives the amount herein devised to her, and until all my other children, to-wit, Euphemia R. Cunningham, Bettie Cunningham, Sallie Cunningham and Melvina Cunningham, shall each receive from my estate $10,000, so as to make them equal with my said daughter, Lizzie Curd, wife of said William Curd.

"4th. I have advanced to my daughter, Euphemia R. Cunningham, $1,018.11, with which sum she is to be charged in making up her $10,000, to make her equal with my daughter, Lizzie Curd, and she is to account in the same manner for any future advancements made by me to her.

"5th. I will and devise to my daughter, Hettie C. Cunningham, $10,000, to make her equal with my daughter, Lizzie Curd. and she is to account out of said sum for any advancements made by me to her after she becomes twenty-one years of age.

"6th. I will and devise to my little daughter, Sallie Cunningham, $10,000, to make her equal with my said daughter, Lizzie Curd, and $8,000, in addition thereto as a fund to raise and educate my said daughter, Sallie, she being an infant of tender years.

"7th. I will and devise to my little daughter, Melvina H. Cunningham, $10,000, to make her equal with my said daughter, Lizzie Curd, and $8,000 in addition thereto as a fund to aid in educating and raising my said daughter, Melvina, she being an infant of tender years. I make these additional devises to my two youngest children, Sallie and Melvina, to aid in raising and educating them because of the fact that I made no charges against my other children for raising and educating them.

8th. The residue of his estate he wills and devises to his said "five children, to be equally divided among them," etc.

"9th. In case either of my daughters, Sallie or Melvina H. Cunningham, shall die without children, then, and in that event, the survivor is to have the entire estate devised to both of my said children in this will.

"10th. In case either of my daughters, Euphemia R. and Hettie C. Cunningham, should die without children, then, and in that event, it is my will, and I so direct, that the estate of the one dying shall be equally divided among all my then living children."

11th. The testator appoints his wife "trustee and guardian for his daughters, Sallie and Melvina Cunningham.

"12th. I hereby appoint George L. Miles trustee and guardian for my daughter, Hettie C. Cunningham, and authorize and empower him to receive from and receipt for any money or estate that may be coming to my said daughter, Hettie, under and by virtue of this will; to loan the same. to collect the interest and use the same in the support and maintenance of my said daughter, and if there be any surplus to reinvest the same.

"13th. I hereby appoint James W. Hays trustee of my daughter, Euphemia Cunningham, to receive and receipt to my executor for any money or estate that may be coming to my daughter from my estate under this will, to keep the same at interest and to collect the said interest and appropriate it to the support of my said daughter, and if there be any surplus interest, to reinvest the same."

The question to be decided is, does Euphemia Webster, formerly Cunningham, take under the will an absolute estate, subject to be defeated if she dies without leaving children, or does she take a life estate only? The testator appointed the mother of Sallie and Melvina Cunningham their trustee and guardian. He also appointed George L. Miles trustee and guardian of Hettie Cunningham, who was a minor. He appointed James W. Hays trustee of Euphemia Cunningham, who was an adult.

In the case of Cunningham v. Wathen, an action brought to construe the provision of this will in reference to the estate that Hettie Cunningham, then Wathen, took under the will, this court held that the fifth and eighth clauses of the will vested in Hettie C. Cunningham an absolute estate, and the provision in the tenth clause, "should she die without children," manifestly referred to the time of the distribution of the estate, which was "to be on the arrival of the devisee at the age of twenty-one." To give the tenth clause any other meaning would be to charge by implication an unqualified estate to the devisee.

The third, fourth and eighth clauses of the will, as clearly gives to Euphemia an absolute estate as do the fifth and eighth clauses to Hettie C. There is but one limitation placed upon

either estate, to wit, that of dying without leaving children, which limitation this court construed in the case supra to mean death before the distribution without leaving children. But it is said that Euphemia, being of age, and the direction that her estate should be placed in the hands of a trustee with power to expend for the support of Euphemia, not exceeding the interest of her estate, made the devise unlike that to Hettie C., and vested her with a life use only.

But as said, the only limitation upon the absolute estate was the dying without leaving children. And it is believed that the testator meant that limitation to be the only one upon the absolute estate, and to confine its operation to the time of the distribution of the estate. The limitation clearly means that should Euphemia have living children before distribution she would take an absolute estate, subject to be defeated if she and the children died before distribution. And taking this clause in connection with the preceding ones quoted, there can be no manner of doubt the estate devised was an absolute estate, subject to the one limitation indicated.

The appointment of a trustee to take charge of the estate and to limit its expenditure upon Euphemia was evidently in view of the fact that the testator did not regard her as competent to take care of it; and the appointment is not incompatible with an absolute estate to the devisee.

Now it seems that as the testator's only reason for confiding the estate to the control and management of a trustee was the belief that Euphemia was not mentally and physically competent to manage it with prudence, and that had she, in his opinion, been competent, he would not have confided it to a trustee. Therefore, it would seem that if the testator was mistaken in Euphemia's condition, or should her health so improve as to render her mentally and physically competent, the chancellor should have the power to remove the trustee and confide the estate to her control.

The judgment in reference to the construction of the will is affirmed.

LEE, &c. v. MARION NATIONAL BANK, &c.

(Filed February 7, 1893.)

Banks—Sureties—Remedies—A collector of taxes to pay off railroad indebtedness of a county, not having on hand a sufficiency of taxes collected to pay same, borrowed a large sum from a bank, giving his individual obligation, with sureties, therefor. After having satisfied said indebtedness to the bank by permitting the bank to credit his indebtedness by the amount of taxes afterwards collected and on deposit in said bank, his sureties on his bond as collector instituted suit against the bank to recover the amount so applied to the payment of this note. Held—That the taxes on deposit in the bank to the credit of the collector were subject to his control, and he had the right to satisfy his indebtedness to the bank out of said fund.

J. P. Thompson for appellants.

W. J. Lisle and Knott & Edelen for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

A. K. Russell was sheriff of Marion county for the years 1885-6, and in virtue of his office collector of revenue and county levy.

He was also, for the years 1887-8-9 collector of taxes to pay semi-annual interest, falling due in April and October, on bonds executed by the county for amount of its subscription to the capital stock of the Cumberland & Ohio Railroad Co., and also a certain amount to the sinking fund for ultimate extinction of the principal.

Not having a sufficient amount of taxes collected for the year 1888 to pay interest coupons then due, amounting to $9,000, he, in April, 1889, borrowed from appellee, Marion National Bank, the sum of $7,000, giving his individual note, with security, therefor, which was used by him to make up the deficiency.

In October, 1889, he paid to appellee one-half the note, and in April, 1890, the residue, which was about $3,500.

This action was instituted by appellants, sureties on the bond given by him as collector of the railroad taxes for the year 1889, to recover back from appellee said sum of $3,500 paid by Russell, April 15, 1890, in discharge of balance of the note as applied by appellee for that purpose.

It appears that Russell commenced May 11, 1889, to deposit with appellee railroad taxes, as he had deposited revenue and county levy taxes from 1885. But the two deposit accounts were kept distinct until January 1, 1890, when the balance in his favor of revenue and county levy taxes, collected after his term of office as sheriff expired, was added to his deposit account of railroad taxes, and but one deposit account was thereafter kept, which was that of collector.

The simple question in this case is whether the amount on deposit with Marion National Bank to the credit of Russell as collector, $3,500 of which the former used to pay balance of the note, was at the time subject to order and control of Russell, for if it was, then he had the right to use it, or authorize Marion National Bank to apply so much as necessary to pay residue of his note.

By terms of the bond of Russell as collector, in which appellants were sureties, he covenanted to pay so much money at specified times, whether then collected or not, or, if collected, whether used by him for other purposes or not. In the meantime he had absolute control of the money collected by him, which he might, at his election, deposit in a bank to his credit as collector, or in person, subject to his check, retain in his own possession or invest in property; and neither the county nor sinking fund commissioners had any right to control or interfere with any disposition he might choose to make of the particular money collected by him from time to time, the remedy being on the bond. It would seem, therefore, to naturally result that the Marion County National Bank had the right to use the money deposited by Russell in discharge of a debt he owed, just as well as to apply money of any other debtor for a like purpose.

No fraud in the transaction is either proved or alleged, nor does Russell complain. The transaction was entirely legitimate, and the money was paid by Russell, or applied by the bank with his consent, in payment of a debt the validity nor justice of which is not questioned.

The sureties of Russell might by proper proceedings in equity have attached or otherwise prevented Russell using the money, after being collected and deposited for other purposes than in discharge of his obligation on the bond as collector; but even in that case appellee, we think, would have had the right to apply the money in the discharge of the note. But this action was not brought until after the note of the bank had been paid, and by reason of default of Russell the sureties had, as they allege, been compelled to satisfy the bond to the extent of Russell's failure to do so.

It appears that the cashier of the bank was also treasurer of the sinking fund; but that fact does not seem to us to make any difference, for if Russell had control of the fund on deposit, out of which the note was paid, it was not in the power of the sinking fund commissioners to prevent him using it for that purpose.

Judgment affirmed.

COLYER v. HYDEN, &c.

(Filed March 16, 1893.)

1. Conveyances—Delivery—The execution and acknowledgment of a deed and its delivery by the grantor, a deputy clerk, for the grantee, was a sufficient delivery to vest title in the grantee; but the execution, acknowledgment and delivery of a deed by the grantor to his wife, with directions "to put it away or take care of it," did not vest title in the grantee, to whom it was not delivered until after grantor's death.

2. Same—Consideration—A promise to give to grantor's son the home place if he would come from the West and take care of him, was based on sufficient consideration.

Will C. Curd for appellant.

O. H. Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hazelrigg.

A few weeks before his death Alex. Colyer, who was quite old and decrepid, executed three deeds for certain lands of which he was the owner, in two of which the appellant, who was his grandson, was alone the designated grantee; in the other the appellant, jointly with Susannah Colyer, his stepdaughter, and L. R. Colyer, a son, were the grantees named.

The validity of these conveyances was assailed by the other children of the deceased—the appellees here—by reason of the mental inability of the grantor, the exercise of undue influence over him and because the alleged conveyances were never delivered to the grantees in the lifetime of the grantor.

The lower court upheld one of the deeds, that to the appellant, for the home place of some seventy acres, and set aside the other two.

We think there can be no question of the correctness of the judgment sustaining the first-named deed.

The old man had contracted in writing with his grandson, some time in 1888, to the effect that he would give him the home place, provided he would come home from the West and live with him and care for him and his wife. They were both old and feeble and needed his help. The grandson did so, and shortly before his death the grantor had the deputy clerk to prepare the deed, which he executed in pursuance of the original contract and delivered to the draftsman, who proves he delivered it to the appellant in a few days thereafter.

There appears to have been no lack of capacity to make the deeds and no evidence of the exercise of undue influence in their procurement: We think, too, that there was a legal delivery of the deed for the twenty-five-acre tract to the appellant. It was

signed and acknowledged by the old man and his wife and delivered to the draftsman, the deputy clerk, for the grantee and delivered to and accepted by him in some three or four weeks thereafter, though after the death of the grantor.

It is now fully settled that a deed may be delivered to a third person for the grantee, and, if subsequently assented to by the grantee, it will be as good a delivery as if it had been made directly to him. (15 Wend., 633.)

With respect to the joint deed for the two hundred-acre tract the state of case is different.

After its preparation and acknowledgment the grantor handed it to his wife and told her to put it away, or to take care of it.

There was no delivery of it to any of the grantees, or to any one for them, until after the grantor's death, when his wife gave it to the husband of one of the grantees.

We think there was no delivery of this deed so as to pass the estate. It seems to have been the intention of the grantor to keep control over the instrument until fully determined whether ultimately to deliver it.

It may be inferred that because he had retained a life estate in the property he thought its immediate delivery would be of no service to the grantees, and that his intention is clear that they should have the property at his death. And yet the fact remains, he did not deliver it or authorize or direct its delivery, and can not, therefore, be said to have divested himself of the title to the estate. In Maynard v. Maynard, 10 Mass., 456, the deed was executed with the usual formalities and recorded, and "the grantor requested the witness to keep the deed until it was called for." The grantee died; the grantor called for and cancelled it. The court said it was clear that no title passed.

"The only reason why it did not pass," said the court, "was that the deed was not delivered as the deed of the grantor for the use of the grantee."

There appears to have been no error in setting off the appellant's claim against the estate by the one-half of his note. The result reached by the chancellor seems just and proper.

Because of the error indicated the judgment is reversed, with directions to proceed as herein determined.

HALL v. COMMONWEALTH.

(Filed May 6, 1893.)

Homicide—Constitutional law—The appellant having, without any cause, murdered his brother, insists, as a ground for reversal, that the judge who tried the case was not legally elected as such; that the law dividing the State into judicial districts contained no emergency clause, and was not passed in pursuance of the Constitution. Held—That no emergency clause was required to such act, as the Constitution, by its terms, was mandatory in requiring the election of circuit judges to be held in November, 1892, and the majority opinion of this court in the World's Fair case has no application to this.

J. B. Auxier for appellant.

W. J. Hendrick for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Pryor.

At the March term of the Pike Circuit Court for the year 1898, Henry Hall, the appellant, was indicted for the murder of his brother, Randolph Hall, and the jury who tried his case fixed his punishment at death.

We have seldom read a record of conviction where there were less palliating circumstances in behalf of the accused than this case presents. He filed an affidavit for a continuance on the ground that his brother had threatened to take his life, and had on more than one occasion assaulted him, facts that could be established by the absent witnesses who had been summoned. The court refused the continuance and allowed the statements contained in the affidavit as to what these absent witnesses would state to go to the jury as evidence. On the trial he established by a number of witnesses who were before the jury that these threats had been made, as well as the assault upon him by his deceased brother with a knife, some time prior to the killing.

There can be no doubt but that both the brothers, when under the influence of liquor, were violent and bad men, and that when their passions were inflamed by liquor they respected the rights or feelings of no one, not even their parents; and this murder was the result of a drunken debauch, when in a game of cards the one brother had won the money of the other.

There was no one present when the murder took place but the little daughter of the deceased, of the age of twelve years, and a brother of the two men who were ready to kill each other at any time when drunk, and that brother was so stupified with whisky as not to be able to give any account of the shooting, except that the shooting aroused him from his stupor and he saw one brother standing with his pistol in hand and the other on the floor shot twice through the head. The little girl seems to have testified with much intelligence, and is corroborated in many particulars.

She says that her father (the dead man) and his brother (the accused) were playing cards in the yard or on the ground fronting the building in which the accused kept a grocery; that they were betting on the game and, it commencing to rain, they left the yard going into the grocery, where a cloth was placed on a box, and the two renewed the game, the accused sitting in a chair and the deceased on the floor; that her father won one dollar off the accused, when the latter handed it over to him and then pulled his pistol, shooting him twice in the head. She heard no quarrel between them.

The appellant's statement is that he refused to play with his brother because he was afraid of him, and told him that he had heard he had threatened to kill him, when the deceased replied that they could play and their other brother could keep the game; that they played until it commenced raining, when they went into the grocery and did not play any more; that the deceased became boisterous and he gave him a dollar to leave; that he put the dollar in his pocket, and then made at him with something like a knife, threatening to take his life, and he shot him to protect his own person, believing that his brother would kill him.

The brother, who seems to have been in a stupid condition when the shots were fired, says that they did play in the house, and he went off to sleep.

The accused also states that the little girl was not present at the time, but had gone to the spring after water, when it is shown by others that she had brought the water before the rain

began to fall. The deceased, at the time he was shot, had no weapon. A small barlow knife was found in his pocket unopened, and it is manifest that the murder was the result of a drunken debauch and that the shooting took place as the little girl states.

If all the threats mentioned in the affidavit had been admitted as true, and many were proven on the trial, the accused was guilty of the awful crime of murdering his own brother with no excuse whatever. He was given the benefit of all the law to which he was entitled. There was an instruction for murder, one for manslaughter and one that he had the right to defend himself against the assault, if any, made upon him by the deceased.

It is persisted that he was in his own castle when the shooting took place, and that he was not compelled to flee or to resort to means of escape that were apparent. Such an instruction should not have been given. This was a grocery to which persons were invited. His brother had the right to be there. There was no assault upon him with a deadly weapon. The deceased had only a small knife, and that in his pocket. The history of the case, as stated by the accused, the jury refused to believe, and, in our opinion, after a careful review of the testimony, it was a murder without palliation or excuse.

After the jury had returned its verdict in this case, and when the accused was asked if he had any reason to assign why judgment should not be pronounced against him, he responded by saying that the judge then presiding—the Hon. Jno. S. Patton—was not the judge of the Pike Circuit Court, for the reason that the act of the legislature regulating the election of circuit judges, etc., in the year 1892, and by virtue of which the said Patton was elected and now holds his office, is unconstitutional and void; that the requisite constitutional number of votes were not cast in favor of said law at the time of its passage; that different amendments were concurred in by the Senate after it came from the House, and no yeas and nays entered on the journal at its passage as the Constitution requires, and that no emergency clause was appended to the bill.

This court, in the case of the World's Fair appropriation, discussed this question, but, in our opinion, the case before us is not to be goverened by the doctrine of the majority opinion in that case. The Constitution requires that the election of all State officers shall be held on the first Tuesday after the first Monday in November, and this court judicially knows that circuit judges were elected in this State as provided by the Constitution on Tuesday after the first Monday in November, 1892, and that John S. Patton was elected in the district in which he presides, embracing the county of Pike. This was a general State election and directed to be held by the Constitution, and no emergency clause was necessary, as the provision of the organic law is imperative, and no legislative act could alter its provisions or fix the time for the election on any other day or year; and the omission of the legislature to comply with this constitutional provision will not be allowed to disfranchise the voters of the State or deprive its citizens or the tribunals created by the Constitution from enforcing the laws of the land. We have, for this reason, not consulted the Senate journals on the question made.

Judgment affirmed.

Judge Hazelrigg not sitting.

HORSLEY v. ASHER'S HEIRS, &c.

(Filed May 6, 1893.)

1. Contract—Rescission—Fraud—In this case a contract for the sale of mineral rights in land is rescinded on account of fraud practiced by agent of grantee on the grantor.
2. Revivor—The widow and heirs at law of a plaintiff filed a petition for revivor of action, and had said order made after the lapse of more than one year from the death of plaintiff, but within one year from the first term of court after the death of plaintiff. Held—That the order of revivor was made in proper time, as required by section 509 of Civil Code of Practice.

S. B. Dishman and Helm & Bruce for appellant.

Wm. Lindsay and E. W. Hines for appellees.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

J. D. Asher brought this action December 10, 1887, to cancel the following writing signed by him and rescind the contract it purports to be evidence of:

"Know all men by these presents, that for and in consideration of $10 in hand, paid today, June 18, 1887, I have sold to W. J. Hensley all the coal, gas, oils or minerals, with customary mining privileges, in or on the tract of land situated on the waters of Redbird, Clay County, Kentucky, adjoining the lands of R. W. Asher and others, containng 3,000 acres, more or less, at twenty-five cents per acre, and I bind myself and heirs to make a good warranty deed for said coal, gas, oils and minerals, free from dower lien and all incumbrances, to the said W. J. Horsley or his assigns, when money is paid as follows, to wit: One-half within six months after above date; balance within six months from first deferred payment, or as soon thereafter as good warranty deed is made to W. J. Horsley or his assigns for said coal, gas, oils and minerals, with necessary timber for mining and coking purposes."

In Augst, 1888, while the action was pending, the plaintiff died testate, and a question is made, which we will first consider, whether the action was revived within the period prescribed by Civil Code. October 10, 1888, an order was made suggesting death of plaintiff, J. D. Asher, though it does not appear upon whose motion the order was made, nor was the name or capacity of the representative stated therein, as required by section 501.

March 25, 1889, Thos., J. D. and A. J. Asher, mentioned as executors of J. D. Asher, though only the first mentioned of them ever did qualify, filed a petition for revivor and prosecution of the action in their names; but summons thereon, though issued, was never served on the defendant, nor does the subsequent order of revivor appear to have been made in pursuance of that proceeding.

But September 9, 1889, a petition, made an amendment to the original peititon of the testator, was filed by his widow and devisees of his will, in which they asked the action revived in their names and for the relief prayed for by him. Summons was issued and two days after served on the defendant. October 11, 1889, the defendant filed an answer to that amended petition, in which it was alleged the time had expired in which an order of revivor could be made. Nevertheless the court sustained a demurrer to the answer, and on that day made an order of revivor.

Section 509 provides that "an order to revive an action in the name of a representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after expiration of one year from the time the order might have been first made."

As an order of revivor can be made only during a term of court, it is obvious the word "forthwith" relates thereto, and limitation of one year was intended under that section to then begin running, and not to run from time of plaintiff's death. In this case the widow and devisees, as they were expressly authorized by section 501 to do, filed their petition before expiration of one year from the October term, 1888, of the court having jurisdiction of the action, when the order of revivor "might have been first made," and thereby, according to both letter and reason of the statute, acquired a standing in court and became entitled to an order of revivor, which was, on the day referred to, legally and properly made.

There is no room for dispute about the facts of this case, nor any reason for hesitation about the judgment a court of equity should render.

The person with whom J. D. Asher made the contract was authorized as agent of defendant, Horsley, to purchase lands containing, or supposed to contain, gas, oil or minerals, and lying within twenty miles of a railroad, to the amount of 20,000 acres; and the title bond executed by J. D. Asher was already written according to a form adroitly and cunningly prepared, and, after the trade was agreed to, all necessary to be done was to fill the blank with quantity of his land and for him to sign his name.

What was sold by J. D. Asher was, according to unvarying testimony of witnesses, at a grossly inadequate price, and the bargain can not be regarded any other way than unconscionable. The land seems to be valuable only for timber and minerals, gas and oil it contains, and some of the witnesses go so far as to say that the minerals being separated from it, and timber taken or used to the extent and in the way that may be done under the contract in question, the land will be of no value.

They fixed the value of the land for minerals, oil and gas, and timber incidentally used for development of it, at from six to ten times more per acre than by the terms of the bond Horsley is required to pay, which is twenty-five cents per acre. And even the agent who made the contract with Asher testifies as a witness what he purchased for that price per acre was worth $1.50 per acre, and that the commission Horsley agreed to pay him was greater than the purchase price the bond bound the purchaser to pay.

We think it is also clear that J. D. Asher did not nor was able to comprehend the nature, import and effect of the contract he made, and was, in fact, overreached and defrauded by Horsley, acting through his agent.

Asher was, at the date of that bond, upwards of 70 years of age; he had been diseased and suffered physical pain for several years to such an extent that he had not attempted nor was qualified to properly transact business, all of it having been done during a period of five or six years by his wife or sons.

The witnesses also testify without contradiction that he, though originally a man of good sense and business capacity, had become at date of the bond childish and notionate. In fact he closed the contract and signed the bond at the agent's house, where he had gone for another purpose, without taking any

time for reflection or consultation, and was in a few hours eager and offered to rescind, but the agent refused to do so.

It is further evident Asher did not understand the true meaning and effect of the bond he signed and which he was unable to read, for by the latter clause of it, which he states was not read to him at all, Horsley was given right to enter upon the land, not merely to dig for, find and use coal, gas and minerals of every kind, but to erect thereon all the buildings, machinery and appliances for coking purposes, which necessarily involved use of timber without regard to quantity or quality.

In our opinion the contract was not one fit to be enforced in a court of equity, but was made to such disadvantage of J. D. Asher as to induce belief, which the evidence makes a conviction, he was, by reason of want of capacity to understand the meaning and effect thereof, overreached and defrauded.

The judgment of the lower court is affirmed.

PASSMORE v. MOORE, TRUSTEE, &c.

(Filed May 9, 1893—Not to be reported.)

Judicial sales—Misconduct of commissioner—The husband of appellant, prior to the sale of her land, was informed by the commissioner that the two sisters of appellant would become her sureties for the purchase of the land, which were agreed to as acceptable to the commissioner, but afterwards appellant became the purchaser and the commissioner refused to accept the two sisters as sureties, and, without giving appellant time to procure other sureties, sold the land at a reduced price to another party. Held—The sale should be set aside, as the conduct of the commissioner was unjust and oppressive, as the sureties offered were sufficient.

Thomas H. Hines for appellant.

Poston & Jacobs for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Lewis.

The property, house and lot brought at judical sale in this case about $1,367, amount of debt, interest and cost; but it was appraised at $3,000, and the evidence shows it is in fact worth more than three times what it sold for. Nevertheless, unless there was injustice or wrong done to the owner and debtor, who is a married woman, by reason of mistake or misconduct of the commissioners, as is alleged by her, the sale must stand.

The evidence of the husband is that on the day of sale, and not long before it took place, he informed the commissioner he intended to bid for his wife amount of the debt, and that his two sisters would become sureties in the sale bond, and was informed by the commissioner they would be accepted as such sureties; but that when the sale took place and the bid was made by him the commissioner refused to accept the persons mentioned as sureties, and thereupon again offered the property, when it was knocked off to the plaintiff, and that sale was reported to court.

He further testified that he did not have time after refusal of the comissioner to accept his two sisters to procure others to be-

come sureties in the sale bond, and, as a consequence, her property was bid off by plaintiff at less than one-third its value.

It seems to us the commissioner was not justified in refusing the two sureties tendered in behalf of Mrs. Passmore, for the evidence shows they had property sufficient to make the sale bond entirely good, and rejection by him of them as her sureties can not be regarded, under the circumstances, in any other way than unjust and oppressive, for there was not the slightest probability of the plaintiff's debt being ultimately lost, in view of the fact the house and lot about to be sold, independent of what her proposed sureties owned, was worth more than three times the amount thereof.

It appears that there had been a previous sale of the property when Mrs. Passmore, the defendant, bid it off, and the sale bond, with the two sisters of her husband as sureties, was accepted and reported to court by the same commissioner; and although that sale was set aside on motion of the plaintiff because the commissioner had miscalculated amount of the debt, no objection was made to sufficiency of the sale bond.

We, therefore, think the commissioner, by his refusal at the last moment to accept the sureties offered in behalf of defendant, Mrs. Passmore, committed a mistake that was misleading and unjust and prejudicial to her, and the judgment confirming his report of the sale to the plaintiff is reversed and cause remanded, that exceptions thereto be sustained and for resale of the property.

DANIEL v. TOWN OF PRINCETON.

(Filed May 9, 1893—Not to be reported.)

Injunction—Damages—Appellant having erected a dam so as to obstruct and stagnate a spring belonging to the city, from which it derived its water supply, the remedy by injunction was properly granted by the chancellor.

L. Pepper for appellant.

Wm. Marble and F. W. Darby for appellee.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Lewis.

Inside corporate limits of the town of Princeton is a spring, known as "Big Spring," affording main water supply for the town. At the mouth of that spring appellant erected a stone dam, backing the water so as to permit escape of a considerable quantity of it through crevices in the cavern, and also to cause an accumulation of refuse matter in the stagnant pond, whereby it is rendered impure and unhealthy.

Based upon these alleged facts and the claim of right on part of the municipal corporation to the spring, in virtue of both grant and long use, this action was brought for an injunction restraining defendant, now appellant, further maintaining or using said dam at the place it now is.

If the dam has the effect alleged and proved the chancellor had jurisdiction to grant the relief prayed for, because the injury was of such nature as not to be adequately compensated for

by damages at law; and whether the spring where the dam is situated belongs to the town is the only question in the case.

There was originally conveyed to trustees and dedicated as site of the town of Princeton fifty acres of land, the title of which, except such parts as had been sold, ultimately vested and now is in the municipal corporation. The peculiar figure of that tract as surveyed and laid off makes it too plain for dispute that the "Big Spring" was intended to be included; and the only possible ground we perceive for excluding it is, that if one of the lines, about twenty-seven poles long, be run as called for in the deed, it would be left out by about three poles. But that call was a mistake which the location of known corners requires to be disregarded.

Appellant has no brief filed and we are not able to discover any other ground which he relies on for reversal.

Judgment affirmed.

LANHAM v. WILSON, &c.

(Filed May 11 1893—Not to be reported.)

Deeds—Construction of—The grantor in a deed conveyed a tract of land to his daughter and her "bodily heirs." Held—That the intention of the grantor, as shown from the deed, was to use the words bodily heirs as words of limitation and not of purchase.

J. W. S. Clements for appellant.

W. E. Selecman for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Bennett.

John C. Paddock conveyed by deed to his daughter, then Morten, and "her bodily heirs" the tract of land in controversy. The habendum to the deed repeats the language of the conveyancing clause. The appellant's contention is that the grantor meant by the words "bodily heirs" the children of his daughter, Mrs. Morten.

It is well settled that the words "heirs of the body" and other similar expressions are appropriate words of limitation, which at common law created an estate tail, but which by our statute is converted into a fee simple estate; but if it can be gathered from the whole instrument that the said words were used in the popular sense of "children," then they are to be construed as words of purchase, and the children will take a remainder interest and the immediate grantee a life interest (Mitchell v. Simpson, 88 Ky., 126); but the deed does not show that the grantor intended to use said words in the popular sense of purchasers.

The judgment is affirmed.

WRIGHT, &c. v. BAKER.

(Filed May 11, 1893.)

1. School—Condemnation of site—Mandamus—A county judge, to whom application was made by trustees of a common school district for a writ of

condemnation for a site, permitted the owner of the land to file his answer, setting up the fact that the land was in use as an orchard, and refused to issue the writ. Afterwards the trustees filed a petition in the circuit court reciting these facts, and prayed for a mandamus compelling the county judge to issue his writ. Held—That the action of the county judge in refusing the writ was a judicial act, not subject to be controlled by a writ of mandamus.

2. Parties withdrawing names of trustees—After an action had been commenced in the name of a board of trustees, the fact that two individual members of the board desire to withdraw their names as parties plaintiff can not affect the proceeding, as the board is a body-politic and corporate, and can sue without using the names of individual trustees.

S. B. Dishman and H. C. Faulkner for appellants.

Tyree & Adams for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Hazelrigg.

The trustees of Common School District No. 7, of Letcher county, having selected a parcel of land as the most suitable for a schoolhouse site, and being unable to agree with the owner as to its price—he in fact declining to sell at any price—made application to County Judge Baker for a writ of ad quod damnum. This was made by petition, and Moses Bently, the owner of the land, was made a defendant. He appeared and filed an answer, alleging that the place sought to be condemned was not as near as practicable to the center of the district as would be convenient of access to all the inhabitants thereof, and that the contemplated site was set in fruit trees and was in use as an orchard.

The act provides that the trustees "shall not have the right to condemn any private property which is used as a residence, garden, orchard or burying ground."

After hearing the evidence the court refused to issue the writ. Thereupon the trustees filed the petition in the circuit court, setting forth the facts connected with the refusal of the judge to issue the writ, and, after notice, moved the court for a writ of mandamus against the county judge to compel him to issue the writ in question.

The issues of fact and of law were all gotten before the court by demurrers and other pleas, and on hearing the court dismissed the petition, and the trustees have appealed to this court. They rely on the provisions of section 6, chapter 96a, General Statutes, as entitling them to a writ of ad quod damnum as a matter of right upon their application as made to the county judge.

That section gives them the right, with the consent of the county superintendent, to "take land by purchase or donation for the purpose of erecting thereon a schoolhouse," and "if they can not agree with the owner of any land most suitable for a schoolhouse site as to the price and terms of purchase and sales thereof, they shall apply to the judge of the county court by petition, in which they shall set forth by metes and bounds the lands they seek to condemn; and the county court shall issue a writ of ad quod damnum, directed to the sheriff, to be executed and returned to said court, as in case of condemning lands for the use of railroad and turnpike companies."

In this case all the necessary requirements and conditions existed entitling the applicants to the writ, as shown by their peti

tion before the county judge, and the question is, did that judge have any discretion as to its issual, and should he have allowed the answer to be filed?

It is argued that in proceedings for the condemnation of lands for turnpike and railroad purposes, to which the school law refers, such writ must issue upon application as a matter of right; but on examination of the statue on this subject, chapter 18b, pages 281-2, General Statutes, we find that, upon the proper application made, the county court is required to appoint commissioners to assess the damages, who proceed as directed by the statute ex parte, and after filing their report a summons is issued against the owner of the land sought to be condemned to show cause why the report shall not be confirmed; and the court shall examine the report and if it be in conformity with the act regulating the proceeding, may confirm same to the extent only to which no exceptions have been filed, and when exceptions are filed the court shall forthwith cause a jury to be empanelled to try the issues of fact made by the exceptions, the court sending the jury to view the land if desired. If sufficient cause be not shown for setting aside the verdict, the court will render judgment in conformity thereto.

It will be observed that in this proceeding ample opportunity is afforded the land owner to raise any issue of law or fact concerning the right to take his land.

The matter of damages is not alone to be determined. This is the question submitted to the jury on the writ of ad quod damnum, but the court must determine as a matter of law whether the report taking the land is in conformity with the act, and the owner is allowed to show, if he can, why his land shall not be taken. Matters of law and of evidence are submitted, and the judgment of the court is necessarily a judicial one and involves discretion on the part of the court.

Before the jury is called on to assess the damages for the actual taking, the right to take under the particular law of the procedure must be first determined, and this must be and is true of the provisions of the school law, else the act would be violative of the Constitution.

Some legal tribunal must pass on the question of whether an orchard is about to be taken, or a garden or burying ground; and these determinations are not ministerial, but judicial acts. The provision that "one-third of the school electors of any district may appeal from the decision of the trustees, in the location of the school house or site for the same, to the county superintendent of the county, whose decision in the case shall be final," does not affect the land owner or abridge his right to have the condemnation proceedings conform to the law purporting to authorize them. The act of County Judge Baker, therefore, in dismissing the petition and denying the right of the trustees to condemn the particular land in question, however erroneous it might have been, was a judicial one, and was not the subject of mandamus proceedings.

The effort by the two Bentleys to withdraw their names as plaintiffs in the action did not affect the proceeding. The trustees of District No. 7 are created a body-politic, and may sue, and in this case did sue, as such body. The individuals might have withdrawn because they did not want to be individually bound for costs.

Nor was it proper to allow Baker, the county judge, to file an answer raising the issues of fact as to the location of the site. He has nothing to do with those issues, and can not make them,

though as judge of the county court he decides them. His connection and interest with the case then ends.

But his judicial action not being controlled by mandamus, the judgment dismissing the petition therefor is affirmed.

CHESAPEAKE & OHIO RY. CO v. HICKEY.

(Filed May 13, 1898—Not to be reported.)

1. New trial—A plaintiff and his attorney being both absent from the court room when his case was called, and a jury sworn and a verdict rendered in favor of defendant, the court did not err in granting a new trial, the affidavits of plaintiff and his attorney showing that the attorney was unexpectedly absent from the court room when the case was called, and plaintiff a short distance off awaiting call by telephone from his attorney. The lower court has a large discretion in granting new trials, and this court will interfere very reluctantly.

2. Title—Adverse possession—Although a certificate to a deed in the record of title from the Commonwealth was defective, adverse possession for fifteen years perfects plaintiff's title.

Hallam & Myers for appellant.

J. W. Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hazelrigg.

Hickey, the appellee, sued the Chesapeake & Ohio Railway Co., the appellant, for wrongfully entering on his lot of ground on Moore street, in Covington, Ky., cutting and grading down same and removing the earth therefrom; also for excavating on its own adjoining lot, by which it removed the lateral support from the plaintiff's lot the entire distance of its length, being some 123 feet.

The defendant offered to confess judgment for $250, which the plaintiff refused to accept in full of his demand.

The defendant filed its answer, denying that the plaintiff was the owner of or in possesion of the lot in question, or that it wrongfully cut down same or removed the lateral support thereof.

On the 5th day of January, 1892, the case was called for trial, and, the plaintiff not appearing, a jury was selected and sworn and the case stated by the defendant's attorney. Thereupon, no testimony being offered by either side, the court, on motion of the defendant's attorney, instructed the jury to find for the defendant.

On the 7th of January the plaintiff filed grounds for a new trial, together with the affidavit of his attorney, and moved the court for a new trial. He also filed his own affidavit on the 8th of January in support of the motion. The court set aside the verdict and judgment, and, the case being tried on the 25th of January, resulted in a verdict in the plaintiff's favor for $275.

Learned counsel present a number of grounds for a new trial, and argue specially that it was error to set aside the first verdict in defendant's favor. When the case was called, the plaintiff not appearing in person or by counsel, the court might very properly have dismissed it without prejudice, and especially under the state of the pleadings. The defendant, without setting up any claim whatever to the lot upon which it is charged to

have trespassed, denied merely the ownership and possession of the plaintiff. It admitted in effect the cutting away, grading, conversion of soil, etc., by simply denying these things as to "any lot of this plaintiff." It did not connect itself with any outstanding title, or claim there was any.

The affidavits of the plaintiff and his attorney, filed on the motion to set aside the judgment, disclosed the fact that the attorney was unexpectedly detained from the court room until 3 o'clock p. m. of the day the judgment was entered, when he returned and found the court had adjourned for the day. The plaintiff was at work some two or three blocks away awaiting a telephone message from his attorney to come when the case should be called. It appeared that it had not been the practice in that court to take such steps as were taken when the attorney for a party was absent.

Under these circumstances we do not think the court abused its discretion in setting aside the verdict and judgment.

In Turner v. Booker, 2 Dana, 338, it is said that a "new trial may be granted to a party who failed in due diligence himself, but who employed a competent agent who was prevented from attending in time by accident which could not have been anticipated." Also, "when a defendant is prevented from making a defense on account of his own and his counsel's casual absence when judgment was rendered, if he comes within three days with a valid answer, judgment should be set aside and his answer filed." (Harris v. Ray, 15 B. M., 680.)

In Haggin v. Christian, 1 Mar., 581, it said that "applications for new trials are addressed to the sound discretion of the court, to be exercised according to the rules and usages of law, and the court should regard the substantial justice of the case equally remote from favoring negligence or exacting unreasonable effort or impracticable diligence."

It has even been said generally that the appellate court will not revise the discretion of the lower court in matters of this kind, certain it is that the right of reversion will be exercised more freely by the appellate court where the trial court has refused than where it has granted a new trial. In this case there had been no trial. The object in view was the ascertainment of the rights of the parties, and the discretion of the court was, we think, properly exercised.

On the issue of ownership and possession the plaintiff exhibited paper title from the Commonwealth down, beginning in 1793.

Various objections were urged to the deeds, the first one—and this is as serious as any suggested—being to the conveyance of Todd to Hawkins in 1818. The certificate of Parker was signed "Robert C. Parker, D. C. C. C. C.," the body of the certificate showing that the deed and its certificate of acknowledgment were produced before Parker as deputy clerk for James Taylor, clerk of the Campbell County Court.

The other objections are similarly technical. Possession alone, without any paper title, shown as in this case to have been in the plaintiff and those under whom he claimed for nearly a century, was sufficient.

We perceive no error in the admission or rejection of testimony affecting the substantial rights of the defendant, and none in the instructions given by the court,

Judgment affirmed.

ROHMEISER v. BANNON.

BANNON v. CITY OF LOUISVILLE, &c.

(Filed April 6, 1893—Not to be reported.)

1. Enforcement of judgment requiring removal of obstructions—Thi court having affirmed a judgment of the chancellor requiring the defendant to remove certain obstructions which he had placed in a public alley, the chancellor should have specifically enforced the judgment. A judgment directing a fine to be imposed upon defendant, unless within five days he should pay into court a named sum for the use and benefit of plaintiff, and which she might withdraw in full satisfaction of her right to have the obstructions in said alley removed, was not such an enforcement of the judgment as plaintiff was entitled to have.

2. Same—Mandamus—This court can not undertake to dictate or control the manner in which judgments which have been affirmed by it are to be enforced. And while it might interfere upon an absolute refusal of the lower court to enforce such a judgment, yet when that court has acted and in fact rendered a judgment, although inadequate to obtain the enforcement, the proper remedy of the party aggrieved is by appeal and not by an application to this court for a mandamus to compel the lower court to proceed to an enforcement of the judgment.

3. Streets and alleys—The status of the alley was not changed by a resolution of the city council refusing to accept it as a public way, the plaintiff and others having by long use acquired the right to use it without obstruction.

Willson & Thum, O'Neal, Phelps, Pryor and John Coakley for appellant Rohmeiser.

Lane & Burnett for appellee Bannon.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

These causes are closely connected, and for that reason will be considered together.

On April 21, 1888, Elizabeth Rohmeiser instituted her action in equity against Patrick Bannon in the Louisville Law and Equity Court, seeking to perpetually enjoin and restrain him from obstructing the south end of a certain alleged public alley in the city of Louisville. The defendant put in issue the averment that it was a public alleyway, and relied also on other defenses.

On the 24th of July, after extending preparation and careful hearing, the chancellor granted the relief sought by the plaintiff, perpetually enjoined the defendant from obstructing said alley, which was specifically adjudged to be "a public alley and dedicated to public uses," and the defendant was commanded to restore said alley to the same condition in which it was just prior to the erection of the walls and the making of the excavations complained of in the petition.

The defendant, Bannon, brought the case to this court by appeal, and in March, 1890, the judgment of the lower court was affirmed. (11 Ky. Law Rep., 987.) In the opinion delivered by Chief Justice Lewis this court said that, notwithstanding there was an outlet to the street by going north, "nevertheless title to the lot now occupied by her (Mrs. Rohmeiser), as has been repeatedly held by this court, carries with it the right to the common and unobstructed use of the contiguous highway, so far as may be necessary for affording her certain incidental ease-

ments and services, and a convenient outlet to other streets;" and further, it is said, "whether formally dedicated to public use or not, the alley has been occupied and used as a highway by appellee and others owning adjacent lots long enough to have acquired the right to use it without obstruction," etc.

Upon the return of the case the mandate of this court was entered and the court, in July, 1890, adjudged that the defendant, Bannon, should comply with the judgment of July, 1888, and remove all of the obstructions complained of in the original petition, and restore said alley to the same condition in which it was prior to the erection of the walls and the making of the excavations.

The defendant still failing to comply with the requirements of the judgments, was ruled to show why he should not be held in contempt and in response urged, first, that the judgment of July, 1888, was final, and that the one of July, 1890, reasserting the same command to remove the obstruction, was void; secondly, that in a proceeding against him, instituted in this court for contempt, in that he had continued to erect buildings on the alley in question, he had been discharged, and his conduct thereby been sanctioned by this court; that he had acted, he averred, in the utmost good faith in commencing and in completing his buildings and had expended some $8,000, relying on the legislative act, held to be insufficient, to authorize him in such construction, and to remove his buildings would involve him in financial ruin. He averred his willingness to pay into court any sum the court might name to indemnify the plaintiff for any loss to her; third, that one Daniel Murphy, and others acting with him, had continuously and officiously intermeddled with his business, pretending to act for the plaintiff, and then in fact a self-elected executioner of the judgment of the court for the sole purpose of harrassing the defendant, and for this reason he had warned Murphy to desist in attempting to remove the obstructions, and in doing so meant no disrespect to the court; fourth, he denies that any notice had been given him of the judgment or of the time fixed for its enforcement. He asked that the matter of contempt be heard in open court on oral proof.

Numerous affidavits were filed and the court, on the 17th of November, 1890, adjudged the defendant guilty of the contempt charged, but reserved what punishment should be inflicted, and further ordered that as the defendant could, by arching over said alley, save to himself the continuity of his buildings and give to the plaintiff unmolested ingress and egress to and from her property, he should do so under plans to be approved by the court. Week after week passed, and motion upon motion was made by the plaintiff asking the court to enforce the judgment.

In May, 1891, the defendant moved to set aside the orders requiring him to remove the obstructions, on the ground that the alley in question had ceased to be a public alley; that in the exercise of its rightful power, under a legislative enactment of March 9, 1869, the city of Louisville, by a resolution of its general council, approved by the mayor of said city on August 1, 1888, had rejected and refused to accept or recognize as public, or as any part of its public ways, the southern portion of the alley in question; that to render effective said resolution, and to have it judicially determined that said southern portion was no longer a public way, the general council of the city, by a resolution of April 21, 1890, directed the city attorney to enter the appearance, and in the name of, for and on behalf of the city to consent to a judgment in any action instituted in the Louisville Chancery Court, or the Louisville Law and Equity Court, de-

claring as closed and discontinued said alleyway; that he instituted such action against the owners of property abutting on said alley, including the plaintiff, Mrs. Rohmeiser, and that the same, of the style of Bannon v. City of Louisville, &c., had been prepared and was ready for trial in said chancery court. The case was, therefore, postponed.

In a supplemental response the judgment of the chancellor, rendered October 7, 1891, in the proceeding last named, is relied on, which determined the right of the city to reject the dedication of the alley by a resolution of the council, and which resolution terminated the right of plaintiff to the use of the alley as a public way, and the ground embraced therein became the property of abutting lot owners.

Thereafter this judgment was set aside, and on final hearing, on March 4, 1892, the chancellor dismissed the petition of Bannon in his case against the city of Louisville and others, holding that plaintiff had not shown himself entitled to maintain the action. All the averments of these responses were controverted of record, the plaintiff all the while insisting on the enforcement of the judgment of July, 1888, as affirmed by this court in March, 1890, requiring and adjudging a removal of the obstructions complained of in her petition.

The cause finally having been submitted, the chancellor, after reciting the grounds upon which the defendant had relied to relieve himself of contempt and the fact that he had been advised by his counsel that he had the right to erect his buildings, armed as he was by an act of the legislature closing the alley and the resolution of the council refusing to accept the same as a public way, adjudged him guilty of contempt, but that his apparent contumacy was the result not of willful defiance of the injunction, but of overconfidence in his legal advisers, etc.; and considering the hardships and financial ruin involved in enforcing the judgment, directed a fine of $4000 to be imposed, unless within five days he should pay into court the sum of $700 for the use and benefit of the plaintiff, and which she might withdraw in full satisfaction of her right to have the obstructions in said alley removed. In the event of such payment all the motions of the plaintiff for the enforcement of the judgment and removal of the obstructions were to be overruled and denied, and the rules against the defendant discharged.

It appears from the record that the defendant paid the sum named into court, and the plaintiff refused to accept it, and prosecutes an appeal from the judgment, which is the case first mentioned above.

The second case is a proceeding for mandamus against the court below to compel it to enforce the judgment of July, 1888, as affirmed by this court in March, 1890.

The third is the action of Bannon against the city and the owners of lots abutting on the alley, in which he sought to close same and which was dismissed by the chancellor.

With respect to the mandamus proceeding it is sufficient to say that this court can not undertake to dictate or control the manner in which the judgments of the lower court, when affirmed by it, are to be enforced. Upon an absolute refusal to proceed to their enforcement being shown, such might be the only alternative left; but where, as in this case, conditions are imposed on the defendant, allowing him to pay a sum certain, or a fine will be imposed and he be held in contempt and punished accordingly, we can not say but what this is, in a manner, looking toward the enforcement of the judgment. It is true it provides a way by

which the defendant may avoid the requirements of the judgment, and the method adopted may prove, as it did in this case, inadequate to obtain the enforcement; but, nevertheless, the court acted and in fact rendered a judgment, and the proper remedy of the party aggrieved is by appeal.

In the proceeding by Bannon against the city it is evident that the chancellor did right in dismissing the plaintiff's petition. It appears that in 1859 the lands of one Cochran were partitioned among his heirs, and this alleyway laid off by commissioners under a decree of court, as a convenience and necessity to the parties to the division. Elaborate maps were made, showing its location, and buildings were erected abutting thereon.

As was said in this case on the former appeal, "whether formally dedicated to public use or not, the alley has been occupied and used as a highway by the appellee, and others owning adjacent lots, long enough to have acquired the right to use it without obstruction."

The status of the alley was not changed, and could not be by a resolution of the general council any more than by an act of the legislature. Moreover, under the charter amendment of 1868 of the city of Louisville, section 34 (see Elliott, page 350), it is provided: "All streets, alleys, lanes, avenues and thoroughfares, and parts of same, either in width or length or extension thereof in said city, heretofore laid out or extended by or in pursuance of any order or decree of court, are hereby declared as public and established."

The judgment of June 6, 1892, arbitrarily fixing the value of Mrs. Rohmeiser's right to have the former judgment enforced, at the price of $700, seems easily disposed of. Indeed it appears only to have been a kindly effort to compromise and adjust the differences between the litigants by the court in such way as to relieve the hardships of the one, and at the same time give full compensation to the other.

It failed in its mission, and the enforcement of the judgment of July 24, 1888, first rendered by the learned chancellor, is all that is left to be done. His language, even in the opinion which seemingly hesitates to enforce this judgment, states the case too plainly to admit of misconstruction. He says: "This court's judgment remains in force and has not been obeyed. There is ample power in this court to enforce its decree, by committing and fining the defendant until obedience is fully yielded to its mandate, or by sending its marshal, with sufficient force, to batter down and remove the defendant's buildings that obstruct the alley."

We doubt not that the chancellor will enforce his decree with proper circumspection, inflicting the least possible harm on the defendants' property. The plan providing for archways appears feasible; but the obstructions must be removed and the alley left open for convenient ingress and egress.

The judgment in the first-named case is reversed, with directions to enter an order enforcing the former judgment of July 24, 1888. The mandamus proceedings are dismissed, and the judgment in the last-named case, dismissing Bannon's petition against the city of Louisville and others, is affirmed.

BERRY v. McCULLOUGH.

(Filed April 8, 1893.)

1. **Elections under new Constitution—Election of coroner—Section 148 of the new Constitution, which provides that no county officer "shall be elected**

in the same year in which members of the house of representatives of the United States are elected," did not forbid an election in 1892 to fill a vacancy in the office of coroner, although members of the house of representatives of the United States were then elected. Section 148 of the Constitution, even conceding that it applies to vacancies, can not be given full effect until the elective machinery of the new Constitution shall have been put into full running order, the election of county officers in 1894, expressly provided for by section 99, being in the face of section 148.

2. Notice of election—Where the time for holding an election is fixed by the Constitution or by statute, a notice of the election is not essential to its validity.

John Roberts, J. J. Calloway, Kohn, Baird & Speckert and Hargis & Turner, Jr., for appellant.

Edward J. McDermott and Humphrey & Davie for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

In August, 1890, one H. C. Miller was elected coroner of Jefferson county for a term of four years. Dying in the early part of March, 1892, on the 18th of that month the appellant, Berry, was appointed by the Jefferson County Court to fill the vacancy occasioned thereby.

At the succeeding November election, 1892, the appellee, McCullough, having theretofore defeated appellant and others in a primary election for the Democratic nomination, was elected over his Republican opponent as coroner of the county, and, having obtained the proper certificate to that effect from the examining board, was duly inducted into office and proceeded to discharge his duties.

About the close of the primary the appellant, Berry, determining that no election for coroner could be held legally in November, announced his intention to hold on under his appointment, and did continue to hold inquests after the election and qualification of McCullough.

Alleging that he was in the rightful possession of the office by virtue of his appointment by the county court, and that the defendant, McCullough, was an intruder therein, whose acts were porducing confusion in the office and hindrance to the proper discharge of his duties, he sought by this action in equity to enjoin the defendant from such unlawful interference.

Upon hearing, the motion for the injunction was overruled by the special chancellor. McCullough's answer to the petition was thereafter filed, and a demurrer thereto was overruled. Upon final hearing, on March 10, 1893, the chancellor dismissed the plaintiff's petition, and from that judgment he has appealed.

Waiving the preliminary question of the appellant's right to maintain the action, we think it manifest that section 152 of the new Constitution fully authorized the election in November, 1892, to fill the vacancy caused by Miller's death.

That section provides thus: "Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district

or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term." * * * In this case the death of Miller and the appointment of his successor occurred more than three months prior to the next succeeding regular election, namely, November 8, 1892, at which county officers, to wit, circuit court clerk and sheriff, were elected under the express provisions of the Constitution.

The term of the deceased coroner did not expire at that time, and hence it was proper that said vacancy should be filled by election for the remainder of the term.

It is true that a coroner was not then to be elected, but sheriffs and circuit court clerks were, and these are of one and the same class. But the appellant contends that under section 148 of the Constitution "no officer of any city, town or county, or of any subdivision thereof, except members of municipal legislative boards, shall be elected in the same year in which members of the house of representatives of the United States are elected."

The learned chancellors below were of opinion that section 148 had reference alone to elections for full terms, and such seems quite probable; but whether it does or not, the Constitution transferred the time of holding the regular August election, 1892, to November of that year, and provided for a regular election of county and district officers at that time, and that was the next succeeding annual election provided for under the Constitution after the vacancy in question occurred.

This was in spite of the inhibition of section 148, and so will the elections of county officers in 1894 be in the face of this inhibitory section.

After the election machinery of the new Constitution shall have been put into full running order, elections for county officers may not be held in years "in which members of the house of representatives of the United States are elected."

The confusion in this case, we think, arises from an attempt to look at the question from a standpoint in advance of the present. To imagine ourselves as holding elections under the Constitution as it will hereafter operate, and not as it now plainly provides. The contention of the appellant would stretch the appointive term very far beyond what was ever intended or provided for under either the old or the new Constitution.

It is contended, however, that the election of the appellee was invalid because of want of proper notice. Only three days' notice, instead of eight, as required by law, was given, and the case of Toney v. Harris, 85 Ky., 475, is cited as authority in support of this view; but that was a case in which the court expressly decided that "neither by the Constitution nor statute is the first Monday in August prescribed as the day in course" for holding the election in question; and further, it was said "to make the election of an officer of government legal, there must be a time fixed for holding such election, either by law or by the officer empowered by law to do so." If, therefore, we are right in determining that the time of holding the election to fill the vacancy now in question was fixed by the Constitution, the case cited is authority in support of the validity of the election. And such is the well-recognized rule in most of the States.

Mr. Cooley thus sums up the true doctrine: "Where, however, both the time and the place of an election are prescribed by law,

every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty.

The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute and not from the official notice. It has, therefore, been frequently held that when a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given." (Cooley's Con. Lim., 6th edition, page 759.)

Nor was there any lack of actual notice in the present instance. The participation of the electors in the election was quite general, and the interest manifested was widespread.

The election to fill the vacancy having been properly held at the regular November election, and the appellee having been duly elected, the appellant's petition was properly dismissed, and the judgment is affirmed.

PRICE v. DAVIS, &c.

(Filed April 29, 1893—Not to be reported.)

Vendor's lien—Purchaser without notice—Equities—It is doubtful whether a mortgage on land by the purchaser under an existing contract was constructive notice to one to whom such purchaser subsequently mortgaged the land for the purpose of raising money with which to discharge the vendor's lien in order that he might obtain a deed, but even assuming that it was constructive notice, yet as the subsequent mortgagee did not have actual notice of the prior mortgage, he is, to the extent that the money obtained from him was actually applied to the discharge of the vendor's lien, entitled to priority over the first mortgage; and the land having been sold to satisfy a part of the vendor's claim which still remained unpaid, and the second mortgagee and a subsequent purchaser, who were not parties to the suit in which that sale was made, having purchased the bid of the purchaser at that sale, are also entitled to priority over the first mortgagee for the amount thus paid by them in removing that encumbrance.

W. D. Greer and Jno. K. Hendrick for appellant.

J. W. Bush and J. C. Hodge for appellees.

Appeal from Livingston Court of Common Pleas.

Opinion of the court by Judge Pryor.

G. W. Adams was the owner of a tract of 300 acres of land in the county of Livingston, and in the year 1873 sold it to one Jeremiah Richards, executing to the latter his bond for title, the price being $6,000, with the greater part of the purchase money unpaid. After this purchase by Richards he (Richards) executed and had recorded to one C. B. Davis, on the 21st of May, 1874, a mortgage, as is contended, on this land to secure a note for $——— as of the same date. This note was assigned to Emily Davis, the present appellee. After this transaction with Davis, Richards, the equitable owner, in order to obtain a deed from

Adams, borrowed of the appellant, Price, $3,100, endorsed by note dated in February, 1875, with the agreement and for the purpose of satisfying Adams' lien, so that he could obtain a deed and the better to secure Price, a mortgage was executed to him on this land that was put to record and in a few days after the deed from Adams to Richards was recorded.

Some time after these mortgages had been executed, Richards sold the land to one James Hawkins, and in July, 1881, James Hawkins made a voluntary conveyance to his son, Arthur Hawkins, the evidence conducing to show that James Hawkins, when he purchased from Richards, agreed to pay off the Price debt.

The mortgage to C. B. Davis, made in May, 1874, seems to have been lost sight of, the testimony establishing the fact that Price knew nothing of that mortgage, unless its record was constructive notice to him of the lien. Richards, when that mortgage was given, held only the equitable title evidenced by the title bond in his (Richards) possession.

It appears from the testimony that Richards failed to apply the whole of the money he obtained from Price in discharge of the lien, but paid only the sum of $2,240, leaving a part of the purchase money unpaid.

In January, 1876, Adams filed a petition to enforce the lien for the balance of the purchase money, making only Richards a defendant, neither Price, Mrs. Davis nor Hawkins being before the court or defendants to that action. A judgment was rendered subjecting the land to the payment of the balance due, and one B. F. Davis became the purchaser.

Price, the appellant, who held this mortgage, and James Hawkins, who had purchased of Richards, seeing that the lien of Adams would have to be discharged, agreed to remove the claim of Davis by purchasing his bid, and paid Davis about $2,700. The two raised the money by Price advancing $400 and the two borrowing the balance by their joint note, and how much of that Price paid does not distinctly appear.

Under the arrangement a deed was made by the commissioner to James Hawkins, with the mortgage of Price upon the land.

After all this transpired, in January, 1889, Price, the appellant, instituted an action to foreclose his mortgage and have his note secured by it paid, making Richards and the two Hawkins' defendants. Emily Davis, to whom the note had been assigned, secured by the mortgage of May, 1874, came into the case, and by her cross petition sought to have that mortgage foreclosed, and asserting her priority by reason of that mortgage of Price, executed in the year 1875.

It is manifest that Price had no actual notice of the Davis mortgage executed by Richards when he held only Adams' bond for title, and by the appellant, Price, it is maintained that if the execution of the mortgage to Davis and its record was constructive notice, that the mortgage failed to so describe the land as to identify it or place the purchaser on inquiry if he had even read it.

In response to this it is said that the deed of Adams to Richards, dated in January, 1875, and before the mortgage to Price, identified the land and made the description complete, and thereby perfected the mortgage to Davis in this respect. How this could have caused the defect when the mortgage is not mentioned in the deed we can not well see; but if it could have that effect, it clearly appears that the conveyance by Adams to Richards, although dated in January, 1875, was not recorded until the 15th of Feburary, 1875, nine days after the mortgage to Price had been executed and recorded; and the reason, doubtless,

that it was not recorded at its date was that Richards had not then made the arrangement with Price to release the lien.

The mortgage to Davis describes the land as 200 acres, more or less, in Livingston county, sold by Adams and wife to Jerry Richards, with no boundaries. No location by mentioning water courses or adjoining tracts, and certainly an imperfect description calculated to mislead one even on inquiry. The tract in question contains 300 acres, and there seems never to have been a question as to boundary; but assuming, for the purposes of this case, that the mortgage of the equity, with the mortgage in possession, was notice by reason of its record to a subsequent purchaser, still the equity of this case is with the appellant.

There is much in this record by way of proof assailing the validity of the note secured by the mortgage to Davis, and also the note secured by the mortgage to Price; still we are satisfied the claim of Price is a just claim; nor are we disposed to question the validity of the note executed to Davis, and will, therefore, proceed to determine the equities arising from these several transactions.

It is certain that the appellant, Price, loaned this money secured by his mortgage to be applied to removing the lien for the purchase money, so as to make his mortgage debt secure, and that this was done without any actual notice on the part of Price that Davis held a mortgage. He parted with his money that the lien of Adams might be removed and his debt secured, and Richards did in fact apply the greater part of it in that way, and that he used the remainder of the money for other purposes is Price's misfortune, but that $2,240 was applied to the discharge of the lien is certain, and if Mrs. Davis gets the benefit of this payment by Price you place the latter in the position of making a contract with Richards to advance this money to remove the lien for the benefit of Davis, resulting in his losing his entire debt. If Price had not removed the lien under the arrangement with Richards the lien of Adams for the purchase money would have had priority over the mortgage to Daivs, and if this lien is still preserved as against Davis by reason of the arrangement with Richards and Price, no injury has resulted to Davis or his assignee.

In the case of the Farmers & Drovers Insurance Co. v. German Insurance Co., 79 Ky., 598, the appellant was induced to release a lien that was prior in date to other liens, and accepting a lien junior in date, by the act of the debtor inducing the appellant to believe there were no other encumbrances, and this court held that the appellant was entitled to relief. The rights of other lien holders, whether legal or equitable, had not been affected by the act of the appellant, and under the belief that there were no other encumbrances the prior lien was released, this court holding that equity and good conscience required that the lien first taken by the appellant should be enforced, as no one was affected by it; so in this case the appellant, not only from the silence of the debtor, but by an arrangement to that effect, removed this purchase money lien with his money and then took a mortgage to secure his debt, having freed the estate, as he supposed, from all encumbrances.

The legal rights of the appellee, Davis, were not affected by this act of Price, and when you come into a court of equity there is but one view to take of the question, and that is to give to Price a lien superior to that of Davis to the extent his money secured by the mortgage extinguished the purchase money lien held by Adams.

It is further claimed for the appellees, Hawkins and Mrs.

Davis, or by the latter, that the purchase by B. F. Davis in the action by Adams to enforce the balance of his lien, instituted in 1876, vested Davis with the title, and that the assignment by him to James Hawkins, and the deed to Hawkins by the commissioner of Davis' right to the land, vested Hawkins with the title and destroyed both mortgages. How this can be adjudged as against Price, who aided Hawkins to remove the encumbrance that had been placed on the land by reason of Davis' purchase to satisfy the lien, is difficult to perceive. Instead of opening the judgment in the Adams case, and in order to remove this lien or divest Davis of the title, the undisputed facts show that both Price and Hawkins, to save their rights, united in paying Davis —Hawkins to save his purchase from Richards, and Price to save his mortgage. They both knew this lien had priority over any claim either had on this land, either by the sale to Hawkins or the mortgage to Price.

It is argued that the promise by Hawkins to pay the debt of Price, secured by mortgage or to give Price an interest in the land, are agreements, if made, within the statute of frauds, and can not be enforced.

Price is not attempting to enforce any such agreements. His purpose is to enforce his mortgage by reason of its execution to him by Richards and the subsequent purchase by Hawkins from Richards with full knowledge of Price's claim, and by reason of the partial payment by Price of the money paid or agreed to be paid by R. M. Davis on his purchase at the decretal sale in the case of Adams v. Richards.

It is contended by Emily Davis that the payment by Richards of Price's money discharging the purchase money lien was a removal of the encumbrance that inures to her benefit, and that the payment by Price and Hawkins to R. M. Davis, relieving him from the purchase, in the case of Adams v. Richards, has a like result, and so the chancellor below decided.

There is no equity, it seems to us, in such a judgment, conceding that the mortgage of the equity by Richards to R. C. Davis in 1874 was constructive notice, and of this there is much doubt.

Hawkins having purchased this land to the extent he satisfied the purchase money lien to Adams on account of the R. M. Davis purchase, he must be protected, but no further, as against the mortgage to Price, and then the land becomes liable as between Price and Hawkins to the payment of Hawkins' mortgage, and, as against the mortgage of Mrs. Davis, Price has a superior lien to the extent he has discharged the lien to Adams; that is, the land should be sold to satisfy the lien paid by Hawkins and Price to R. M. Davis, the amount paid by each to be ascertained, and also for so much of the purchase money lien discharged by the money advanced by Price and secured by the mortgage, which was $2,240, or about that sum, with the interest. These claims must be satisfied before the mortgage of Mrs. Davis, executed in 1874, is satisfied. After these liens are paid then the mortgage of Mrs. Davis will have the preference. Hawkins is not appealing from the judgment of Mrs. Davis against him. If, after the purchase money liens are satisfied as herein directed, there is more than enough left to pay the Davis mortgage, then it will be applied to the balance due Price on his mortgage. This places the parties in the condition they would have been if the liens had not been discharged, and prevents the taking of Price's money to secure the mortgage debt of Davis. With this view of the case it is not necessary to determine the effect of the

indefinite description of the land, as well as other questions raised by the appeal.

Judgment reversed and remanded for proceedings consistent with this opinion.

DUGGINS' GD'N v. CRAIG, &c.

(Filed May 23, 1893—Not to be reported.)

Construction of deed—A deed conveying the grantor's undivided interest "descended and willed" to him and his brothers and sisters by their father, in a tract of land described, passed not only the interest which the grantor took under the will, but also the interest of one of his sisters, which had descended to him prior to the date of the deed.

R. F. Peak for appellant.

J. A. Trout and McCain & Carroll for appellees.

Appeal from Trimble Circuit Court.

Opinion of the court by Chief Justice Bennett.

Elzy Rucker, by his deed, dated the 25th day of September, 1845, conveyed to Wm. McDowell his "undivided interest belonging to the party of the first part and descended and willed to the said Rucker and his brothers and sisters by their father, E. E. Rucker, in a tract of land containing 140 acres, more or less."

Mrs. Spillman was one of the sisters of Elzy Rucker, and took jointly under the will with him, and, she having died, and shortly thereafter her child having also died, Elzy Rucker inherited its interest in its mother's part of the land willed to her by E. E. Rucker. It is contended by appellant that he is entitled to his interest in the land thus inherited by Elzy Rucker. The appellees contend that said interest passed to Wm. McDowell by the deed quoted. Appellant contends that said deed only conveyed to McDowell the interest that Elzy Rucker received by will directly from his father, E. E. Rucker.

It is to be remembered that Elzy Rucker inherited his interest in his sister's child's land in 1834, and that he owned said interest at the time he made the deed to McDowell, which composed a part of his undivided interest in the land willed by his father, E. E. Rucker.

Now there is nothing in the deed indicating that Elzy Rucker did not intend to convey his entire interest in said tract of land, including that interest that he inherited, unless it be the expression "descended and willed," which the appellant contends limits the interest sold to that interest that was willed directly to him by his father. But we do not so understand it. We think that as the land inherited from his sister's child constituted a part of his undivided interest, the deed conveying said undivided interest conveyed all the interest he had in said land, and that the expression, "descended and willed," is descriptive only of the tract of land in which his undivided interest was. Also the appellant is bound to trace his right to recover back to said will, and Elzy Rucker would have to do the same thing if the right of either was questioned.

The judgment is affirmed.

SUPERIOR COURT ABSTRACTS.

KINNIMOUTH, &c. v. KIMMEL.

Filed May 8, 1893. Appeal from Muhlenberg Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Claimant of attachment property—Proceeding on forthcoming bond—Estoppel—If the claimant of attached property, who executes bond pursuant to section 214 of the Code, and retains possession of the property, fails to set up his claim in the attachment proceeding, he is estopped to assert his claim as a defense to a proceeding on the bond. But as the estoppel, in this proceeding by rule on such a bond, was not relied on by demurrer to the response of defendants to the rule, or in any other way, this court must determine whether the claim of defendants is sustained by the evidence.

2. Purchase with notice of lien—As plaintiff had a lien upon the attached property prior to and independent of his attachment, and defendants purchased with notice of that lien, their claim can not be sustained.

W. A. Helm and Edward W. Hines for appellants; Jep C. Johnson for appellee.

METROPOLITAN LIFE INSURANCE CO. v. REINKE.

Filed May 8, 1893. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

A contract of life insurance is a personal contract and can not be made without the knowledge and consent of the insured, therefore, the courts will not enforce a policy of insurance procured by the wife upon the life of the husband without his consent. And if the wife has, without the consent of the husband, used his money in paying the premiums on such a policy, he may recover of the company the amount so paid. But in an action by him for that purpose the burden is on him to show that fact, and the court erred in assuming in its instructions to the jury in this case that the money paid by the wife was the husband's, that fact being specifically denied by the answer.

J. W. Bryan for appellant; Wm. Goebel for appellee.

MOORE v. TRAXEL.

Filed May 8, 1893. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. Fraud—Want of consideration for note—In this action upon a note executed for the balance due by defendant upon a subscription to the capital stock of a hedge fence company, as the stock was worthless and the whole transaction was tainted with fraud, the chancellor properly dismissed the petition.

2. Rescission—Tender—As the certificates of stock were issued and delivered to the defendant in his own name, signed by the officers of the corporation, and it does not appear that plaintiff or his assignor ever had a title to the certificates, no tender was necessary to be made to him.

Cochran & Son and Edward W. Hines for appellant; Thomas H. Hines for appellee.

MOORE v. PARKER.

Filed May 8, 1893. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Parol testimony to vary promissory note—A promissory note which contains an unconditional promise to pay can not, unless assailed for fraud or

mistake, be converted by oral evidence into a conditional promise to pay. Therefore, in this action upon such a note, it was not competent for the defendant, in the absence of an allegation of fraud or mistake, to show by oral testimony that the payee agreed that if he should "become dissatisfied" he should have the privilege of returning the certificates of stock for which the note was executed and have the note returned to him.

Coohran & Son and Edward W. Hines for appellant; Thomas H. Hines for appellee.

CITY OF PARIS v. CURRENT, &c.

Filed May 8, 1893. Appeal from Bourbon Circuit Court. Opinion of the court by Presiding Judge Yost, affirming, Judge Brent not sitting.

Municipal corporations—Injury to private property from negligent grading of streets—In grading and regrading streets a municipal corporation must use the same degree of care which prudent and competent men would exercise in their own affairs in such a case, and if the officers and agents of the corporation in doing such work act negligently or improperly, and thereby inflict damage upon a property owner, the corporation is liable.

J. W. Lucas for appellant; Ward & Dickson for appellees.

CONNER, &c. v. CLARK, &c.

Filed May 8, 1893. Appeal from Kenton Chancery Court. Opinion of the court by Judge Brent, affirming on original and cross appeal.

1. Married woman estopped to deny validity of condemnation proceedings —Although the land of a married woman was condemned by a town for the purpose of a street without notice to her or her husband of the condemnation proceedings, yet as they had notice before the street was improved of what had been done, and insisted upon the payment to them of the damages awarded, which they finally consented might be appropriated to the payment of taxes they owed the town, they are now estopped to deny the validity of the condemnation proceedings.

2. Dedication—An owner may dedicate his ground to the use of the public by any act which sufficiently evidences his will without any previous adverse user.

3. Repeal of statute—The act of 1867, limiting the charge that could be made against property or the owner thereof for street improvements to "one-half the value of said ground," contemplated the value of the land at the time of the completion of the work. And as the General Statutes have not legislated on the same subject-matter, that act is not repealed.

4. Parties ought not to be held liable for interest until the amount they owe is ascertained with certainty, and as the amount which appellants should pay was not ascertained until the judgment was rendered, the court did not err in refusing to adjudge interest against them.

Hallam & Myers for appellants; W. H. Mackoy, Simmons & Simmons and O. P. Schmidt for appellees.

McNEES v. OWENS, &c.

Filed May 8, 1893. Appeal from Harrison Circuit Court. Opinion of the court by Judge Brent, affirming.

1. Judgments can not be set-off one against the other unless they are so held that in settling between the parties third persons are not prejudiced.

Where a judgment in favor of a firm has been assigned to one member of the firm in payment of the amount found to be due him upon a settlement of the partnership the defendant can not set-off against the judgment a debt due him by the other member of the firm.

2. Failure to paragraph pleading—The fact that the defendant did not comply with an order of the court requiring him to paragraph his answer does not prevent the allegations of the pleading from being considered, the court having taken no steps to enforce its order.

J. T. Simon for appellant; A. H. Ward for appellees.

CARTER v. JAMES, &c.

Filed May 10, 1898. Appeal from Graves Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

Attachment—The plaintiff having at the commencement of the action sued out an attachment upon grounds which had no existence, and had it levied upon the only property owned by defendants, which was sold under order of court and purchased by plaintiff, the court properly refused to allow him after this to come with the additional ground of attachment that defendants then had no property subject to execution.

Webb & Johnson for appellant; W. P. Lee for appellees.

BRADY v. BUTTS, &c.

Filed May 10, 1898. Appeal from Rowan Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Order of delivery—Bond good at common law—All bonds voluntarily executed, although neither required nor authorized by statute, if they do not contravene public policy nor violate any statutory provision, are valid and binding on the parties.

Although the officer in whose hands an order of delivery was placed for execution had no authority to execute the process, yet, as the defendant retained possession of the property by executing a bond to perform the judgment of the court, the bond is binding as a common law obligation, whether good as a statutory bond or not, and the surety therein is liable.

James E. Clarke and Wm. H. Holt for appellant; Wood & Day for appellees

McCOWAN v. HORTON.

Filed May 10, 1898. Appeal from Wolfe Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

Claimant of attached property—The evidence in this case is sufficient to sustain the judgment of the court dismissing the petition of a claimant of attached property.

Z. T. Hurst and A. F. Byrd for appellant; Wood & Day for appellee.

HAMILTON v. MINOGUE, &c.

Filed May 10, 1898. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Barbour, affirming.

The decision of a county superintendent of common schools refusing to allow a resident of one school district to send his children to school in another district is conclusive until reversed or set aside by the board of education, an appeal to that body being the only remedy allowed. Therefore, the courts have no power to interfere.

Kennedy & Son for appellant; John P. Norvell for appellees.

McCANN v. ROGERS, &c.

Filed May 10, 1898. Appeal from Fayette Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. A national bank, although it has ceased to do a banking business, has such a corporate existence as enables it in its own name to collect, for distribution among its stockholders, debts contracted with it.

2. Limitation as to judgments—Under the statute which provides that "a surety shall be discharged from all liability under any judgment or decree after the lapse of seven years, without any execution issued thereon and prosecuted in good faith for the collection thereof," limitation runs not from the time of the issual, but from the time of the return of the first or

prior execution. And the issual of the execution, in the absence of facts showing the contrary, is evidence that it was issued in good faith and for the purpose of collecting the debt.

Breckinridge & Shelby for appellant; Geo. Denny and Robert Harding for appellees.

ROBINSON & CO. v. McINTEER, &c.

Filed May 17, 1898. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Attachments—Collection of debt not endangered by delay—Under the statute which authorizes an attachment upon the ground that the debtor has not sufficient property subject to execution to satisfy the plaintiff's demand, and that the collection of the demand will be endangered by delay in obtaining judgment or return of no property found, the fact that the debtor has not enough property in this State subject to execution to satisfy the plaintiff's demand is ordinarily prima facie evidence that its collection will be endangered by delay, but this may be rebutted by showing that defendant was, notwithstanding his lack of property, able and willing to pay the demand.

A few days before the issuance of the attachment in this case defendant's storehouse and stock of goods were burned, he at the time carrying thereon a policy of insurance for $1,200. In addition to the insurance, he owned in cash and accounts $1,000. He had always had good credit and was a man of established integrity. Held—That the collection of plaintiff's demand of $228.65 would not have been endangered by delay.

Macy & Fitzpatrick for appellants; S. M. Payton for appellees.

CARTER, &c. v. McINTEER, &c.

SAME v. SAME.

Filed May 17, 1898. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Attachments—Judgment affirmed for reasons given in Robinson & Co. v. McInteer, &c., reported above.

H. C. Martin and John J. Stamp for appellants; S. M. Payton for appellees.

RICHARDSON BROS. & CO. v. McINTEER, &c.

Filed May 17, 1898. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Attachments—Judgment affirmed for reasons given in Robinson & Co. v. McInteer, &c., reported above.

Macy & Fitzpatrick for appellants; S. M. Payton for appellees.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. SEPTEMBER 1, 1893. No. 5

KENTUCKY COURT OF APPEALS.

THE ADDYSTON PIPE & STEEL CO. v. COPPLE.

(Filed May 2, 1893.)

Receipt in full settlement for personal injuries—Mistake—Burden of proof—Where the defendant in an action to recover damages for personal injuries relied for defense upon a writing signed by the plaintiff acknowledging the receipt of a certain sum from the defendant "in full settlement" of all claims against defendant on account of the injuries received, it was error to instruct the jury that the burden was on the defendant to show that the plaintiff fully understood and assented to the agreement as a settlement of his claim for damages. The presumption is conclusive that the plaintiff so understood the writing, and he is bound by it with that meaning unless he attacks it by a plea of mistake and then sustains that plea by the weight of evidence.

Nelson & Desha for appellant.

W. W. Cleary and Chas. J. Helm for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee brings this suit against the appellant to recover damages for the loss of a leg caused by the gross neglect of the appellant in knowingly having defective machinery for the appellee to work with while in its employment, and of which defect the appellee did not know, and which defect caused the machinery to give way and brake the appellee's leg.

The appellee recovered $4,500 damages for said injury. The appellant has appealed from that judgment. The appellant traversed the allegation of defective machinery and negligence. It pleaded the further fact that appellee, before the institution of his suit, accepted $100 in money and an artificial leg in full satisfaction of said injury. The appellant relied on a written contract, which reads as follows:

"Received from Addyston Pipe & Steel Co. the sum of $100 in full settlmement of all claims, of whatsoever kind or character, caused by or in any wise growing out of an accident to me, Henry Copple, on or about the 29th day of October, 1889, at Pit No. 3. Newport Works, Newport, Ky.

"In testimony whereof, I have hereunto set my hand, this, the 17th of February, 1890.

"HENRY COPPLE.

"We also agree to furnish said Henry Copple with a good and serviceable artificfal limb."

The appellee admits the agreement, but says that the appellant procured it from him by fraud, etc. He does not allege mistake as to the contents of the writing.

The court instructed the jury in instruction No. 4 that they must find for the appellant if the appellee, at the time he signed the agreement, "understood and fully assented to the same as a settlement in full of his claim for damages herein." Instruction No. 7 informs the jury that "the burden is on the defendant to make out its case by a preponderance of proof of the said settlement with the plaintiff under the 4th instruction herein."

The other instructions place the burden upon the appellee as to the allegations of fraud. The instructions taken together mean that the burden of proof was upon the appellant to show that the appellee "understood and fully assented to the agreement as a settlement of claim" for damages, and that the burden was upon the appellee to show that the agreement was obtained by fraud.

The writing signed by the appellee means that the damages caused by the injury complained of was fully settled by the acceptance of the $100 in money and the artificial limb; and the presumption is conclusive that the appellee thus understood it, and he is bound by the writing with that meaning, unless he attacks it by a plea of mistake, and then sustains that plea by the weight of evidence. Therefore, the instruction throwing the burden upon the appellant to show the appellee "understood and fully assented" to the writing is erroneous.

The judgment is reversed and case is remanded for a new trial.

There is no brief on file for the appellant.

PRESTON, &c. v. FIDELITY TRUST & SAFETY VAULT CO., &c.

(Filed May 2, 1893.)

1. An appeal lies to the circuit court from an order of the county court refusing to probate a will whether for supposed want of jurisdiction or for other cause, the refusal to probate being a "rejection" of the will within the meaning of the statute giving an appeal. And upon the trial of the appeal in the circuit court, if that court determines that the county court has jurisdiction, it should hear the case upon its merits and determine whether the will should have been probated, although the county court may have refused to probate the will upon the sole ground that it had no jurisdiction.

A county court having heard testimony as to the residence of a testatrix, and refused to probate her will upon the ground that it had no jurisdiction, and the propounders having appealed to the circuit court, this court refuses to grant a writ of prohibition to prevent the circuit court from entertaining the appeal, holding that the appeal lies.

2. Mandamus does not lie to compel the county court to probate a will where that court has heard testimony as to the residence of the testator and determined that it had no jurisdiction, the remedy being by appeal to the circuit court.

Wm. Lindsay and Humphrey & Davie for appellants.

Byron Bacon, Barnett, Miller & Barnett and P. B. Muir for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

Mrs. Mary Howard Preston departed this life on the 17th of November of the year 1892, leaving a paper purporting to be her last will and testament that was offered for probate in the Jefferson County Court, and by one of its provisions the Fidelity Trust & Safety Vault Co. was made the sole executor.

The contestants, who were the heirs at law of Mrs. Preston, resisted the probate of the will on three grounds: First, because the decedent, at the time of her death, resided in the county of Trimble; second, she was of unsound mind at the time she executed the instrument, and, lastly, that it was procured by undue influence.

The case was heard by the judge of the Jefferson County Court on Decemebr 30, 1892, upon evidence touching all the points at issue, viz., residence, mental capacity and undue influence, and this judgment entered: "It is the judgment of the court that the legal residence of Mary Howard Preston, at the time of her death, was in Trimble county, Ky., and for that reason this court has no jurisdiction to probate the will, and the said motion is overruled."

After this judgment was entered the propounders of the paper took an appeal to the Jefferson Court of Common Pleas; and after the case reached that court the contestants, for the purpose of questioning the jurisdiction of the court, moved to dismiss the appeal from want of jurisdiction on the part of that tribunal to determine the question, insisting that the remedy for the propounders was not by an appeal, but to apply to a court of superior jurisdiction to compel the county court by mandamus to dispose of the case on its merits.

The common pleas court, having the jurisdiction of appeals in will cases, overruled the motion to dismiss the appeal taken by the propounders, and the contestants, claiming that this action on the part of the judge of the court of common pleas was a usurpation of jurisdiction, filed the present petition in this, the appellate court, asking for a writ of prohibition commanding the judge of the court of common pleas to cease entertaining jurisdiction on the appeal.

The right of the contestant to this writ and the exercise of such a supervisory power by this court is claimed to be derived from section 110 of the new Constitution, that provides: "Said court (the Court of Appeals) shall have power to issue such writes as may be necessary to give it a general control of inferior jurisdictions."

As the court below has, in our opinion, jurisdition of the appeal, it is unnecessary to determine the power of this court to grant the writ. We will proceed, therefore, to discuss only the right of the propounders to an appeal.

The statute gives to the circuit courts (common pleas courts having like jurisdicion) jurisdicion of appeals from every judgment of a county court admitting a will to record or rejecting it. (General Statutes, section 27, chapter 113, title, Wills.)

It is not claimed this will has been rejected on the merits, or that the judgment of the county court rejecting it for want of jurisdiction would be a bar to a like proceeding in the Trimble County Court; but it is contended the probate has been denied,

and this gives the right to an appeal, and, if so, the remedy being ample, it affords a strong reason for refusing the writ.

The language of the statute in regard to appeals in will cases does not require before an appeal can be taken that a judgment should first be rendered invalidating the paper, it is enough that the court to whom the application is made refuses to probate the writing, whether for the one cause or the other, the will has been rejected, and the right to an appeal exists. The word reject means, as defined by Mr. Wesbter, "to throw away; to discard; to refuse to receive; to refuse to grant, as to reject a prayer or request." To give the word reject the technical meaning contended for by counsel for the contestants would be to deny the propounders a remedy when the offer of probate is denied and the jurisdiction of the county court, so far as its decision goes, ended. If application to probate should be made to the Trimble County Court with a decision adverse to the jurist jurisdiction, the propounders would be without remedy. When the case reaches the circuit court the judge hears the testimony on the question of jurisdiction and determines it, and if his judgment should be adverse to that of the county court the case will then be tried on its merits, and whether at the same term is for that court and not this to determine. If the decision of the judge accords with that of the county court as to the jurisdiction, the propounders on that issue alone can appeal to this court, and, if the case is heard on the merits, either party can also raise the question, should it come to this court. There is no reason why the case should not be tried as other cases on appeals, the court first determining its jurisdiciton. The case was before the county court for judgment, and if that judgment is final as to that court, there is no reason for withholding from the circuit court the power to try the entire case, if, in his opinion, the county court had jurisdiction to probate the paper.

It is, however, argued that the judgment upon the question of jurisdiction was not a final judgment or one from which an appeal could be taken, and the case of Benjamin's Heirs v. Dubois, 118 U. S., —, is referred to as sustaining this view. It is said in that case that a judgment or decree to be final, so as to give the court jurisdiction on appeals or writs of error from the Supreme Court of the District of Columbia, the judgment must be on its merits. That case has no application to the practice in this State, as appeals may be granted from orders of dismissal for want of jurisdiction or for any other cause where the amount in controversy is within the jurisdiction of the appellate court.

The statute provides that the appeal in will cases shall be in five years after the judgment of probate or rejection, and this would apply, in so far as the appeal is concerned, to the judgment refusing to probate for want of jurisdiction, and, while the limitation applies to the appeal, it would not affect the right to probate in the court having the jurisdiction, as a judgment without jurisdiction is a nullity.

We must deny the request made for the writ.

(Modified June 15, 1893.)

The mandate has gone in this case; but, the court doubting its power to issue the writ, if there had been no jurisdiction in the court below, of its own motion withdraws so much of the opinion as discusses the question as to the right of the contestants to the writ. This can not affect the trial below, as the writ was denied.

JACOB, JR. v. HOWARD, &c.

(Filed May 6, 1893—Not to be reported.)

1. Contingent remainder—Under a devise to one for life, remainder to his descendants living at his death, and if no descendants then to his heirs, the children of the life tenant take a contingent remainder, which may be subjected to the payment of their debts.
2. Judicial sales—The property consisting of city lots, and the several lots being indivisible, the chancellor, in this action to subject the contingent one seventh interest of one of the remaindermen, erred in directing the commissioner to sell the defendant's entire one seventh interest in each lot, if necessary to pay the debt. The chancellor, for the protection of the debtor, should require the commissioner to first offer to sell a less portion than the one seventh interest.

Augustus E. Wilson, Polk & Hülsewede and W. W. Thum for appellant.
A. C. Rucker for appellees

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The appellees, who are creditors of R. T. Jacob, jr., with their claim in the form of judgments, filed their petition in equity to subject his contingent interest in certain real estate in the city of Louisville, described in the judgment directing its sale. Jacob appeals to this court, and insists that the appellant had nothing to sell, and, therefore, the appellees got nothing by their purchase.

The devise under which the appellant acquired this interest is a devise to R. T. Jacob, sr., for life, with remainder to his descendants or heirs, if any such then living, in the same manner as it would pass by the law of descent, if the land were to descend from him; and, if no descendants, then to his heirs.

Here is a contingent remainder, and the interest can be subjected to the payment of R. T. Jacob, jr.'s, debts. It seems that R. T. Jacob, sr., has seven children, and the interest of the appellant is the one-seventh of the lots to be enjoyed and possessted after the death of the life tenant, should R. T. Jacob, jr., be then living. The interest, therefore, of the debtor was properly subjected. (See section 21 of chapter 63, article 7, General Statutes.)

This doubtless is valuable estate, and the contingent interest is being sold for small debts, and if purchased at the amount only of the debts, might result in a great sacrifice of the estate of the remainderman.

The chancellor has directed his entire one-seventh interest in each lot to be sold, if necessary, to pay his debts. This property is indevisible, and no possession can be delivered; but the chancellor, to protect the debtor, should repuire the commissioner to first sell or offer to sell a less portion than the one-seventh interest in each lot. The creditor or one desiring to purchase might be willing to pay the debts for the one-fourth or the one-half of the one-seventh interest in one of the lots, and in order to ascertain that fact, the interest should be offered for sale in that manner. Who will pay the debts for less than the one-seventh interest should be the manner of the offering. For this reason, and no other the judgment is reversed for proceedings consistent with this opinion.

There is some controversy in another tribunal about the claim of Leighton. If this has been decided for the appellant he should be allowed to amend his pleadings and set up that fact.

SUPREME LODGE KNIGHTS AND LADIES OF HONOR v. OWENS, &c.

(Filed May 9, 1893.)

Trusts—Contributions for cyclone sufferers—The supreme lodge of a benevolent society having, in response to a "distress call" which it had sent out, received contributions from subordinate lodges for the relief of the families of members of the order who had suffered by a cyclone, it had no right to withhold from distribution any part of the fund thus contributed, the persons for whose benefit it was contributed having the right to the whole. And this is true, although the number of persons injured and the extent of their injuries were less than was estimated in the call, there being no such disproportion between the estimates made by the call and the actual facts as to amount to fraud or mistake.

Humphrey & Davie and Jas. A. Beattie for appellant.

L. N. Dembitz and E. S. Watts for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

The Supreme Lodge Knights and Ladies of Honor is an institution organied to promote benevolence and mutual protection and assistance. Besides the Supreme Lodge, it has a number of subordinate lodges.

On the night of the 27th of March, 1890, the city of Louisville was visited by a terrible cyclone, which killed and injured a great many persons and destroyed and damaged a great deal of property. One of the subordinate lodges in the city of Louisville was known as Falls City Hall. About 125 of its members and friends were assembled in the hall that night to transact the business of the order, and while they were in the hall for that purpose it was demolished by the cyclone, killing, it was supposed, about forty members and injuring as many more.

On the 29th of the same month, just two days after the sad occurrence, John T. Milburn, the supreme protector and presiding officer of the supreme order, issued the following distress call to all the other lodges of the same order: "The sad but important duty of laying before you briefly the facts of one of the most unfortunate calamities that has ever befallen our order imposes itself upon me. On the evening of the 27th of March, 1890, a cyclone visited the city of Louisville, Ky., passing from a southeastern portion in a northwestern direction a distance of about two miles, in width about four squares, destroying everything in its path. Neither tongue nor pen can convey a correct idea of the devastation and suffering that has followed in its track.

"It is not my purpose to enter into details, as that which concerns you and the members directly is the misfortune that befell the visitors and membership of Jewel Lodge, No. 2, Knights and Ladies of Honor, which, at the time, was in session at the hall between Eleventh and Twelfth streets, on Market street, known as Falls City Hall, a large three story building, which is utterly demolished, and nearly everything and everybody in it were victims of the calamity. Jewel Lodge room was situated in the third story of the building. It was an occasion on which 125 to 130 members were present. There were present for initiation eighteen candidates. The lodge had just gotten fairly to work when it went

down in a heap of ruin. All is yet confusion. A corps of laborers has been engaged, ever since the accident, excavating and removing the debris and removing dead bodies. I can safely say with the committee whom I appointed, composed of supreme trustees (naming them), that no less than forty members have been killed and nearly as many injured, leaving many families and members in sore distress, which can be materially comforted and relieved by prompt assistance I, therefore, place before you briefly the foregoing facts, without attempting to give the details, as it would require more time and space than the circumstances in this shape would permit, and I call upon you for aid and assistance to relieve the suffering of our brethren, their families and dependents. This matter is one that is addressed to your sympathy and fraternal love. Prompt and immediate action is absolutely necessary, and I feel called upon to say no more upon the subject. The committee, before referred to, will be continued. The grand protectors of the several jurisdictions will please report this call to their subordinate lodges.

"Send all remittances to the supreme secretary, C. W. Harvey, Indianapolis, Ind., who will acknowledge receipt of same in the next number of the Intelligencer, and upon proper order the same will be turned over to the proper committee for disbursement among the members and their familes in distress."

It turned out that instead of forty persons being killed only twenty-two were killed, and thirty-six or more were more or less injured, and several of the injured persons afterwards died of their injuries.

Four thousand nine hundred and fifty-six dollars were sent in in response to this call. The secretary kept back about $2,813, and instead of sending it to the committee covered it into the treasury of the supreme lodge; and the committee returned to the secretary $22 of the sum confided to them for distribution among the members and their families and dependents mentioned in the distress call, making $2,841 covered into the treasury of the supreme lodge. The committee distributed said sum among fifty-eight persons, filling the description of the object of the bounty named in the distress call. The committee made said distribution, and disbanded before the middle of May.

The amount received under the distress call was not published or made known to the committee until it appeared in the Intelligencer for July. The said sufferers, feeling that they were entitled to all of the fund contributed, sought by negotiation to obtain the sum covered into the supreme lodge, and failing to obtain it, they bring this suit to compel its surrender to the court and its distribution among them. The lodge contends that the relief asked was for the purpose of relieving the necessities of the class of persons named in the distress call, resulting from the injuries received by the fall of the building, and the committee appointed for the purpose not only had a discretion as to how much of the und contributed they would expend, but the proportion that each person was entitled to receive, and that the committee having in good faith settled both of these matters, their judgment is final and conclusive.

Now it must be remembered that the distress call did not fix definitely the number of killed and wounded. It was intended as an approximation only, more or less. If there had been more persons entitled to the relief, they would have been entitled to share in the whole fund contributed for that purpose; if less, it seems that they would also be entitled to the whole fund unless the number entitled to the relief was so disproportionately less

than the number estimated in the call, or their injuries so much less than estimated, as to amount to a mistake or fraud, which would entitle the donors to a return of at least a proportionate part of the money contributed; but there was no such mistake or fraud. The percentage below that estimate was not unreasonable.

After describing the accident and its effect the call is made for contributions for the relief of the sufferers and their families. The call also states that the remittances will be turned over to the proper "committee for disbursement among the sufferers and the r families in distress."

Now there was a particular class of persons described as having been killed or injured, and contribution was asked for the relief of them and their families, not to the common charity fund of the lodge; but the appeal was directly in behalf of the sufferers and their families, and the contributions were to be turned over to a committee to be distributed among them.

The contributions were not to the lodge, to be held by it and distributed or not as it should see proper, but, as said, to a named class of persons, to be distributed among them by a committee appointed by the lodge, according to their necessities, caused by the injuries received by the falling of the building.

The contribution was made by strangers for the specific purpose of relieving the necessities of a particular class of persons, caused by extraordinary circumstances; and it was entrusted to the appellant for that purpose, and for that purpose alone. It had no right to the fund except for the particular purpose of distributing it among the particular class according to their necessities; and in making the distribution the appellant could not be controlled by a court of equity, for the appellant was the trustee of an express trust for the purpose of making the distribution, and if it acted in good faith in making it, its judgment concluded all parties concerned.

Niblack, on Mutual Benefit Societies, sections 133, 147, says: "A court of equity will not undertake to interpret a duty of the society or control it in distributing the money according to its judgment and discretion that its members have contributed 'to a common fund,' to be applied to the relief of its members when in sickness, want of employment or other disability." (See also Tulpress v. African M. E. Church, 48 Pa., 209, and other cases cited by appellant.)

We agree that where contributions are made to the common fund of a society or as a special fund, to be used in whole or in part by it, at its discretion, for the benefit of such members as it might select, or in such proportion as it might agree, a court of equity can not control its judgment either as to the amount or as to the proportion of the donation among the members. But, as said, the contributors raised a fund and placed it in the hands of appellant as trustee for a specific purpose, and the turstee was not given the power to pay the money or withhold it or a part of it at its discretion; but the only discretion given it was the power to distribute it according to the necessities of the donees. It was trustee of an express trust for that purpose alone and had no power to withhold any part of the fund from distribution because it was not delegated to it. The money was held in trust for the benefit of the sufferers, which was to be distributed in proportion to their necessities arising from the injuries. The whole was contributed for their benefit, and they, as far as the appellant is concerned, are entitled to it.

The contributors having before them a substantial account of the injuries caused by the falling of the building contributed to

the relief of the sufferers according to their inclinations, and appellant can not withhold it.

The general rule is that, in case of contributions for a specific purpose, the contributors may recover back the surplus (See Niblack, supra, section 150); but in a case like this the contributions are made to relieve the necessities of sufferers, and the sum necessary for that purpose is to be estimated by the contributors, and as the sum necessary for such purpose depends upon the opinion of each contributor, there can be no surplus, and the contributors can not recover back any part of their contributions unless on the groud of mistake or fraud. But how can the appellant withhold it when there is no complaint by the contributors? Its power as trustee does not extend that far.

Now, if A entrusts B with a sum to be distributed between C and D according to their necessities. B can not withhold a part of it upon the ground that the sum was more than their necessities required, because the nature of B's trust did not authorize him to make the inquiry; his only trust duty was to distribute the fund according to the necessities o C and D. The donor was the judge of the amount that he would give for that purpose. But it is said that the appellant can withhold such part of the fund for the benefit of the contributors as it may deem the necessities of the donees do not require; and if they do not call for it, the appellant may keep it and use it for the benefit of the next cyclone sufferes or some other sufferers. If the appellant can withhold a part of it, why not all of it, if it concludes that the condition of the donees does not require it? And if the donors complain the appellant can say that, upon due deliberation, it concludes that they are entitled to no part of the fund, or that, upon a close and careful calculation, they are entitled to just $3.62\frac{1}{2}$. The balance will be covered into the treasury for the benefit of the contributors, who are scattered all over the country, and in all human probability will never call; but in that event the sum will be held for the benefit of the next sufferers. To allow this contention would open the door wide open to fraud. Its only duty was to distribute the money according to the equities of the donees.

The judgment is affirmed.

OWINGS v. SMITH.

(Filed May 11, 1893—Not to be reported.)

1. Vendor and vendee—Limitation—In this action to recover the purchase price of land, as the defendant prays for enforcement of the contract by conveyance to him of the land, the statute of limitations is not a bar to the recovery by plaintiff, although it would otherwise have been a bar.

2. Same—Judgment—As one who owned the land jointly with plaintiff, and joined with him in the sale, refused to unite in this action as plaintiff, and, being made defendant, stated in his answer that the whole of the purchase price has long since been paid, it was error to render judgment in favor of plaintiff for more than one half the purchase price.

3. Judicial sales—It was error to assume that the lot was not susceptible of advantageous division, when the only support for it was the statement in the petition to that effect, which was denied in the answer.

Cornelison & McKee for appellant.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellee, Robt. T. Smith, brought this action January 14, 1888, to recover alleged balance unpaid purchase money for a lot sold in 1868 by himself and Geo. E. Owings, joint owners, to appellants, Milton Owings and Smith Bondurant, and for sale of the property to satisfy the debt. He filed no note as evidence of existence of the debt sued on, nor does he in fact state a note was ever executed for purchase money, neither was the title bond, if there ever was one, before the court. Besides, Geo. E. Owings, one of the vendors, refused to unite in the action as plaintiff, and, being made defendant, stated in his answer that the whole purchase price has long since been paid.

The statute of limitation would have barred recovery if the defendant, Milton Owings, had not prayed for enforcement of the contract by conveyance to him of the lot. As it is, the circumstances and condition of the parties tend strongly to show the purchase money had been paid; but as the burden of proving payment rested on defendant, and no evidence of the fact was offered, we do not feel authorized to say it has been paid.

The statement was made in the petition that the purchase price was the gross sum of $225, and the lower court, without proof, erroneously assumed that allegation to be true, although it was expressly denied by defendant, the statement of the answer being that the price was $225 per acre, and that the lot contained only three-fourths of an acre.

It was also error to assume the lot was not susceptible of advantageous division, when the only support for it was the statement in the petition which was denied in the answer.

We also think the court adopted the wrong basis for determining the amount due. Instead of fixing $225 as amount of original purchase price, three-fourths only of that sum should have been adjudged the true amount; and as Geo. E. Owings disclaims any right to the purchase price upon the ground all of it has been paid, what appellee is entitled to recover, if any thing at all, should be calculated and ascertained thus: The amount of original purchase was, instead of $225, three-fourths of that sum, or $165, one-half of which, or $82.25, belonged to appellee, from which should be deducted one-half of $124, amount paid, or $62, leaving $22.25 only now due to appellee, if in fact he is entitled to recover any thing.

The judgment is reversed and cause remanded for proceedings consistent with this opinion; and the lower court may, with a view to justice and in its discretion, permit pleadings of either party amended and proof taken by either.

Judge Hazelrigg delivered the following response to petition for rehearing:

It may be true, as contended, that the courses and distances set up in the plaintiff's petition are not denied by either pleading or evidence; and they may arithmetically embrace three roods and twenty-five poles of land, but it is also true that the basis for charging the defendant with anything under the contract of purchase after his denial of the contract, as alleged in the petition, and in the absence of all proof, is the admission of the defendant himself that there was three-fourths of an acre. Taking this as the basis, the result of the calculation, in the manner suggested in the opinion, is that the defendant owes the plaintiff the sum of $22.37½, if any thing, instead of $22.25, as mistakenly stated in the opinion.

However, as we supposed that the lower court might, in its

discretion, and in the interest of justice, allow additional preparation, the calculation was more by way of illustration than to fix accurate results. Also all accounts for interest was, therefore, omitted. This the plaintiff should have, if upon final determination he shows himself entitled to anything. As the case stands the plaintiff is entitled to one-half of $168.75, with interest from March 13, 1868, less $12 as of that date, and less $50 as of February 1, 1870.

Petition overruled.

CHESAPEAKE & OHIO RAILWAY CO., &c. v. MULLINS.

(Filed May 17, 1893.)

Municipal government—Construction of sidewalks—Notice—Under particular ordinance of the city of Covington a contractor was entitled to a lien on the property of the appellant for the cost of constructing sidewalk abutting thereon, the owner of the property having failed to construct same. The passage and publication of the ordinance furnished the owner with constructive notice.

Hallam & Myers for appellants.

D. A. Glenn for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Bennett.

The city of Covington, by ordinance, ordered the construction of a sidewalk in front of the appellant's property. The appellant having failed to construct the sidewalk, it was constructed by the appellee as contractor. He now sues the appellant for the price of construction and for an enforcement of a lien on the property.

By section 1 of the act to amend the city charter, approved April 28, 1884, it is provided, in substance, that the city of Covington shall have authority, by ordinance or resolution, by a vote of a majority of the board, without the petition or consent of the property owners, to order or cause the construction of the sidewalks of any street or any part thereof, etc., within the city, in such manner and with such material as it may deem best. It shall have authority to assess the costs of such construction, etc., against the lots or part of lots, etc., in front of which the sidewalk is constructed or repaired, etc., and a lien is given on the lots or parts of lots for the contract price, which shall attach from the time of the passage of the ordinance or resolution, and which may be enforced by the contractor or the city of Covington: Provided, That the owners of said lots, etc., for the period of fifteen days after the passage of the ordinance or resolution, shall have the privilege of doing the work in the manner provided by the council.

Does the city charter require actual notice to the property owners before the city can construct the sidewalks and charge the property with the expense of it? The section above referred to certainly does not require actual notice to the owners of the property. The section repeals the amendment of 1882 requiring actual notice to be given to the property holders. Is it necessary that the property owners should have actual or constructive notice before subjecting their property to the burden of constructing sidewalks, etc.? We think that actual or constructive notice is necessary.

The State has the right to confer upon the towns and cities the right of local government and to confer upon them such police powers as are necessary for their health, comfort, convenience. prosperity and happiness. Their powers and rights are granted and regulated in their respective charters; their power to burden the property within their limits and make it contribute to their purposes is given by their charters, which usually provide for giving the owners of the property notice, either actual or constructive, before taking it for such purposes. Actual notice is such notice as is required to be given in some particular way to each owner. Constructive notice is such as results from some public act required to be done publicly and in a particular manner and of which the owners of the property upon which the burdens are imposed are required to take notice. Here the charter authorized the city of Covington, by ordinance or resolution, to make the abutting property pay the expense of constructing sidewalks, etc. There is no complaint that the ordinance in reference to the construction of the sidewalks in controversy was not in every respect regular, and published in conformity to the requirement of the charter, thus making it a complete constructive notice to the appellant that its property was required to bear the expense of constructing the sidewalk, and which is all that is required by the charter.

The judgment is affirmed.

CONNER v. COX, &c.

(Filed May 17, 1893—Not to be reported.)

Partition—In particular case, although the proof shows that the land is indivisible, yet as it is further shown that the interest of appellant can be allotted to him without injury to the interests of the other joint tenants, the court should allot his interest to him.

G. S. Fulton for appellant.

Ben Johnson for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

This is a case involving the right to a sale or partition of a tract of land containing 165 acres. The interest of the appellant is the one-twenty-seventh of the entire tract, and it is evident from the testimony that the land is indivisible, and, while this is so, it by no means follows that the interest of the appellant can not be allotted to him, and under the circumstances of this case it is plain that this should be done.

He owns a tract of 140 acres of land adjoining the tract of land sought to be divided, and his tract on the one side is surrounded by the land jointly owned. His house stands near the Bardstown and Louisville turnpike, and there is a small strip of the land to be divided, lying between his house and the turnpike, and if his interest is allotted to him it gives him an outlet on his own land to the turnpike, and this can be done without materially injuring the balance of the tract for sale or otherwise.

The diagram filed with the record or brief of counsel and inserted in this opinion will show the hardship on the appellant

and the injustice of an order compelling the appellant to sell his interest for the common benefit of the joint tenants, when an allotment to him of his interest would work no injury to them and result in such a convenience to those living on his home tract. The diagram is here shown:

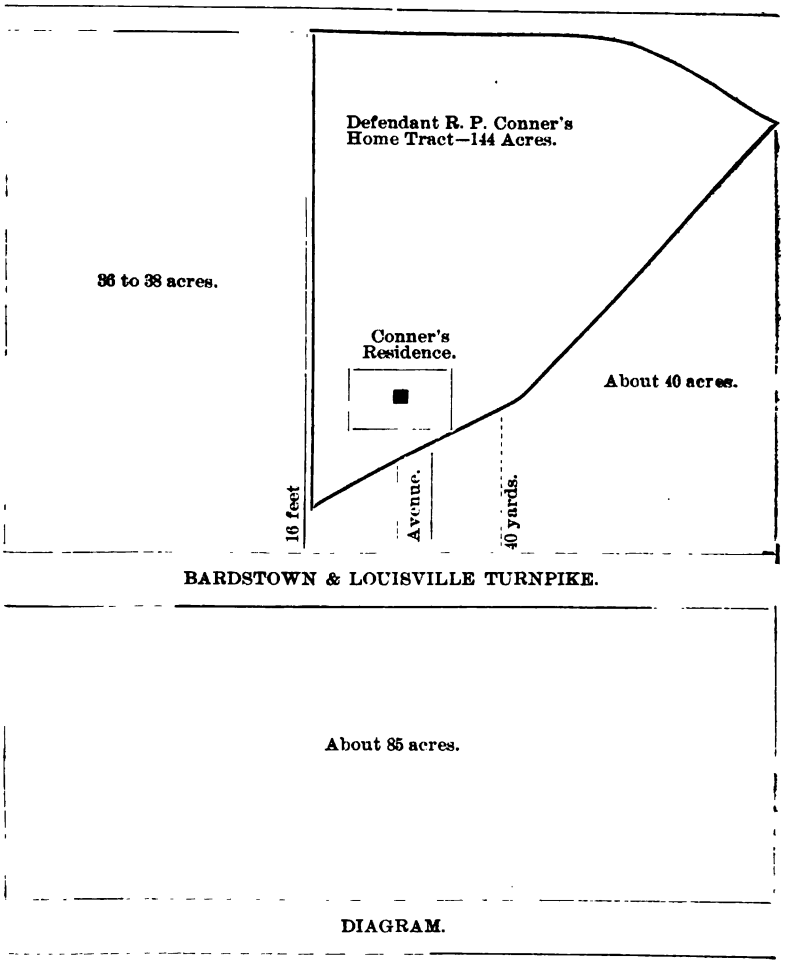


DIAGRAM.

If the land between the house and the turnpike is more valuable than the rest of the land, then it is proper to give the appellant less land, and no injury can result to any one of the parties in interest. While the testimony shows the land can not be divided, it also appears that the allotment to the appellant of his interest can be readily made.

There is some proof conducing to show some agreement by which the vendor of Conner was to have an outlet to the pike by surrendering part of what is now the Conner tract, but no

such statement is found in any pleading or issue made on that subject; nor does the testimony really show that any binding agreement that could be enforced was ever entered into by either Conner or his vendor.

This case will have to be reversed, with directions to have the appellant's share allotted to him fronting the turnpike, so as to give him the ground between the house and the turnpike, and in making the allotment thereof Conner should be controlled by the value of the land allotted; if worth more per acre than the balance, the appellant must take less land. The balance can then be sold.

Judgment reversed and remanded for proceedings consistent with this opinion.

HANEY, &c. v. BARNEY, &c.

(Filed May 18, 1893—Not to be reported.)

Estoppel—Where a mortgagee consented that the mortgagor might convey to his grandson a small part of the mortgaged land, and the grandson entered upon the land thus conveyed to him and erected improvements, and at the sale of the mortgaged property, in an action to enforce the mortgaged lien, that part of the land was excluded from the sale by the direction of the mortgagee, who became the purchaser, the mortgagee and those claiming under a voluntary conveyance from him are now estopped to claim that part of the land thus excluded from the sale, although it was included in the commissioner's deed; and although testimony as to the exclusion of this part of the land from the sale contradicts the record of the sale by the commissioner and the commissioner's deed, it is competent, as sustaining the defense, that prior to the sale the mortgagee consented to the making of the deed by the mortgagor to his grandson.

E. F. Dulin for appellants.

R. C. Burns and Frank Chinn for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Pryor.

Marcus Williams mortgaged certain lands to one Fisher to secure the latter in a certain indebtedness. The mortgage was foreclosed, and Fisher bought the land, and the sale was confirmed on the 12th of December, 1885. Fisher caused the deed to the land to be made to his daughter, Manda Haney, and her children as a gift from him.

On the 10th of November, 1885, Williams conveyed one acre and twenty-eight-one-hundredths of an acre of this mortgaged land to his grandson, Marcus L. Barney, and the deed was lodged for record. This small part of the land was in the possession of Barney when Fisher purchased under his mortgage, and when the deed was made to Mrs. Haney and her children and his mother, Mrs. Davis (Barney's mother), erected a house on the small strip of land and made other improvements.

Mrs. Haney and her children, ascertaining that the deed made to her by the commissioner at the instance of Fisher embraced this land, brought an action of ejectment to recover it. The appellees, Mrs. Davis and her son, Barney, answered, setting forth title from Williams and alleging that the mortgagee, Fisher, consented that Williams, who was the real owner, should convey this land to his grandson. This was denied and proof heard that is now maintained was incompetent. Fisher had only an equity

by reason of his mortgage, and consenting that Williams should convey the absolute title to this one acre of land to his grandson and the possession delivered and improvements made upon it, is estopped either by himself or his vendees from asserting title. The proof shows the agreement between Williams and Fisher, and further that this lot, when the land was being sold, was excluded from the sale by Fisher's consent and direction, and the proof is uncontradicted on this point, and the only question made is as to its competency. There may be evidence in this record as to what Williams said that sholud have been excluded, but the testimony to the effect that Fisher, the mortgagee, consented that Williams should make his grandson a deed, and that it was made and lodged for record and was not includetd in the sale of the mortgaged lot, was competent and works an estoppel on both Fisher and his vendees.

It is said, however, that proof of the exclusion of this strip of land from the sale contradits the record of the sale by the commissioner and the deed to Mrs. Haney by the consent of Fisher. It is competent as sustaining the defense that, prior to the sale or the making of the deed to Fisher, the latter consented to the execution of the deed to Barney. It is also unreasonable to suppose that Mrs. Davis, the mother of Barney, would take possession of this one acre of land with no improvement but a rail fence around it at the time the deed was made, and proceed to build and make other improvements upon it with the mortgages upon it held by Fisher unless there was some understanding in regard to her possession or that of her son.

That there was such is uncontradicted, and the judgment is now affirmed.

BRECKINRIDGE CO. (LIMITED) v. HICKS.

(Filed May 20, 1893.)

Failure of master to comply with promise to repair—Risk assumed by servant—Where the master is notified by the servant of a defect in the appliances or premises furnished for the servant's use and promises to remedy the defect, the servant, by continuing in the master's service for a reasonable time after the promise to repair, does not assume the risk, and if by reason of the defect he is injured within that time the master is liable. The servant assumes the risk only where, with knowledge of the defect, he continues in his work without any promise upon the part of the master to repair, or where, although the master has promised to repair, such a length of time has elapsed since the promise was made that the servant has no right to believe that the master intends to comply with his promise.

A miner called the attention of the "mining boss" to loose rock in the roof of the room where he was at work and the "boss" promised to send in timbers for the purpose of propping the roof. The attention of the "boss" was called to the matter a second time and he said he had forgotten it. Two days after the original promise by the "boss" to repair the miner concluding the props would not be sent in, resolved for that reason to quit work, and as he was leaving the mine a rock fell upon him, crippling him for life. Held —That the master is liable.

Bullitt & Shield for appellant.

Fairleigh & Straus and David R. Murray for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, Hicks, in working the mines of the appellant, received a serious personal injury, by the falling of a stone upon him from the roof of the quarry or mine, while in the employ of the company, and has recovered $4,000 in damages on the ground that the injury resulted from the negligence of the company's employes.

In order for the protection of miners, and to prevent such injuries from falling stones, the roof above the miner is supported by props that are furnished by the company, and where the distance under the mines from the entry is considerable, these props are hauled in by cars that are used in bringing out the coal. Sometimes the miners themselves carry the props on their shoulders to the places wanted, but the evidence in this case conduces to show, and without contradiction, that it is the duty of the company to furnish them at the place designated or deemed necessary for their use.

The appellee and his fellow-laborers were experienced miners, and apprehending danger, or thinking there was a necessity for props where they were at work, had laid out timbers, such as they wanted to use as props, and marked them so as those whose duty it was to bring them in would have no difficulty in getting such props as they wished.

The haulers, as they are termed, were told several times to bring them in, but failed. The mining boss had been in the room where this appellee was at work two days before the accident, and his judgment consulted as to the danger. He was shown some loose stone in the roof over the road, and wanted the workmen to brace it, and was told it would cost no more to take it down, Hicks, appellee, remarking that they could not get timbers to brace their room up, or roof above, much less the roadway. The boss then promised to send timbers in.

The very day of the accident the employes or haulers were told to bring the timbers in by Hicks; and Dickerson, who was at work with Hicks, says they were told every day. This boss was told a day or two before the injury that the props ought to be sent in, and his reply was: "Damn it; I forgot it."

Hicks and Dickerson were the only ones working in the room at the time of the injury, and finding that no props would be sent in resolved to quit work, and in leaving, Hicks having gone into one corner of the room for oil to fill his lamp, in returning this rock fell upon him, crippling him for life.

Dickerson says it was not the rock above their heads where they had been digging, and if the testimony of these witnesses is to be credited it is evident that the personal injury resulted from the neglect of the defendants' employes.

We have given the testimony for the appellee bearing on the main question, all of which is in effect controverted by the testimony for the appellant, and the sole question in this case is, should the court have instructed the jury to find for the defendants?

A peremptory instruction was based on the idea that this appellee, knowing the danger, voluntarily continued his work, in a place where he knew or must be presumed to have known that he was in danger of great bodily harm.

The cases of Sullivan's Adm'r v. The Louisville Bridge Co., 9 Bush, 81, and Bogenschutz v. Smith, 84 Ky., 330, as well as other similar cases, are relied on as sustaining this doctrine. The doctrine contended for is well understood, and if the testimony for the appellee brings this case within the rule, then the verdict below should have been for the defendant.

In Sullivan's Adm'r v. The Louisville Bridge Co., there were two planks placed side by side from a barge filled with stone to a crib, into which the stone was being placed. The workman used the plank in carrying the stone for days, making no complaint, and finally fell off the plank and was drowned. He knew the danger, saw what he had to stand on, made no complaint, and after his death it was insisted that proper protection to his person had not been afforded by his employer. This court said he voluntarily placed himself in the position from which he fell, knew the danger, and by the exercise of proper care might have avoided it.

The same question arose in Bogenschutz v. Smith, 84 Ky., 330, and in Hughes v. Railroad Co., 13 Ky. Law Rep., 72.

It will be assumed in this case that both the employer and employe knew of the danger, or from the facts had the right to apprehend it; then the question arises: Did Hicks waive the danger and voluntarily assume to work without looking to the employer for these props? If Hicks, knowing the danger, continued in his work without complaint, or rather without requiring of his superior to provide these props, then he can not recover; and this is the rule recognied by the cases to which our attention has been called by counsel for the appellant.

Suppose, however, the superior is notified of the danger and the necessity for these props, and promises to furnish them in a reasonable time, then the workman may continue his work, and will not be adjudged to have waived the right of exacting this duty of his superior by remaining this reasonable time in the service.

This is the doctrine of all the text-books with reference to machinery and the appliances to be used by the laborer in the discharge of his duties. (Beach on Contributory Negligence, page 372.)

This court said, in Bogenschutz v. Smith, "but generally, if a servant knows that the machinery or material furnished him for work is defective and unsafe, or that the premises where he labors are dangerous, and he, without complaint or promise from the master of a change, continues to use them, he must be deemed to have waived any claim against the master by reason of the injury."

The ordinary risk and danger in this kind of labor the appellee assumed when he undertook the work, and while the danger may be anticipated, either with or without supporting the roof above, where the laborer continues to discharge his duties for a few days, believing, and having the right to believe, that the support required will be furnished him, there seems to us to be no valid reason for determining that such conduct is a waiver of the right of recovery when, if the superior had complied with his promise, no injury would have been inflicted.

The course pursued by the appellee was rational, and under the belief that all danger would be averted by a compliance by the boss with the promise, and when he saw that danger was actually impending, was leaving to avoid it when the stone fell. The right of recovery exists if the testimony of the appellee and his co-workman is to prevail.

Judgment affirmed.

CHRISTIAN v. ROSE, &c.

(Filed May 20, 1893—Not to be reported.)

Mistake in deed of partition—In this action to reform one of several deeds of partition upon the ground that 500 acres of land allotted to plaintiff in

the division were omitted from her deed by mistake, the evidence is sufficient to entitle plaintiff to the relief sought.

John L. Scott & Son, Tyre & Adams and Wm. J. Hendrick for appellant.

Wm. H. Holt for appellees.

Appeal from Letcher Circuit Court.

Opinion of the court by Chief Justice Bennett.

Allen Christian died in October, 1886, intestate, leaving the appellant, who was his wife by second marriage, his widow, and two daughters, Mrs. Mary Rose and Mrs. Betsy Brashears, by his first mariage, as the legal representatives of his estate, which consisted of considerable land, personal property, cash and cash notes. There were no debts against the estate.

Mr. Adkins qualified as administrator of the estate; but not long after his qualification the appellant, Margaret Christian, and the appellees, Mrs. Rose, Mrs. Brashears and their husbands, agreed to pay the administrator off and dismiss him and "divide the estate in three equal parts, and the said widow aforesaid is to take choice of one-third of the real estate, and the notes now on hand are to be divided by the commissioners who divide the land."

The agreement was reduced to writing on the 8th of November, 1886, and signed by all the parties by making their marks, except Wm. J. Rose, husband of Mary Ann Rose, who signed his name by writing.

Each of said parties selected a commissioner to divide said estate, to wit: W. V. Lusk, Wm. B. Campbell and Kelly Hogg, who met on the 23d of November, 1886, and divided the cash notes, cash and other personalty into three equal parts, and the appellees agreed to the division and each accepted their respective parts.

On the same day and year, November 23, 1886, each party, as is alleged, signed and acknowledged a deed to a third of the land as set apart to the other in the division, which deed was duly recorded. The appellant's deed conveyed to her a fee simple title.

It seems that the commissioners, by the direction of said parties, did not divide all of the land, but left some waste land, which was to be held in common Each party took possession of the land allotted to him. In 1889 the appellant brought this suit to reform the deed made to her upon the ground of mistake, consisting in the fact of leaving out of her deed 500 acres of land allotted to her in the division. The appellees, the daughters and their husbands, defended the action upon the ground that, first, the land was not left out of the deed by mistake; second, that they did not sign or acknowledge said deed; third, that the agreement of the 29th of November was that the appellant was to have one-third of the land for life only.

Now as to the third proposition: Was the appellant to have only a life estate in the land? The written agreement of the 9th of November, 1886, says that the real estate and the personal estate are to be divided into three equal parts, and the appellant and the appellees were each to take a part.

Mr. Adkins, the administrator, and Mr. Craft, the county clerk, who took the acknowledgment of the parties to the writing, say that it was agreed between all the parties, on occasion of writing the paper, that the appellant was to take a child's part of all

of the estate. Mr. Lusk says that was his understanding at the time the division was made, and other persons say that they heard the appellees say the same thing. It seems to be clear, very clear, that such was the agreement.

Second. Did the appellees sign and acknowledge the deed to the appellant? Now, while Hogg states that he did not agree to a division of the land, and that no division was made, the other two commissioners, Messrs Lusk and Campbell, are equally as positive that a division was made, and agreed on by themselves, Mr. Hogg differing about where one or more of the division lines should be run. Mr. Lusk says that he drew up, in part at least, the deeds of division, and that the appellees, Mrs. Rose and Mrs. Brashears and their husbands, requested him to sign their names to the deed, and they made their marks, etc.

The appellees, Mrs. Rose and Mrs. Brashears, both positively deny that they requested Mr. Lusk to sign their names to the deeds or that they made their marks; or that their husbands authorized him to sign their names; and some other persons who were present say that they did not hear the appellees request Lusk to sign for them, and one says that Mrs. Rose and husband had left the place before the time for signing had arrived. On the other hand, as just said, Mr. Lusk says that they did request him to sign their names, and then they made their marks. The appellant says the same thing.

Polly Christian, colored, says that she was present and the appellees requsted Lusk to sign for them, and they made their marks. Mr. Cornett says that he was present when said deeds were made, and that the names of Mrs. Rose and others were signed by Mr. Lusk by their request.

It is true the appellees prove by some witnesses that Mr. Cornett was not there at that time; but others say he was there at the time. He has no interest in the matter.

Joseph Christian says that he was present and Mr. Lusk signed the name of Mrs. Rose by her direction, and she made her mark. He also states that he heard her acknowledge the deed before the deputy clerk.

Davis Fields says that Wm. J. Rose admitted that they (the appellees) had made the appellant a deed, but that the 500 acres were left out; but that it ought to have been deeded to her.

In the division a tract of land lying on Leatherwood creek was allotted to Mrs. Rose and included in the deed to her; and Robert H. Brashears says that he bought said land from Rose and wife after the division, and they referred to it as the land that had been allotted to them in the division and all had made deeds, and that he had heard all the parties say the same.

It is also said by Wm. R. Brahsears that his name as a witness to the deed to the appellant is a forgery; but Mrs. Collins and her daughter both swear that he told them that he and another person were witnesses.

Now it is an uncontroverted fact that all the parties agreed to have a division of all the estate into thirds, each to take a third; and the personalty was divided and each took his share. The weight of the evidence is that the land was divided, and deeds were signed and acknowledged to each party by the others for his third of the land, and each took possession of the land under said deeds, and has held and disposed of the same according to his judgment.

The weight of the verbal testimony, as it appears to us, is with the appellant; but when the certificate of acknowledgment of

the county clerk and the sale of the land set apart to Mrs. Rose, as the land she received in the division, and the possession of the land that Mrs. Brashears received in the division, are considered in connection with the verbal testimony, the evidence that all the parties signed and acknowledged the deeds is overwhelming.

It is also clear from the evidence that said 500 acres of land was allotted to the appellant, but left out of the deed by mistake.

The judgment is reversed and the cause is remanded, with directions to sustain said division of land and reform the deed made to the appellant so as to include the 500 acres of land.

BUCHANNON v. LITTLE, &c.

(Filed May 25, 1893—Not to be reported.)

Agreement to convey land in consideration of support—Rents and improvements—A verbal agreement to convey land to a person in consideration of his supporting another for life can not be enforced; and in this action to recover land from one who has been in possession under such an agreement, the question as to the value of the support furnished by defendant as agreed, and the value of the rents and improvements having been passed on by the chancellor, his judgment, offsetting the board and improvments against the rental value of the land will not be disturbed, the testimony being conflicting.

Wood & Day for appellant.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellees, as the widow and devisees of Wm. Little, sue the appellant in ejectment for the possession of the land in controversy.

The appellant claims that he holds the land by verbal agreement with Wm. Little, to the effect that Wm. Little was to let him have the land, rent free, for taking care of and supporting his (Little's) mother, Charlotta Little, during her life, and at her death said Little was to convey to him the land in fee simle; that he complied with the contract, and is entitled to a specific performance; but if that can not be had he asks for $1,000 as compensation for taking care of and supporting Charlotta Little for six years, and for $150 for lasting and valuable improvements, and for $12 that he paid as taxes on the land, and that a lien on the land be allowed him for said sums.

The appellees denied the agreement, except to the extent that the appellant was to have the land rent free during the life of Mrs. Little for taking care of and supporting her. The agreement to convey to the appellant the land being verbal, specific perfromance can not be enforced. Therefore, the question is, what was a reasonable compensation to the appellant on account of the matters he sets up? Upon these matters of fact the lower court has rendered judgment. Should that judgment be reversed? We think not, for the reason that the court was called upon to pass judgment on the questions of the rental value of said land and a reasonable compensation for appellants' care and board of Mrs. Little, improvements, etc., and whether or not the rental was sufficient compensation.

Upon that subject Phillip Little testifies that the rental value of the land was $75 per annum, and that it was worth $50 per

annum to take care of Mrs. Little, and that while she lived with the appellant she contributed to her support in various articles and in labor, and that she had a cow, mare, filly and some sheep which the appellant appropriated to his own use after her death. Wm. Wilson says that the land was worth $50 per year rent, and Mr. Day says that Mrs. Little traded with him during her stay with the appellant; that she bought goods for herself, etc., and paid him for them in butter, feathers, eggs and money; she also bought sugar, coffee, etc., and paid for them in the same way. About the same number of witnesses prove the appellant's claim about as he presents it.

Now, in view of this conflict of testimony as to the rental of the land and improvements and the reasonable value of Mrs. Little's board, the judgment of the lower court offsetting the board and improvements by the rental value of the land and giving the appellees the possession of the land can not be disturbed.

The judgment is affirmed.

BOWLIN v. COMMONWEALTH.

(Filed May 25, 1893.)

1. Homicide—Continuance—Upon the trial of appellant for murder he was entitled to a continuance on account of the absence of a witness who, if present, would have testified that the deceased, just before the killing, advanced rapidly toward defendant with an angry look, having his hand in his pocket, and when he came up threatening to kill defendant, the affidavit for a continuance showing that due diligence had been used to procure the attendance of the witness. And in view of the conflict in the testimony as to what took place immediately preceding tthe killing, the error in refusing a continuance was prejudicial.

2. Same—Defendant was also entitled to a continuance on account of the absence of witnesses whose attendance he had used due diligence to procure and who, if present, would have testified that deceased had offered to hire one of them to kill defendant, and also that deceased had purchased a rifle for the purpose, as stated by him, of killing defendant.

3. Instruction as to manslaughter—Upon a trial for murder, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis, as it is not the province of the court to weigh evidence for the purpose of determining whether the defendant is entitled to such an instruction.

Tyler & Apperson, H. B. Kinsolving, Hazelrigg & Reid and H. M. Woodford for appellant.

W. J. Hendrick for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

Henry Bowlin, having been indicted for murder of Henry C. Brown, convicted and sentenced to death, appeals.

According to testimony of witnesses of the Commonwealth, the deceased, while walking quietly along a public street in Mt. Sterling, and after he crossed from one corner of a square to another, was shot in the back of the neck and instantly killed by appellant, who had followed, when near enough to touch him, shot with a pistol without warning. It further appears that a

year or more before that the two men had a quarrel and fight at a picnic in the country in vicinity of where they resided; and, subsequently, on occasion of a fight between deceased and a man named Wilson, appellant procured or had a gun with which, there is evidence tending to show, he intended and endeavored to shoot deceased.

In behalf of appellant, witnesses testified that in forenoon of the day of killing, there being a considerable number of persons assembled in Mt. Sterling to hear a political speech, deceased met appellant on a street and threatened to kill him, though he made no demonstration to then do so, and that appellant then procured a pistol, having come to town without one.

According to the testimony of appellant and of one or two other witnesses, he did not in fact follow deceased to the corner where the homicide occurred, but that before seeing deceased he had started diagonally across the street to a storehouse on that corner for the purpose of meeting a person there on business, and before reaching that place unexpectedly met deceased, who spoke to him, saying "damn you, I have got you now" or "I will killl you now," at the same time putting his hand in his pocket and advancing towards appellant. He further states he was, at the time of that collision, nearer to the corner mentioned than was deceased, and that deceased saw him when the shot was fired.

It was further proved by witnesses in behalf of appellant that deceased had, during several months prior to the killing, repeatedly threatened to kill appellant, and carried a gun apparently for that purpose. The deceased was shown to have been a much larger man than appellant, and several witnesses testified to his reputation as a quarrelsome, overbearing man.

The first ground for reversal we will consider is refusal of the court to grant a continuance of the case upon appellant's motion.

The homicide occurred near the last of October, 1892. The indictment was found during the ensuing November term, and on the 29th of that month. The case was not then tried, being continued to the next term; but the next term, by reason of a change in time of holding that court, began in January, and the case was again called 16th of that month and set for trial on the 18th of January, 1893, when it was commenced.

In appellant's affidavit for a continuance he states three witnesses were absent; that by the first one of them named he could prove that a short time before the killing deceased offered to hire and pay the witness to kill appellant, and also told witness he intended to kill him; that by the second he could prove the deceased purchased a Winchester rifle for the purpose, as stated by him to witness, of killing appellant, and that the third witness would prove he was in Mt. Sterling and saw deceased a few moments before the killing rapidly advance towards appellant with an angry look, having his hands in his pocket, and when he came up used the language already mentioned.

One of these witnesses was, at the time, absent from the State, though it was stated in the affidavit his attendance could be procured at the next term of court. As to the other two, it appears due diligence had been used to have them present.

It seems to us that in view of the conflict of testimony in regard to what took place and the relative position and conduct of appellant and deceased immediately preceding the homicide, the testimony of the absent witness in regard thereto was very important. The testimony of the other two absent witnesses was also material, because it tended to show appellant was then in

danger of losing his life or suffering great bodily harm at the hands of deceased, and also because it tended to support the theory that appellant was in constant fear and dread of deceased, and that under excitement or impulse of that fear he fired the fatal shot.

And that brings us to the second ground for reversal; that is, failure of the lower court to give an instruction authorizing the jury to find appellant guilty of manslaughter.

In our opinion the testimony heard on the trial was enough, independent of that of the absent witnesses, to justify and require such an instruction, and failure of the lower court to give it was an error to the prejudice of the susbtanrial rights of appellants. In fact it is not the province of the lower court any more than of this to weigh evidence for the purpose of determining whether a person on trial for his life is entitled to an instruction as to manslaughter; but if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis.

We perceive no other error of law in regard to instructions given and refused. But for the reasons indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

Judge Hazelrigg not sitting.

ANDERSON v. McDANIEL.

(Filed May 27, 1893—Not to be reported.)

Assignment of insurance policy—Rescission of contract—Where a policy of life insurance was assigned in consideration of the conveyance of land by the assignee to the assignors, and at the same time the assignors assigned the obligation of a third person to keep the premiums or dues paid up, although the policy was not assignable, the appellee can not now insist upon a rescission of the contract, as by reason of the forfeiture of the policy he is unable to put the assignors in statu quo, it being his duty to pay the premiums or dues in default of payment by the third person, who had undertaken to pay them, and in any event to have notified the assignors of such default so that they might have paid them.

A. K. Cook, J. H. Tinsley, J. W. Alcorn and W. H. Holt for appellant.

James D. Black for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Lewis.

April 17, 1880, Wm. McDaniel and his wife, Louisiana McDaniel, in writing transferred to W. B. Anderson all his right to a certificate of membership in the Kentucky Grangers Mutual Benefit Society, Georgetown, Scott county, Ky., which contained an obligation by the society to pay to McDaniel's wife and children or his assigns, or as he might direct by will, in sixty days after due notice and proof of his death, $1 for each name on the register of the society in good standing at time of said death.

At the same time there was transferred and assigned to Anderson a written covenant of J. T. Gibson, whereby, in consideration of the transfer to Gibson of a certificate of membership and policy issued by the same society to Louisiana McDaniel, he agreed to pay all dues and to keep alive and in full force the

policy issued to William McDaniel and transferred to Anderson. The consideration of such transfer to Anderson was a tract of land then conveyed by him to William McDaniel.

This action was brought June 1, 1889, by Anderson to rescind the contract and recover back said land. It is stated in the petition that the policy transferred has been long since forfeited by failure of Gibson to pay dues required in order to keep it in force, and that it is now worthless.

The transation is admitted to have been made in good faith, both parties, as alleged, believing, at the time, the policy was assignable. In fact Anderson was a member of the society, acquainted with its character and objects, and had purchased other policies.

Although the policy was not assignable, and Anderson could not, in case of McDaniel's death, have recovered the amount due if resisted by the society, or if the beneficiaries had set up claim to it, still it was of value at the time of attempted transfer; and, as alleged in the answer, without denial, it was forfeited and became of no value by reason of failure of Gibson to pay dues as required. So that Anderson was not when the action was brought, nor had he been for several years, able to place McDaniel or the beneficiaries in the position they occupied when the contract was made.

In the case of Jackson, &c. v. Anderson, 9 Ky. Law Rep., 165, when a similar policy, issued by the same society, was attempted to be transferred, it was held that failure of the assignee to tender back the policy in the condition it was when received, was sufficient to defeat the plaintiff's right to rescission and recovery back of the consideration paid for the policy.

There the policy had become forfeited by reason of the assignee's failure to pay the dues as he directly agreed and undertook to do. In this case Gibson had agreed to pay the regular dues and keep the policy alive, which he failed to do. But it seems to us that as McDaniel was not, according to the terms of the transfer, bound to pay the dues, it was the duty of Anderson to do so himself in case of Gibson's failure; and, consequently, he has by his own neglience and fault placed or permitted himself to be put in a position where he can not place McDaniel or the beneficiaries in statu quo. Besides, he not only failed to keep or cause the policy kept alive, but did not give notice to McDaniel that he might do so. In our opinion he was not in a position to entitle himself to any relief when this action was brought, nine years after the transaction.

Judgment affirmed.

McLEOD & ANDERSON'S AS'SEE v. O'NEILL, &c.

(Filed April 29, 1893.)

1. Sales of personal property without transfer of possession—A sale of personal property, unless the actual possession in good faith accompanies the same, is void as to creditors prior to the lodging for record of the transfer of title. And while, as between the parties themselves, where they reside together, the possession follows the title, yet such constructive delivery of possession, where no alteration in the possession accompanies the sale, does not make the sale valid so far as creditors of the vendor may be affected by it.

2. Same—Where the purchaser of personal property, the sale of which was not accompanied by the possession, mortgaged the property to raise money

for the vendor, who signed the mortgage note as surety, the mortgagee, having no notice of the actual fraud, if any, is in the same attitude as if the vendor had executed the mortgage to her, and she is, therefore, entitled to priority over creditors of the vendor, whose attachments were issued subsequent to the execution and recording of her mortgage.

Stone & Sudduth for appellants.

Muir, Heyman & Muir, Kohn, Baird & Speckert and Thomas H. Hines for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hazelrigg.

Under the provisions of section 3, article 1, chapter 44, General Statutes, "every voluntary alienation of or charge upon personal property, unless the actual possession in good faith accompanies the same, shall be void as to a purchaser without notice or any creditor prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides."

And it has been held that "as between the parties themselves, where they reside together, the possession when a sale is made, follows the title, and is presumed to be with the vendee," but that such constructive delivery of the possession produced by the transfer of the title, when no alteration in the possession accompanies the sale, does not relieve the purchase from the operation of the statute and make it valid so far as the creditors of the vendor may be affected by it. (Jarvis v. Davis, 14 B. M., 424.)

In the case at hand, on January 18, 1889, O'Neill, the vendor of the personal effects, the proceeds of which are in dispute, executed a bill of sale therefor to Hopson, whose stepdaughter was his wife, and in three days thereafter Hopson executed a mortgage thereon to Mrs. Gilmour, from whom, with O'Neill as his surety, he borrowed $2,600, which sum he turned over to O'Neill.

Even if Hopson, the vendee, can be said to have been residing with O'Neill when the sale was made, of which there is much doubt, it can not seriously be contended that there was any alteration in the actual possession attending the sale. It is evident from the proof that no change, either of title or possession, was intended as between the parties. Therefore, the transfer is at least constructively fraudulent as against the attaching creditors of O'Neill. But Mrs. Gilmour is not affected with notice or shown to have had any complicity in the contrivance alleged to have been concocted between Hopson and O'Neill. She loaned the money on the faith of a mortgage executed and recorded prior to the issual of the attachments of the creditors, and is in the same attitude as if she had bought the property from O'Neill or loaned him the money, taking in good faith a simultaneously executed mortgage.

It matters not to her whether O'Neill owned the property or Hopson; as held by the lower court, she is a bona fide purchaser. The money arising from the sale of the vendor's effects were applied properly, first to the payment of the mortgagee's lien and, secondly, to the pro tanto satisfaction of the prior attaching creditors.

Judgment affirmed on both the original and cross appeals.

HOWARD v. LOCK.

(Filed May 6, 1893—Not to be reported.)

1. Action to recover land—Pleading—A petition for the recovery of land must describe the land so that it may be identified.
2. Same - Burden of proof—In an action to recover land the defendant, by asserting his claim to the property, does not assume the burden of proving it, and where the plaintiff claims the land as the heir of another the defendant's failure to deny the ownership of plaintiff's ancestor, or the heirship of plaintiff, does not throw upon defendant the burden of proving his own ownership, as it does not follow that the title which descended to plaintiff at some time in the past was still held by him when the petition was filed.
3. Similarity of names—Presumption of identity—Where the land of infant heirs was sold under decree in an action brought by "John King, curator," the court will not hold the decree and sale void because summons in the action was served by the deputy of "John F. King," who was sheriff, as it can not be assumed in the absence of evidence that John King and John F. King were one and the same person.

Hays & Hays and Knott & Edelin for appellant.

Wm. Lindsay and James D. Black for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

In the first paragraph of their petition, the plaintiffs, appellants here, allege that they are the only children and heirs at law of John Higgins, who died in 1869, the owner in fee of a certain house and lot in Barbourville, Ky.

In their second paragraph they assert their ownership of "the property above described," and that the defendant, the appellee, has unlawfully entered thereon and now wrongfully withholds same.

Neither paragraph constitutes a cause of action. The first set up a state of case barely justifying at least a conclusion that if the ancestor died seized of the property, leaving the plaintiffs his heirs at law, it descended to them in 1869 and they were the owners of it. From no fact stated does it follow that they were the owners in 1892, when they brought this suit.

The second paragraph cures the defect in this particular, but is not good because there is no description whatever of the property sued for.

Section 25 of the Civil Cod eprovides that "a petition for the recovery of land or for its subjection to a demand of the plaintiff must describe it so that it may be identified."

Without demurring, however, the defendant filed his answer admitting the ownership of Higgins in 1869, but denying the seizin or ownership of plaintiffs at the institution of the suit, or wrongful entry or holding on his part. He asserted ownership and title in himself and claimed the whole of the property.

By a reply the plaintiffs denied that the defendant was the owner in whole or in part of the lot or had title thereto, and attempted in a second paragraph to set up the title under which the defendant claimed and to show that it was not good. Upon the trial the court held the burden of proof to be on the plaintiffs, and this, the appellant insists, was error.

They say that the substantive facts are (1) seizin by Higgins, (2) heirship of plaintiffs, (3) disseizin by defendant, (4) de-

scribed premises; and that only a conclusion of law—the illegality of their disseizin—is denied by the defendant; that under no system of pleading could the defendant admit the facts from which the law inferred ownership and then deny the ownership. This is certainly true, but we think the fallacy of the learned counsel is in assuming that the plaintiffs' ownership can be inferred from the facts which defendant admits.

As indicated above, it does not follow that the title that descended to the appellants in 1869 was held by them on the 1st day of April, 1892, when the petition was filed. Moreover, in setting up his claim to the property the defendant was not required to assume the burden of proving it. Subsection 2 of section 125, Civil Code, provides that "in an action for the recovery of land the answer of the defendant must state whether or not he claims it or any part of it; and if he claims part of it his answer must so describe such part as that it may be identified. The making of such statement or of such statement and description shall not of itself throw on the defendant the burden of proving his right to the land claimed by him, etc." On the whole case the burden was clearly on the plaintiffs. On the trial the plaintiffs showed that their ancestor had not sold or disposed of the property, or had they done so; but in showing this from the record it was also disclosed that at the suit of John King, curator of the estate of John Higgins, deceased, against his heirs and creditors, the property had been sold, and by the master commissioner of the Knox Circuit Court conveyed to one A. R. Singleton and by him and others, in due form and succession, on to the defendant and appellee, Lock, the judgment of sale being for the purpose of paying the debts of the plaintiff's ancestor.

They say, however, that the judgment was void because they were infants, and that the process appears to have been executed on them by the deputy of John F. King, who was sheriff, and it is assumed without a word of proof or pleading to that effect that John King, curator, and John F. King are one and the same person, and, if so, the summons could not lawfully be executed by the plaintiff in his own case or by his duputy, but the only suspicion of this is to be gathered from the similarity of the names, and it is needless to say that this is insufficient to render void the judgment of the court rendered some twenty years ago.

Nor is it fatal to the judgment of sale that the plaintiff in this old action is styled "curator."

The appellants were properly before the court, were represented by guardian ad litem, and it must be presumed that the chancellor saw to it that the plaintiff had a right of action. The whole of the old record is not before this court.

The judgment is affirmed.

CUMMINGS v. BRADFORD.

SAME v. BRADFORD.

(Filed May 11, 1893—Not to be reported.)

1. Right of subcontractor against contractor—A contractor for the construction of certain sections of a railroad sublet the construction of some of those sections, and after collecting the amount due him for the work according to measurements and estimates of the trustees of the railroad company, and paying to the subcontractors what their work amounted to according to the same measurements and estimates, sued the trustees for an additional

amount, alleged to be due on account of mistake in the estimates of the engineers of the trustees. That litigation resulted in judgment for plaintiff for a much smaller amount than that sued for. Thereafter these actions were brought by the subcontractors against the contractors to recover an additional amount alleged to be due them according to the estimates of an engineer other than the engineer of the trustees. Held—That plaintiffs are entitled to recover only their pro rata part of the additional amount recovered by the contractor in his action against the trustees, after deducting costs and attorneys fees paid by him in that litigation, as their claim, upon any other basis, is barred by limitation.

2. Same—Interest—The defendant having by mistake paid plaintiffs more than the amount due them according to the measurements and estimates of the engineers of the trustees, he is entitled to interest on the amount thus overpaid them, they being allowed interest on the amounts adjudged in their favor.

O'Hara & Bryan for appellant.

Leslie T. Applegate for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

These two cases, though not consolidated, will be considered and determined together, as was done by the lower court.

In 1874 E. Cummings made a written contract with trustees of the Cincinnati Southern Railroad, by which he agreed for stipulated prices to construct grading and masonry of twelve miles or sections of the road in this State.

Afterward he sublet construction of three of the twelve sections, 103, 107 and 108, to T. J. Bradford and H. N. Bradford, though the latter is sole plaintiff, and, by purchase, owner of the demand against Cummings sued for in the first mentioned of the two actions.

About the same time he sublet to Russell Bradford, plaintiff in the other action, section 102.

Both those contracts were verbal, but t seems to be conceded that each of the sub-contractors was to do the work in conformity with contract made by Cummings with the trustees, receiving therefor prices he had agreed to do the work for, from which, however, was to be deducted 10 per cent., payable to him out of the final estimate of 20 per cent., the trustees had a right to retain until completion of the work according to their contract with Cummings.

The twelve sections, including those sublet, were completed in the latter part of 1876, and the amount due, according to measurements and estimates of engineers of the trustees, was paid to Cummings and by him was paid to the subcontractors what their work amounted to according to the same measurement and estimates, less the 10 per cent. he was entitled to reserve.

But Cummings, not being satisfied with the amount paid, instituted an action against the trustees to recover about $77,226.02, additional amount alleged to be due for work on the twelve sections on account of improper measurements and classifications and extra work. That litigation continued for several years, and in 1881 judgment was rendered in favor of Cummings for the causes mentioned in the sum of $22.998 and interest, which judgment was, on appeal to this court, affirmed December 6, 1884.

These two actions were brought on the same day, August 19, 1885, and in each a judgment is asked against Cummings for difference between amount estimated by engineers of the trus-

tees to be due on account of work done by plaintiffs respectively and the amounts subsequently ascertained by another engineer to be due. But the lower court rendered judgment according to facts found and upon basis of settlement adopted by the master commissioner in favor of H. N. Bradford for $1,161.59, and in favor of Russell Bradford for $1,047.59.

The commissioner states the whole amount of work of the twelve sections, according to estimates of the engineers of the trustees, at $580,303.12, and also the estimate for each section. He also states the whole amount claimed and sued for by Cummings at $657,529.31, and also amount claimed for each of the twelve sections, making difference between the two aggregate sums $77,226.02, for which he sued.

But as the amount recovered by him was only $22,998, and it was not stated in the judgment wherein or in relation to which one of the twelve sections the mistakes and miscalculation of the engineer of the trusetees had been made, the master commissioner proceeded to ascertain the pro rata sum each of the plaintiffs was entitlted to out of $22,998. But before doing so he deducted therefrom 10 per cent., which Cummings was entitled to under his contract with plaintiffs, and also costs and attorneys' fees paid by him in litigation with the trustees. And it seems to us that is the only feasible or just mode of determining the amount plaintiffs are entitled to recover if any thing; for if they have the right to recover of Cummings the actual amount their work amounts to, according to estimates of engineers other than those of the trustees, and without regard to what was adjudged in the suit of Cummins against the trustees to be the whole amount due, then the cause of each of their actions accrued more than five years before they were commenced and the plea of limitation must prevail. And, in fact, the only way they can or attempt to avoid that plea is by assuming and trying to show there was an agreement or understanding they would await and abide by that litigation. We think there is no question of the justice of the settlement made and reported by the master commissioner in this case, for all they could in any event now recover is their ratable share of what Cummings had recovered from the trustees, and they would not have gotten even that except for the litigation of Cummings with the trustees.

But it appears that Cummings overpaid T. J. and H. N. Bradford and there was a balance due him on the settlement they made in 1876 upon the basis of estimates by engineers of the trustees. And as interest was counted by the lower court in favor of H. N. Bradford upon what was due him of the judgment of Cummings against the trustees, it seems to us Cummings ought to be allowed interest on what was overpaid in 1876. The court also erred in failing to allow Cummings full and unconditional credit for amount of the debt he had paid to White & Co. for H. N. Bradford. Wherefore, the judgment in case of Cummings v. H. N. Bradford is reversed on appeal and cause remanded for further proceedings consistent with this opinion, but affirmed on cross appeal.

Judgment in the case of Cummings v. Russell Bradford is affirmed on appeal and cross appeal.

SUPERIOR COURT ABSTRACTS.

KIEL v. KLINE.

Filed May 17, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. Quantum meruit—Elections—The plaintiff, in an action to recover the contract price for work done, having filed an amended petition seeking to recover upon a quantum meruit, was properly required to elect which action he would prosecute, and is concluded by his election, though made under protest, to rely upon the claim for a quantum meruit, if indeed the amendment itself did not operate as an abandonment of the case set out in the petition.

2. Same—Where a party undertakes to build a house in accordance with certain plans and specifications, if the work has been done, but defectively, he may recover on a quantum meruit.

3. Departure of contractor from specifications—If one desiring to have a house built contracts for particular materials, and for the doing of the work in accordance with a certain plan, the contractor has no right to substitute other materials or to change the plan, even though he may conceive that the substituted materials and the altered plan are as good as those provided for in the contract; and where the contractor has made such change, in arriving at the difference in the value of the house as built and as it should have been built under the contract, the cost of taking out all the work and material which was not done according to contract and having it done over should be ascertained.

F. Hagan and Kohn, Baird & Speckert for appellant; Matt O'Doherty for appellee.

WARNER v. HALL'S ASS'EE.

Filed May 10, 1893. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, reversing.

Assignment of note to surety—Burden of proof—In this action upon a note in which the plaintiff was surety, and which he alleges was paid off by him after maturity, and then and there assigned to him by the payees, the defendants having denied that the payees assigned the note to plaintiff at the time alleged, and averred that it was indorsed by the payees to a bank before maturity, and that more than five years after it was paid off the pretended assignment was written over the names of the payees wrongfully and without right, the burden was upon plaintiff to show that the assignment was made when it purports to have been made, and failing to do this he was not entitled to judgment.

T. N. Lindsey, Chas. A. Hardin and James N. Sanders for appellant; Bell & Bell and J. W. S. Clements for appellee.

GILLENWATERS v. CULTON, &c.

Filed May 10, 1893. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Reversible errors—As the error, if any, in placing the burden on defendant in this action for slander, and requiring him to first introduce his evidence, is not made a ground for new trial, there can be no reversal on that ground.

2. Same—Even if it was competent for defendant to prove his character or reputation, the refusal of the court to allow him to do so is not a reversible error, there being nothing to show what answers the witnesses would have made to the questions as to that matter.

J. S. Hays, H. C. Faulkner and Golden & Davis for appellant; J. D. Black for appellees.

WALLS v. ROBB.

Field May 10, 1893. Appeal from Jessamine Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Assault and battery—Burden of proof—In this action for assault and battery, by shooting, etc., the answer having admitted the shooting, but pleaded son assault demesne, the burden was upon defendant, and the court erred in giving the conclusion of the argument to plaintiff.

2. A witness may be impeached by general evidence affecting his credit for veracity, but the examination must be confined to his general reputation.

Phil H. Thompson, John H. Welch and Bronaugh & Bronaugh for appellant; George Denny for appellee.

McKAY v. LANCASTER, &c.

Filed May 17, 1893. Appeal from Bullitt Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. Attorney and client—Construction of contract—Where the defendant in an action entered into a written contract with an attorney, whereby the attorney for an agreed consideration undertook to "look after his interests" and "defend for him" in said suit, and upon the filing of an amended petition seeking additional relief, the attorney defended it without notifying him that he would make an additional charge, and after the suit was finally disposed of, made out his claim against the defendant, based upon the original contract, and upon the payment to him of the amount thus claimed acknowledged receipt "in full of my fees on within contract," concealing all the while his intention to charge another fee, he was thereby estopped to make any further charge.

2. Same—The contract covered all the services rendered by the attorney, as he could not, after the filing of the amended petition, properly look after the defendant's interests, as he had undertaken to do, without defending him against the course of action therein set up; and if he felt that he could not do this for the fee agreed upon, it was his duty, then and there, to notify his client of this fact.

3. Same—Mistake—The rule which requires that courts shall scrutinize closely all dealings between attorney and client was intended for the protection of the client, and does not apply where the attorney is seeking relief on the ground of mistake in a contract with the client, the terms of which were stipulated by himself, and which he, with his own hand, reduced to writing.

Charles Carroll and Fairleigh & Straus for appellant; Knott & Edelen, T. L. Burnett, Lane & Burnett and Rives & Spalding for appellee.

RICHARDSON v. PAYNE.

Filed May 17, 1893. Appeal from Meade Circuit Court. Opinion of the court by Judge Barbour, affirming.

Defect in pleading cured—Although the petition was bad and the demurrer to it should have been sustained, the court will not on that account reverse the judgment in favor of plaintiff, as the answer cured the defects and made an issue.

Wathen & Richardson for appellant; Hamilton & C. C. Fairleigh for appellee.

TYE v. SILER.

Filed May 17, 1893. Appeal from Whitley Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Judgment sustained by evidence—As this appeal presents a simple question of fact, and the finding of the chancellor is not against the evidence, his judgment must be affirmed.

Richardson, Tye & Sharp for appellant; Wm. Lindsay and Edward W. Hines for appellee.

TRUSTEES COMMON SCHOOL DISTRICT v. LOUISVILLE & NASHVILLE R. R. CO.

Filed May 17, 1893. Appeal from Laurel Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Taxation of railroads for school purposes—To authorize the trustees of a common school district to recover of a railroad company taxes alleged to be due from it on account of the assessment of its property in the district for school purposes, they must allege in their petition that the county superintendent has furnished the defendant with a boundary of the district, it not being sufficient to allege merely that the boundary has been furnished defendant, as it is entitled to have the information furnished it officially by the superintendent, and the petition must so show; and the petition must also allege that the auditor has notified the clerk of the county court of the amount assessed for taxation against defendant, and has notified the defendant of the amount of its assessment.

R. L. Ewell, W. H. Holt, W. J. Hendrick and R. Reid Rogers for appellants; Alcorn & Craft for appellee.

CHESAPEAKE & OHIO R. R. CO. v. COWHERD.

Filed May 17, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Suit against foreign corporation for injury done in another State—That a citizen of this State who is injured in another State, by the negligence of a foreign corporation, may sue such corporation in the courts of this State, is not an open question.

2. Same—Venue—Section 73 of the Civil Code fixes the county in which an action against a common carrier for an injury to a passenger must be brought; and this statute applies even where a carrier is a nonresident and the injury is received in another State. And although by reason of the nonexistence of any of the localizing facts, there may be no forum in which the injured party can assert his right, the courts are powerless to supply the omission.

3. Same—Transitory actions—An action for such an injury is transitory, and the defendant can be made to answer in any county in which process is served, in the absence of a statute localizing the action. But where such a statute exists, the fact that none of the conditions exist in a particular case which would authorize the action to be brought in any of the counties fixed by the statute, does not make the action transitory.

4. Same—Even if section 73 of the Civil Code does not localize all actions against carriers for injuries received by passengers, an action against a foreign railroad corporation for an injury received in another State must, under section 1 of chapter 48, General Statutes, be brought in a county through which the road runs.

Judge Brent, in a separate opinion, holds that an action against a nonresident common carrier for an injury to a passenger in another State is transitory, and the defendant may be required to answer in any county in this State in which process is served, but that service of process in this case upon a local ticket agent for several roads, including defendant, and who had no other duty or authority in connection with its business, was not a sufficient service.

Helm & Bruce for appellant; Fairleigh & Straus for appellee.

The Kentucky Law Reporter

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

VOL. 15. SEPTEMBER 15, 1893. No. 6

KENTUCKY COURT OF APPEALS.

VOORHEIS, MILLER & RUPLE v. EITING.

(Filed April 11, 1893—Not to be reported)

1. A receipt for the purchase price of land is a sufficient written memorandum of the contract to comply with the statute of frauds, provided it contains such a description of the land as will enable the chancellor to know what particular land has been sold. But a receipt for a certain amount "on my seventh part interest in real estate, as deed will show," contains no description of the land, and is not such a written memorandum as is required by the statute.

2. A deed to land executed pursuant to a previous verbal contract for the sale of the land does not relate back to the date of the contract and overreach an attachment lien created upon the land between the date of the contract and the date of the deed.

3. Lien of purchaser under verbal contract—Attachment—Where possession has not been taken under a verbal purchase of land, the lien of the purchaser for the purchase price paid by him is subordinate to an attachment lien acquired by a creditor without notice of the verbal contract for the sale of the land.

4. Where there is a failure to properly sign a pleading, the defect will be regarded as waived if not taken advantage of by rule.

5. It is not essential to the validity of an affidavit that the name of the affiant should appear in the body of the affidavit. It is sufficient that he describes himself as "the affiant."

6. It is no objection to an attachment bond that it is made payable to the defendants jointly, as any one of the defendants that is damaged by the wrongful act of obtaining the attachment may sue thereon. Nor is it material that the bond is executed to defendants as a firm, as a bond thus taken is a protection to each defendant in his individual capacity.

Brown, Humphrey & Davie and W. B. Dixon for appellants.

Helm & Bruce for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Bennett.

On the 11th day of July, 1889, the appellants brought suit against Lange, Hilderhaus & Co. in the Louisville Chancery Court, and obtained an attachment against their property. The attachment came to the hands of the marshal at 11:30 o'clock a. m. At 12 o'clock m. the same day Theodore Droppelman, one of the members of said firm, and who was included in said suit as defendant, and against whom the attachment was obtained, made and acknowledged and lodged a deed for record to the appellee, Eiting, conveying to him the land in controversy.

It is not contended that there was any written memorandum of the sale of said land to the appellee prior to the time that the attachment came to the hands of the marshal, which created a lien upon said property, unless the following writing be deemed sufficient to comply with the statute of frauds and perjuries relative to the sale of land:

"Decature, Ind., July 6, 1889.

"Received of John Eiting $100 on a bargain between me and him on my seventh part interest in real estate, as deed will show."

It will be seen that the receipt contains no description of the land whatever—not even its location.

This court, in the case of Jones v. Tye, decided October, 1892 (14 Ky. Law Rep., 448), that if a receipt acknowedging the purchase money for the sale of land contained such a description of it as to enable the chancellor to know what particular land has been sold, it will be a sufficient written memorandum to comply with the statute of frauds and perjuries. (Tyler v. Onzts, &c., 14 Ky. Law Rep., 321, and Camp v. Moreman, 84 Ky., 640.)

But unless the receipr contained such description it was not a sufficient memorandum for such purpose, and the sale would be regarded as verbal, which would not pass to the purchaser any title, either legal or equitable. The receipt quoted contains no description whatever of the land in controversy—not even its location. It is certainly not sufficient to comply with the statute of frauds and perjuries. Therefore, it passed to the appellee no title whatever. Now, it is clear that when the attachment came to the marshal's hands a lien was thereby created on such property of the defendants as was subject to be seized under it, and there is no doubt that the property in controversy was subject to such seizure at the time the attachment came to the marshal's hands, consequently, a lien was thereby created on it.

But appellee contends that, although the verbal contract was not enforcible so long as it remained in that condition, yet as soon as a deed was made and delivered to the vendee pursuant to the verbal contract, such deed related back to the date of the verbal contract and defeated the lien that was created by the attachment coming to the hands of the marshal.

But it seems to us that the case of White, &c. v. O'Bannon, &c., 9 Ky. Law Rep., 334; 86 Ky., 100, is direct authority against the contention of the appellee. It is there said that "a verbal sale of land invests the purchaser with no legal or equitable title. * * * And attachments having been levied on the land before James White had conveyed his interest therein to John W. White by any writing, a lien was thereby created on said interest, which lien, the subsequent written conveyance by James H. White to John W. White, although made pursuant to the prior verbal agreement of division, which, antedated, the levy of the attachments could not overreach." The case of Jones v. Allen & Co., 10 Ky. Law Rep., 962; 88 Ky., 381, decides the same thing.

It will be observed that no possession was taken under the verbal purchase supra prior to the creation of the attachment lien. And if we concede that the appellee was a bona fide purchaser of said land, and entitled to a lien upon it, as between him and his vendor for the purchase money that he had paid thereon, the question arises, is said lien superior to that of the attaching creditors? The answer is that, as there was no possession, there was nothing to put the attaching creditors upon inquiry as to such purchase and lien for the payment of the purchase money, and as the creditor had acquired a legal lien upon said property as security for the payment of his debt without notice of the purchaser's equitable lien growing out of the transaction, such lien is superior to that of the purchaser's.

Section 115 of the Civil Code provides that pleadings must be signed by the parties that file them or by their attorneys. If a pleading is not thus signed, the proper way to reach the omission is by rule, and then, if the rule is not complied with, to reject the pleading. In this case there was no rule upon the plaintiffs, hence the question can not be considered.

It is contended that the affidavit is defective, because the statement that the appellant believes does not inform us who the appellant is, but it seems to us that such expression is sufficient. It is also thought that the bond made payable to the defendants altogether is sufficient, because there is no doubt that any of the defendants that is damaged by the wrongful act of obtaining the attachment may sue thereon. Also the fact that the defendants are described as a firm is merely in case of attachment bond descriptive, and the bond thus taken is a protection to each defendant in his individual capacity rendered against the members for debt, and has the effect of a personal judgment against each.

The judgment is reversed and cause remanded to enforce the attachment lien on said land, and that the appellees purchase is subject to same.

MITCHELL, &c. v. CAMPBELL, &c.

(Filed May 13, 1893.)

Construction of devise—Defeasible fee—A devise of an estate generally or indefinitely, with a power of disposition, carries a fee. But in construing the instrument in cases where the party has a power and also an interest, the intention is the great object of inquiry.

A testator, after devising his estate to an unmarried sister to enable her to take care of the children of a deceased sister, provided that if the sister should be alive when the children mentioned were "raised and old enough to no longer require care of guardian and support," she should "continue the ownership of the estate and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she dies without leaving heirs of her own body, then my will is that my brothers are to dispose of the estate for the benefit of my heirs at law." Held—That the sister took the fee defeasible upon the contingency of her dying without children, and, therefore, as she died leaving children, one to whom she conveyed the fee became invested upon her death with the absolute title.

J. W. S. Clements for appellants.

W. E. Selecman and Thos. W. Simms for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Lewis.

A. E. Groatley, having conveyed her property to appellee Campbell in trust for benefit of creditors, he brought this action for settlement of his transactions as trustee and for sale of her property, including a tract of $185 acres now in controversy, for payment of debts; and at the March term, 1891 of the court a judgment was rendered for sale as prayed for in the petition.

But at the September term, 1892, appellants, R. W. Mitchell, A. R. Mitchell and Hugh T. Mitchell, were, on their motion, made parties defendants, having filed a petition which was treated as an answer and cross petition.

They state in substance that their mother, Maria Jane Mitchell, formerly Walker, died about eight years previously, leaving them her only children; that though she and her husband, father of defendants, in 1886, sold and conveyed absolutely the 185 acres in question to R. P. Groatley, under whom A. E. Groatley claims, she, their mother, had only a life estate, remainder in fee being vested in them by the will of her brother and their uncle, Robert L. Walker, from whom the land was derived. Whether they have any interest in the land must of course depend upon proper construction of that will, dated in 1851 and admitted to record in 1854.

Except ten or twelve acres of land the testator stated he had promised to let his brother, Murry Walker, have, and desired conveyed to him all his estate of every kind, was in express terms devised to his mother and sister, Maria Jane, to be held as a means of support for themselves, and to enable them to care for the children of his sister, Emily Plat; but it was provided that in case Maria Jane died before those children were raised, he desired his brothers, Murry and John, one or both, to take charge of the children and property in conjunction with his mother, if living, and carry out his wish in regard to them and to ultimately dispose of his estate for benefit of his heirs; though his mother was not, in any event, to be disturbed in her possession and ownership of the property.

Provision, in case of his sister, Maria Jane, being alive when the children mentioned were "raised and old enough to no longer require care of guardians and support," is in the following language: "But if my sister, Maria Jane, is living, she is to continue the ownership of the estate, and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she dies without leaving heirs of her own body, then my will is that brothers John and Murry Walker are to dispose of the estate for the benefit of my heirs at law."

Whether Maria Jane Walker took under the claim quoted the fee or an estate for life, with power of disposition, is the main and decisive question.

It is a well established rule that a devise of an estate generally or indefinitely, with a power of disposition, carries a fee; but, as said in Kents' Commentaries, volume 4, page 335, "in construing the instrument, in cases where the party has a power and also an interest, the intention is the great object of inquiry."

We do not think there is much difficulty in determining what was the testators' plan for disposing of his estate, for it was evidently well considered and matured. The term "ownership," used to describe the quantity of estate he intended his sister, Maria Jane, to have, according to its common signification, comprehends a fee, and can not be properly restricted so as to mean a mere life estate; and the proviso of her leaving heirs of her

own body, who were to take the estate, was obviously intended to be operative only in case she died intestate, and not to limit the estate already given to her. For their absolute right to take it can not be at all reconciled with her unqualified power to do as she pleased with it at her death. Moreover, if the testator had intended to restrict the devise to a life estate, it is a reasonable supposition he would have used the word children instead of heirs to indicate who were, at all events, to take at her death.

When the will was written Maria Jane was unmarried, and it is very plain he intended she should have the fee defeasible, upon the contingency of her dying without children, and passing to his heirs, who, in that case, would have been her right heirs.

Then, as she acquired a fee, power existed to dispose of the land in question by either deed or will, subject, however, to defeat the title conveyed upon the contingency mentioned, and the words "at her death" were evidently not intended and did not have effect to qualify that power, but were used rather to negative the idea of a life estate.

As, therefore, the contingency upon which alone the fee, with which Maria Jane was invested, was to be defeated did not happen, Groatley became invested, in virtue of the deed of herself and husband, Mitchell, with absolute title to the land in question.

Judgment affirmed.

PERSIFULL, &c. v. BOREING.

(Filed May 13, 1893—Not to be reported.)

1. Statute of frauds—A parol agreement by one person to buy of another a tract of land when the latter should obtain a patent therefor, and pay as purchase price a certain sum, is within the statute of frauds, and, therefore, not enforcible by the vendor.

2. Amended pleading—An amended answer not being tendered until the second term after the action was commenced, nor until after the case was submitted, and no reason for the delay being given, the court did not abuse a sound discretion in permitting it to be filed.

Weller & Hays for appellants.

W. H. Holt and A. W. Cook for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Lewis.

The right of appellee to recover amount of the note for purchase price of land sued on, and to enforce an exisitng lien upon the land sold by him to appellants, is not controverted in their answer, but they plead and rely as a set-off alleged indebtedness of appellee to them, created under the following circumstances:

They were, as alleged, employed by him to run out, in February and March, 1890, land he owned in Bell county, and while doing so, as surveyors, found considerable vacant land, of which there was a tract of 36 acres that was entirely surrounded by appellee's lands; that he agreed, if they would allow him to have all said vacant land except the tract of 36 acres patented to him, he would take the 36 acres and pay them $396, or $11 per acre for same, which was subsequently patented to them; and that they did allow appellee to procure patents in his own name

for all said vacant lands, except the 36 acres, in consideration he would take the 36 acres and pay them $396 therefor.

They stated in their answer they had duly executed and acknowledged ready for delivery a warranty deed for the 36 acres, and appellee having refused to accept it and pay the agreed price therefor, they tendered it to him in court.

The relief prayed for is judgment allowing $396 as set-off against the note sued on, or, if that could not be done, that he be required to convey to them the vacanat land they had found and allowed appellee to have patented to himself.

May 21, 1891, a general demurrer to the answer previously filed was overruled, but December 22, 1891, plaintiff withdrew his reply, and on his motion the case was submitted, and thereafter a motion of defendants to set aside order of submission and file an amended answer was overruled, and judgment rendered for amount of the note sued on.

The amended answer differed from the original in that it was stated that plaintiff agreed if defendants would locate and show the county surveyor five tracts of vacant land, aggregating 175 acres, and direct the survey of four of them for plaintiff, that he might have them patented in his name, and would direct the fifth tract, of 36 acres, patented to them, he (plaintiff) would pay them $396, all of which was done as stated in the original answer.

The cause of set-off, as stated in the original answer, was an alleged parol agreement by plaintiff to purchase of defendants the tract of 36 acres when they obtained a patent therefor, and pay as purchase price thereof $396.

It is true it is alleged as part of the agreement that they were to allow plaintiff to have patented to himself all the vacant land except the 36 acres; but it is not stated in the original answer how many tracts, nor what quantity of land they showed to plaintiff and allowed him to obtain patents for in his own name; nor is it therein alleged, in terms or in substance, that there was any other consideration for the $396, agreed by plaintiff to be paid, except the 36 acres. So that the contract, as stated in the original answer, is, we think, within section 1, chapter 22, General Statutes, which provides that no action shall be brought to charge any person upon any contract for the sale of real estate unless it be in writing; and, consequently, no right to either recover in original action or maintain as a set-off the alleged purchase price of the 36 acres existed in virtue of that contract.

The amended answer not being tendered until the second term after the action was commenced, nor until after the case was submitted, and no reason for the delay in offering to file it having been given, we think the court did not abuse a sound discretion in refusing to permit it filed.

Judgment affirmed.

PRYOR, &c. v. HARDWICK, &c.

(Filed May 13, 1893—Not to be reported.)

1. Tax sales—The burden is also upon a party claiming title to land under a sale and conveyance for taxes to show that all the steps required by the statute were substantially taken by the officer making the sale; and neither

his certificate nor report of sale, nor deed made to the purchaser, can be relied on to show the facts.

As it does not appear in the record of this case, except from the sheriff's report, that the land sold for taxes had been previous to the sale assessed, or what amount of taxes, if any, were due and unpaid when the land was sold, the purchaser acquired no title.

2. Same – Where a sheriff, in making a sale of land for taxes, exposes as a whole two or more tracts of land of the taxpayer, when the sale of one of them might be sufficient to pay amount of taxes due, the sale passes no title.

Wood & Day and Ben W. Hall for appellants.

Riddell & Son for appellees.

Appeal from Powell Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellees brought this action alleging themselves to be owners and entitled to possession of 600 or more acres of land, described in the petition by metes and bounds, upon a portion of which appellants, claiming title, had trespassed by cutting and carrying away large quantities of timber. The relief prayed for was recovery or value of timber and an attachment, which was granted, and followed by sale, under order of court, of timber and lumber levied on, and the final judgment was for $—, to be paid out of sale bonds, a lien thereon being given for that purpose.

Both parties claim under John C. Mason, who is conceded to have once been the owner of the land, appellees in virtue of sale for taxes, and appellants under a commissioner's deed, made under judgment in two actions on notes given by an alleged purchaser of the land from Mason. But we need not determine as to validity of appellants title until that of appellees has been considered. Sheriff's deed to appellees was made November 8, 1887, and the only authority for it is what purports to be a report of a sale made for taxes in 1876. In that report it is stated by the sheriff then acting that, having advertised according to law the following-described property, to-wit, 1,000 acres of land, or the Mason claim in Powell county, assessed in the name of John C. Mason's heirs, in districts Nos. 1, 2 and 3 in said county, I did, February 7, 1876, offer the same for State taxes for the years 1873, '74, '75, and there being no other bidder, J. W. Williams and others (naming them) became purchasers thereof at the sum of $39.50, amount of the taxes and sheriff's commission due thereon. The statute at that time required, among other things, the sheriff to give a description of the land sold as fully as he is able to do; and, of course, where there is more than one tract of land belonging to the defaulting taxpayer, to so state. But, according to the report in this case, there was sold and of course previously advertised for sale, if advertised at all, land described in general terms as 1,000 acres of land of the Mason claim, the whole of which was sold for only the sum of $39.50. Yet, in the deed of 1887, based upon that report, three distinct tracts of land, described by metes and bounds, and containing about 1,100 acres, were conveyed to appellees and now claimed by them.

In fact there is evidence in this record tending to show the quantity actually conveyed and now claimed under that sale is near 1,200 acres. For a sheriff to expose as a whole two or more tracts of land of a taxpayer, where the sale of one of them might be sufficient to pay amount of taxes due, and thereafter ascertain

and convey them all to the purchaser, describing each by metes and bounds, shows a disregard of plain requirements of the statute and consequent injustice to the taxpayer not to be tolerated. For it is too plain for discussion the sheriff making the sale did not give a description of the land sold as fully as he was able to do, and by his failure, if sanctioned, the taxpayer will lose and appellees gain these tracts of land, containing 1,100 acres and probably 2,000, where sale of one tract and a tenth or twentieth of the quantity sold would have sufficed to pay the taxes.

It is well settled by this court that the burden is always upon a party claiming title to land under a sale and conveyance for taxes, to show that all the steps required by the statute were substantially taken by the officer making the sale; and further, that neither his certificate nor report of sale, nor deed made to the purchaser, can be relied on to show the facts.

It does not appear in the record of this case, except from the sheriff's report, that the land had been, previous to the sale, assessed, or what amount of taxes, if any, were due and unpaid when the land was sold by him. On the contrary there is evidence that the person under whom appellants claim had actually listed a portion of the land sold by the sheriff in 1876 and paid taxes thereon for the three years mentioned and previously, so that taxes had already been paid on some part of the land, if not all, when sold to appellees. In our opinion appellees acquired no title in virtue of their purchase in 1876 or deed of 1887, and, consequently, have no right of action against appellants for the cause stated in this petition.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

KENNEDY v. McELROY, &c.

(Filed May 16, 1893—Not to be reported.)

1. Validity of patent to trustees of academy—Patents for land having been issued in 1811 to the trustees of an academy in virtue of an act of the general assembly, passed in 1798, authorizing the appropriation of certain vacant lands for the benefit of academies, the title evidenced by those patents can not now be called in question upon the ground that the land covered by them was not a part of the territory which was subject to appropriation under the act of 1798.

2. Same—Reversion to Commonwealth—Validity of act authorizing county court to dispose of land—The title thus granted having subsequently reverted to the Commonwealth as matter of law, by the object of the trust becoming extinct, an act of the legislature authorizing the county court to dispose of the land for the benefit of the common schools of the county was not unconstitutional.

3. Validity of conveyance by county judge alone—Failure of county court to assert title—Even if the county judge alone, without the concurrence of the justices of the peace, had no power under that act to pass the title, yet as the plaintiff here is an innocent purchaser, and the county court, although made a party and duly summoned, failed to set up any claim to the land, the court should have adjudged the plaintiff's title good, although she claims under one who derived his title from the county court, composed of the county judge alone, the deed from the county court having been executed more than thirty years before this action was instituted.

H. C. Baker for appellant.

Montgomery & Jones and James Garnett for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action in equity for judgment that she is owner and entitled to the possession of the land in controversy, parts of which, she alleges, appellees, eight in number, and insolvent, have severally and unlawfully entered upon and cut and carried away timber, and an injunction was asked for.

Her claim of title is based upon patents issued July, 1811, to trustees of Lewis Academy, in Lewis county, in virtue of an act of the general assembly. She states that by an act of 1825 the trustees were authorized to sell said lands. But having failed to do so, and there being, in 1851, no living trustees, and said academy being dissolved, an act was then passed repealing the act of 1825 and empowering the county court of Lewis county to sell and dispose of the lands by themselves or an agent; that at the June term, 1858, of that court it, as shown by an order recorded, contracted to sell and did sell to P. B. Rippe all said lands, and afterwards, in July, 1858, the court executed and delivered a power of attorney to Rippe, authorizing him to sell and convey the lands; that Rippe entered thereon and controlled the lands until 1869, when he sold and conveyed the same to J. Mitchell, who, in 1879, sold and conveyed to C. J. Walton, and from the latter appellant purchased and obtained a deed.

A demurrer was sustained to the petition and the action dismissed, but upon appeal to this court the judgment was, October 3, 1891, reversed.

This, the second appeal, is from a judgment on the merits, again dismissing the action. Upon return of the cause the defendants, appellees, filed an answer, and we will proceed to consider the issues of fact made thereby and the rights of parties applicable to the state of case presented.

1. It is denied that the trustees of Lewis Academy were entitled to appropriate and receive patents for land in question, because the act of 1798 prescribed the territory south of Cumberland river, when only vacant land was subject to appropriation for benefit of academies. Without inquiring as to scope and effect of that act, it seems to us the patents actually issued to the trustees of Lewis Academy in 1811 afford evidence of their title to the land in controversy that can not now be called in question. Besides, the act of 1825 authorized them to sell and pass title to the land, and the act of 1851 authorized the Lewis County Court to sell the same lands and apply the proceed to common schools of that county.

2. But it is contended the act of 1851 is unconstitutional.

There is evidence satisfactorily showing that at that time there was no acting or organized body of trustees of the Lewis County Academy, and that in fact such institution no longer existed. As decided by this court on the former appeal, the land having been originally granted to persons named as trustees for a certain purpose, when the object of the trust became extinct, the title reverted to the Commonwealth as matter of law. And such being the case, we are not able to perceive how the act of 1851, the object and effect of which was to invest the county court of Lewis county with power to dispose of the land for benefit of common schools of that county, was any less valid and effectual than was the original act under which the patents were issued, or the act of 1825, under which power was directly given to the trustees to sell the land for benefit of an academy in the same county.

In our opinion the act of 1851 did fully empower the county to sell for the purpose mentioned and to pass to the purchaser a good title.

3. It is, however, contended that only a county court composed of justices of the peace acting with the county judge, and not the latter alone, had power under the act of 1851 to pass the title to Rippe. The order as set out in the petition purports to have been made by the county court of Lewis county, but it does not fully appear how the court was organized. But we will consider the case as if the county judge alone caused that order to be made, and also without concurrence of the justices of the peace executed the power of attorney to Rippe.

Appellant occupies the attitude of an innocent purchaser under Rippe, who had, more than twenty years prior to commencement of this action, conveyed to Mitchell, in pursuance of a deed and power of attorney, executed to him by the county court of Lewis more than thirty years before that time. It seems to us, therefore, that it is competent and in fact the duty of the chancellor, having acquired jurisdiction to adjudge appellant's title good, inasmuch as the Lewis County Court, though made a party and duly summoned, fails to answer or set up claim to the land. Certainly her title ought to prevail against those of the appellees, whose sole claim to the land is based on patents issued within four or five years before the action was commenced, and are void and of no effect.

In our opinion appellant has shown herself possessed of title and entitled to the relief prayed for against all the appellees, except those who have held actual adverse possesion for fifteen years before institution of the action.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE RAILROAD CO. v. WALLINGFORD.

(Filed May 16, 1893—Not to be reported.)

Railroads—Injury to switchman in coupling cars—In this action against a railroad company to recover damages for injuries received by plaintiff while coupling cars in the discharge of his duty as switchman, the evidence was sufficient to authorize a verdict for plaintiff, and the instructions were as favorable to defendant as it was entitled to ask.

Geo. Washington and Jas. C. Wright for appellant.

John S. Ducker for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee, while in the service of the appellant, as switchman on a construction train, and while adjusting a link and pin, in order to make a coupling, got his arm caught between the bumpers and mashed. The result was that it became necessary to amputate it. He brings this suit to recover damages for the injury, alleging that it was caused by the gross negligence of the foreman. The defense is a denial of the negligence and contributory negligence. The jury were authorized to believe that the train of cars was moved back until it struck the standing car, without waiting for a signal to back from the appellee, which was negligence.

The lower court put the burden of proof on the appellee to es-

tablish gross negligence. It made the appellee's right to recover damages for the injury depend on the establishment of gross neglect. It also repuired the jury to find for the appellant, if injury to the appellee was brought on by his contributory negligence. The instructions were as favorable to the appellant as it was entitled to. We can not say that the verdict was influenced by passion or prejudice.

The judgment is affirmed.

MULLINS, &c. v. CONGER.

(Filed May 16, 1893—Not to be reported.)

1. Adverse possession—In this action to recover land in which the defendants pleaded in bar of the recovery an adverse possession of fifteen years as the evidence shows that the possession of defendants was amicable until within ten years before this action was instituted, the plaintiffs are entitled to recover.

2. Rents—As plaintiffs, who are remaindermen, would not, without the assent of their father, the life tenant, be entitled to the possession, and this they obtained by a deed of release only at the time this action was instituted, they are not entitled to recover rents.

Eversole & Sparks for appellants.

Wm. H. Holt and Ewell & Smith for appellee.

Appeal from Laurel Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

In 1846 Wm. Rollins was the owner of the land in controversy, or at any rate held a title bond therefor. His wife, Hannah, brought suit against him for divorce and for alimony, and sued out an attachment against his property.

By a writing, purporting to be "by order of court, December special term, 1846," signed "W. H. Randall, clerk," one Wesley Shotwell, who was a defendant to Hannah's suit, and charged with having possession of the bond named, was directed to surrender the same to the complainant, Hannah. Endorsed on this order, the sheriff of Laurel county certifies that "the bond for the title of the within named land was surrendered to the complainant, Hannah Rollins; the other within named property was found. This March 1, 1847." Signed "J. S. Randall, D. S., per W. Jackson, S. L. C."

Thereupon Hannah took possession of the land and shortly afterwards sold it to one Samuel Strausberry, assigning him the title bond indicated above. The latter took possesion of the land, and very soon put his son-in-law, John Runion, on it, who cleared up some of it and built thereon a small cabin, in which he and his family lived.

In 1855 Strausberry died, having made a will by which he devised this land to his daughter, Martha, wife of Runion. They continued to live on it from three to six years, when Martha died, leaving the appellants, save James Mullins, husband of Martha, her only children.

The husband and children continued this occupancy for a few years, the proof not disclosing accurately how long, when he sold his "improvements" by a verbal contract to one F. T. Hodges. He sold him no land. Hodges took possession under

the arrangement with Runion, and held by himself and others until 1882, when he made a quitclaim deed to Joshua Hodges, who held until 1887, when he made a similar conveyance to the appellee, Conger.

The appellants, in January, 1891, instituted this suit in equity, claiming to own the land as the only heirs at law of their mother, Martha Runion, who took it as devisee under the will of her father, Samuel Strausberry, who purchased it from Hannah Rollins, and who obtained it in the proceedings against her husband in 1847.

The appellee purchased it from Joshua Hodges, who got it from Flem (F. C.) Hodges, and he obtained possession under John Runion in about 1860.

Flem Hodges, and others under him and at his instance, held the land some twenty odd years, and his vendee and the appellee some nine years before this action was brought, and it is evident that the character of these holdings is the vital question in this case.

Runion, as has been observed, did not pretend to sell the land, but only his "impovement," and, at most, we may presume, sold to Hodges his right of possession and occupancy, which was as tenant by the curtesy.

Having entered as a subordinate of Runion, Hodges will be presumed to have continued this amicable occupancy until the contrary appears.

The original source of the title claimed by the appellant and the appellee is the same, to wit, the title of Hannah Rollins. It is true that the appellee denies the title of Strausberry, her vendee, but the proof is overwhelming that Flem Hodges, under whom appellee claims, held only under Runion, and to his son-in-law, Shotwell and others, substantially admitted the title of Strausberry's heirs.

Shotwell occupied the place two years, and explains his occupancy thus: "Old man Hodges (Flem), whose daughter I married, had bought out a little improvement of John Runion, and told me that he would give it to me, and to go up there and build on it. I built on it and cleared up right smart of the land, some ten or twelve acres; there were some improvements on it when I went there. I heard this land belonged to other parties, and went to Flem Hodges and wanted him to make me a deed to it, and he said he could not make me a deed; that it belonged to other parties; that I had a better right there than he did, having it in my possession; * * * he said it belonged to some Rollins or Strausberry heirs; don't remember now; heard him talk about it several times; that it was willed to them; * * * I sold my little improvement back to old man Hodges, and he sold it to Josh Hodges (son of Sam)."

The latter took no deed for it, or had none recorded, because the old man had none, and then sold to Joshua Hodges (Neds' son), who obtained the quitclaim of 1882 from Flem Hodges. This latter Joshua was the vedor of the appellee, Conger.

Shotwell probably occupied the land from 1878 to 1880, then Joshua Hodges (Sam's son) got it until 1882, and certain enough is it that until this time the elder Hodges had refused to convey the land, or even claim it openly, for the reason, as he stated, that it belonged to others. Emboldened by long use and occupancy, he at last made a deed of special warranty, in 1882, to Joshua Hodges.

The appellants prove by a number of witnesses that their ownership or claim under the will of their grandfather, or as heir of their mother, was known to all, even to appellee, Conger. The bar to their possession, they insist, was the life tenancy of their

father. They urge now that this tenancy has been openly denied or repudiated, first in 1882 and continuously since; that their right of action is assertable; that the statute of limitations began to run only when the holding of Flem Hodges became openly and notoriously adverse, which was in 1882.

However much we feel indisposed to disturb the finding of the lower court in cases of this kind, where the learned chancellor has special knowledge of the parties, we think he has misconstrued the nature of the holding and occupancy of the Hodges, and imposed a penalty on the appellants for their delay in taking steps to recover their lands, when they had no cause of action, at least until 1882. As long as the holding of the Hodges were friendly, and their father lived, they were not entitled to possession. Upon the repudiation of this amicable possession, which occurred openly in 1882, they could first assert their rights. Nor does the defectiveness of Strausberrys' title affect the question, obtained though it was through Hannah Rollins' erroneous or irregular purported order of court. All the parties claim through Runion, and the issue is, who has shown the superior title.

We think that the appellants are the undoubted owners of the land, and have established that fact by their proof in this case.

Without the assent of the life tenant, John Runion, they would not be entitled to the possession, and this they obtained by his release and deed early in January, 1891. They are not entitled, therefore, to recover rents.

The judgment below is reversed and cause remaded, with directions to enter a judgment in the appellant's behalf for the land in contest.

Judge Hazelrigg delivered the following response to a petition for rehearing:

Respect for the opinion of the learned attorney for the appellees—the late Chief Justice of this court—render it proper that this petition for a rehearing of his client's cause should have appropriate response.

"I wish," says the learned attorney, "to call attention to a matter which it seems to me has been, in the press of business, doubtless, overlooked, and which it seems to me requires an affirmance of the judgment, or at least a modification of the opinion of the court. The appellants sue as the heirs of Martha Runion, who, at her death, together with her husband, John Runion, was in possession of the land. He was tenant by the curtesy. It is true Runion says he did not sell the land, but he certainly sold his possession—his occupancy—his right.

"The opinion so says as I understand it. It can not be otherwise understood from the evidence than that he sold his right of tenant by the curtesy. * * * He is still alive. * * * Runion could not put Hodges out, or, what is the same, his vendee, without restoring the status quo ante. * * * The judgment should be affirmed because the appellants sue for the land. They certainly can not recover, although the sale by Runion was verabl, unless they restore to the party now holding it by virtue of the purchase from Runion what he received and the value of the permanent improvements. There is no offer to do so. They must either do so or wait until Runion' death, when their own right would become enforcible."

It certainly can not be supposed that the court overlooked the fact that Runion, the life tenant, was still alive. Distinct reference is made to that fact in the opinion. But it was said that "as long as the holding of the Hodges was friendly, and their father lived, they (the appellants) were not entitled to posses-

sion. Upon repudiation of this amicable possession, which occurred openly in 1882, they could first assert their rights."

This was upon the well known principle that when the tenant atones to another, or asserts adverse title in himself, the landlord may at once enter. This is true, because limitation begins to run against the real owner from the time of said open renunciation, and it would be singular indeed if the owner or landlord may not sue for the land upon such renunciation and yet lose it by waiting fifteen years. Our conclusions, therefore, as announced in the opinion, were not reached by reason of "the press of business," but after reasonable deliberation and in recognition of confessedly elementary propositions of law. If no special emphasis were given the announcement of those principles by way of elaboration in the opinion, it was because it was not supposed that such widespread and familiar doctrines of the law should ever be doubted.

STAMPER, &c. v. HIBBS, &c.

(Filed May 17, 1893.)

Fraudulent conveyance—Assignment by operation of law—Where a creditor assails a transfer made by his debtor upon the ground of actual fraud and obtains his attachment, he has, upon establishing the fraud, a prior lien, and other creditors coming into the action have subordinate liens, dating from the filing of their petitions. And in the absence of any pleading bringing the case within the statute against fraudulent preferences, it is error to the prejudice of the debtor to adjudge that there has been an assignment by operation of law of all his estate for the benefit of creditors.

Stone & Sudduth and Z. T. Young for appellants.

E. B. Wilhoit for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Pryor.

This judgment as to Wm. Stamper must be reversed. There is no charge of a fraudulent preference made by Wm. Stamper for the purpose of securing creditors, and, therefore, it was improper to adjudge that, in contemplation of insolvency, and with a design to prefer, he had conveyed his property.

Where constructive fraud exist, by reason of the statute, the title to the entire estate of the debtor passes, by operation of law, to his creditors; and this statute was enacted to prevent a failing debtor from giving a preference to one creditor over another; and where a preference is made all creditors share alike unless there are bona fide liens; but in case of actual fraud the creditor who assails the transfer on that ground and obtains his attachment, there being no pleading to bring the case within the act of 1856, has his prior lien when establishing the fraud, and other creditors coming into the action have subordinate liens, dating from the time of filing their petition.

It is claimed that Wm. Stamper has no interest in this controversy. He has this interest: His entire estate is made to pass to all creditors by the judgment, when there is neither pleading nor proof authorizing it.

Judgment reversed as to appellant, Wm. Stamper, and affirmed as to the other appellants.

OWENSBORO, &c., RAILROAD CO. v. BARKER.

(Filed May 18, 1893—Not to be reported.)

1. Burden of proof—In this action in which the plaintiff sued for a certain strip of land, charging an unlawful entry and occupation by defendant, and the defendant by its answer denied this and set up claim and title in itself under a deed from plaintiff, which it filed with its answer, the burden of proof was on the plaintiff. While the burden was on defendant upon an issue made by it as to a mistake in the deed filed with the answer, yet, on the whole case, the burden was on the plaintiff.

2. Appellate practice—Necessity for bill of exceptions and motion for new trial—The burden of proof being on the plaintiff, and no evidence having been introduced, the judgment is not sustained by the pleadings; and neither a bill of exceptions nor a motion for a new trial is necessary to enable this court to review the judgment based upon a verdict for plaintiff, returned in obedience to a peremptory instruction.

R. W. Slack and J. A. Dean for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

Barker, as plaintiff below, sued the defendant railroad company for a strip of land situated on the south side of his farm, commencing at Barlow's eastern line and running through his land, sixty-six feet in width, to Gillum's line, containing two acres, and upon which the company, as he alleges, have unlawfully and without right entered and constructed their roadbed. He alleges that he conveyed the right of way to the company over his lands at a different point, but not as located by the company.

The defendant company denied the unlawful entry or holding of the strip, and set up claim and title thereto in itself under a deed from the plaintiff. An issue as to a supposed mistake in the deed, respecting the survey, was made by the pleadings, and upon the calling of the cause for trial the court ruled that the burden of proof was on the defendant. Upon his declining to introduce any proof the jury was instructed to find for the plaintiff, and judgment was accordingly rendered.

The single question presented is, where was the burden of proof? Under subsection 2 of section 125 of the Civil Code, it is provided that "in an action for the recovery of land, the answer of the defendant must state whether or not he claims it or any part of it; and if he claims part of it, his answer must so describe such part that it may be identified. The making of such statement, or of such statement and description, shall not of itself throw on the defendant the burden of proving his right to the land claimed by him; but if plaintiff recover any part thereof the defendant shall pay the cost of the action."

Here the plaintiff sues for a certain strip of land, charging an unlawful entry and occupation by the defendant; the answer denies this and sets up ownership, and files the plaintiff's conveyance. We do not perceive anything in the case to take it out of the rule casting the burden on the plaintiff.

The plaintiff alleged that the roadbed had been located at a different place than that conveyed to it, and this was denied by the defendant. The burden of showing this was on plaintiff.

The description of the strip as made in the petition and that in the answer and deed filed with it are the same. They are all general descriptions. Whether there had been a survey and lines marked out when the deed was made, or whether the conveyance was so general as to admit of variation in locating the roadbed, were matters of proof.

In so far as defendant may rely on any alleged mistake in the deed filed, the burden on that issue would be on it; but on the whole case, the burden was on the plaintiff.

There is no need for either a bill of exceptions nor a motion for a new trial in this case. The burden of proof being on the plaintiff, and no evidence having been introduced, the judgment is not sustained by the pleadings.

The judgment is reversed and cause remanded, with directions to proceed according to this opinion.

KNEFFER, &c. v. COMMONWEALTH.

(Filed May 18, 1893.)

1. Disorderly house—An actual disturbance of the public peace is not indispensable to constitute the offense of keeping a disorderly house. It is enough that acts be there done contrary to law and subversive of public morals, health or safety.

2. Same—Gambling in futures—A place where persons habitually assemble to bet or wager money or property on the prospective rise and fall in the prices of stocks, bonds, grain, etc., is, in law, a common gambling house, and the person owning and controlling it is guilty of the offense of keeping a disorderly house, although there is no penal statute applicable to that particular species of gambling.

H. Marshall Buford for appellants.

W. J. Hendrick and Reid Rogers for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lewis.

Appellants were convicted of the offense of keeping a disorderly house, charged in the indictment to have been committed by them in occupying and contolling, under the firm name of G. W. Kneffer & Co., a house in the city of Lexington, where they unlawfully permitted divers persons to habitually assemble and habitually engage in betting, winning and losing money and property on the prospective rise and fall in stocks, bonds, grain and other produce, to the common nuisance and annoyance of all citizens of the Commonwealth of Kentucky, and especially those living in the neigborhood of said house and passing same.

An actual disturbance of the public peace is not indispensable to constitute the offense of keeping a disorderly house; but it is enough that acts be there done contrary to law and subversive of public morals, health or safety, and, consequently, it has been held by this court that a common gaming house is, in legal contemplation, a disorderly house. (Cheek v. Commonwealth, 2 Ky. Law Rep., 339: 79 Ky., 369.)

The first question, then, is whether the house of appellants, kept and used for the purpose and in the manner described in the indictment, is a common gaming house.

The purpose for which the house was kept and persons assembled there was, as stated in the indictment, simply to bet or wager money or property on the prospective rise and fall of stocks, bonds, grain and other produce. There is no suggestion in the indictment that the business of buying and selling, accompanied with delivery of any of the articles mentioned, as was carried on there. Consequently, as said in Smith v. Western Union Telegraph Co., 8 Ky. Law Rep., 672: 84 Ky., 664, in regard to a similar establishment, "a mere statement of the character of business done by appellant shows it to be a species of gambling, as well defined and as reprehensible as that of keeping a faro bank or a dice machine, and is, therefore, illegal and contrary to public policy."

In that case, upon the ground "appellant was engaged in a gambling enterprise, contrary to law, good morals and public policy," the telegraph company was relieved of any obligation to transmit messages as a means of carrying on his illegal business.

In Beadles, Wood & Co. v. McElrath, 8 Ky. Law Rep., 848; 85 Ky., 230, it was held that a contract, though in form one for sale and future delivery of personal property, yet entered into with no intention to deliver, but to be carried out by a mere settlement of difference between the contract price and market price on the day for delivery, is a mere wager, not enforcible.

And in Lyons v. Hodgen & Miller, 12 Ky. Law Rep., 211, it was held such contract was, in meaning of sections 1 and 2, article 1, chapter 47, General Statutes, a wager, and a party was entitled to recover back from another engaged in such transaction money lost by wagering upon future rise and fall in price of bonds, stocks, provisions or other personal property, and paid in settlement of differences between contract and market prices, where no delivery was made or intended.

There does not seem to be any penal statute applicable to that particular species of gambling; but it seems to us clearly that the place where it is habitually carried on is in law a common gambling house, and the person owning and controlling it guilty of the offense of keeping a disorderly house.

The instruction given to the jury fully and accurately states the circumstances and conditions that must exist in order to constitute the offense charged in the indictment and as there was, in our opinion, evidence to support the verdict, the judgment is affirmed.

CITY OF LOUISVILLE v. LOUISVILLE GAS CO.

(Filed May 18, 1893—Not to be reported.)

Taxes are not debts; and in an action to enforce their collection each step that is required to be taken to constitute a valid assessment and levy must be specifically pleaded.

Barnett, Noble & Barnett for appellant.

Goodloe & Roberts, John W. Barr, jr., and Humphrey & Davie for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Bennett.

The city of Louisville brought this suit to recover from the appellee taxes upon its property claimed to be due for the years 1876, '78 and '79.

Taxes are not debts. They are obligations in invitum. No person is bound to pay them unless the law in reference to their assessment and levy has been strictly complied with. And in an action to enforce their collection each step that is required to be taken to constitute a valid assessment and levy, must be specifically pleaded. (Ormsby v. City of Louisville, 2 Ky. Law Rep., 66; 79 Ky., 197; City of Louisville v. Cochran, 5 Ky. Law Rep., 833; 82 Ky., 15; Dumesnil v. City of Louisville, 4 Ky. Law Rep., 14. and Slaughter, &c. v. City of Louisivle, 12 Ky. Law Rep., 61; 89 Ky., 112.)

The petition and amended petition offered to be filed, but were rejected by the court, fail to show a valid assessment of appellee's property.

It is not alleged that the board of commissioners of taxes ever met at the time fixed by law, nor sat as required by law, nor that the day when the board of commissioners should meet was fixed by advertisement. (Slaughter v. City of Louisville, supra.) There are other omissions not necessary to be noticed. The above are sufficient. The law relating to the assessment and levy was not complied with.

The judgment is affirmed.

HUGHLETT v. LOUISVILLE & NASHVILLE RAILROAD CO.

(Filed May 18, 1893—Not to be reported.)

Railroads—Injury to passenger leaving train while in motion—Where a passenger on a railroad train was injured in leaving the train immediately upon the announcement of a station, while the train was still in motion and on the opposite side of the track from the platform, his injuries were the result of his own negligence and he can not recover of the company.

Brasher & Brasher, A. H. Clark, and W. R. Howell for appellant.

Joe McCarroll for appellee.

Appeal from Christian Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellant was injured in leaving appellee's train of cars, having both feet crushed by the wheels of the car, and claims that the injury resulted from the neglect of its employes. The appellant was the only witness testifying, and upon his testimony the court instructed the jury to find as in case of a nonsuit.

On the night of the accident, about 4:30 o'clock, the night being very dark, the appellant boarded the train by taking his position on the platform of the smoking car, as he says he had frequently done before, expecting to pay his passage, when the conductor called on him. The ticket office at the station (Kelley's) was not open, nor was it usual for this fast train to stop at the station. The distance to Hopkinsville was about seven miles, and the appellant's purpose was to get a check cashed at Hopkinsville that had been given him by the appellee for some of his stock that had been killed. The train made rapid speed to Hopkinsville, and the witness says when approaching the depot

an employe of the appellee came upon the platform where he was standing and cried out, "All off for Hopkinsville," and the appellant, believing that the train had reached the depot, stepped off on the east side of the track and was injured. He thought the train had stopped or about stopped when he left it. His own testimony shows that it was moving eight miles an hour, and that the train when he left it was several squares from the depot. He had ridden, he says, on this train often before; was perfectly familiar with the Hopkinsville depot and the surroundings, and knowing that the depot was on the west side of the track, got off on the east side, and gives as a reason for so doing that some large man was in his way so that he could not get off on the proper side of the train. He did not offer to pay his fare or enter the car at any time, and it is evident that the conductor did not know he was on the train, although he says the conductor, after the accident, told him he saw him get on. Conceding, however, that he was on the train as a passenger—had paid his fare—what neglect has the company or its employes been guilty of? None whatever. All who board trains as passengers know that the announcement is usually made of the train's approach to a depot before it actually reaches it to enable passengers to prepare for leaving, and in this case the passenger, if he was one, is found leaving the train on the wrong side without notifying the conductor or any one else, and is now claiming damages for this horrible injury, when he brought it about himself, and when there was no omission or neglect of any sort on the part of the employes of the company. The company is in no manner responsible.

Judgment affirmed.

WELLS, JR. v. COMMONWEALTH.

(Filed May 20, 1893—Not to be reported.)

An indictment found by a grand jury consisting of twelve persons since the new Constitution took effect is valid, as section 248 of the new Constitution, limiting the number of grand jurymen to twelve, does not require legislation to give it effect.

S. A. Russell and Wm. E. Russell for appellant.

W. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was charged with the crime of manslaughter, and sent to the penitentiary for the term of two years. The evidence clearly justified the verdict.

The indictment was found since the present Constitution took effect, and only twelve men were selected to serve on the grand jury. There is no irregularity about the manner of their selection or return of the indictment.

The counsel for the appellant seems to proceed upon the idea that the 248th section of the Constitution, which limits the number of grand jurymen to twelve, etc., is not self-executing, and until a law is enacted regulating the manner of selecting the grand jury, sixteen men must be selected as heretofore under the law as it was before the adoption of the present Constitution.

But we have decided that the section supra of the Constitution is self-executing and mandatory; and that the grand juries selected after it went into effect should be twelve, but the manner of selecting them, until changed by law, should be according to the direction of the General Statutes and Code, except as to the number selected. (Downs v. Commonwealth, 13 Ky. Law Rep., 820.)

The judgment is affirmed.

PENDERGEST, &c. v. HEEKIN, &c.

(Filed May 23, 1893.)

1. Homestead—A debtor may by will as well as deed invest his wife or child with title to his homestead free from the claims of his creditors.
2. Same—A debtor residing with his family on land devised to him is entitled to a homestead therein against debts created prior as well as debts created subsequent to the time he acquired title.

In this case a widow with a family is held to be entitled to a homestead in land devised to her by the husband as against debts created by her after the death of the testator.

3. An appeal lies from a judgment dissolving an injunction where it is rendered on final hearing and as part of a judgment dismissing the petition.

John H. Barker for appellants.

J. T. Simon for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Bennett.

John A. Pendergest died testate. By the terms of his will his wife gets all his property during life or widowhood, remainder to his son. But in case he should die before his mother and without issue, then she gets the estate absolutely. The testator's estate devised consisted of a house and lot in the town of Falmouth, not worth exceeding $1,000.

After the death of the testator the widow contracted some debts to the appellees, Heekin & Hill, upon which they obtained judgment in the Pendleton Circuit Court. Executions were obtained thereon and levied upon the house and lot devised. This suit was brought to set aside the levies, and an injunction to prevent the sale until the court could act was obtained.

The executions were levied upon the idea that the debts were created by the testator in his lifetime, and that the property, his homestead, could be sold, subject to the homestead right of the widow and infant children therein, for the debts were not debts due by the testator. Now, according to the decision of this court (see Myer's guardian v. Myer's Adm'r, 89 Ky., 442), a testator may will his homestead and invest the devisee, though such devisee may be his wife or child, with the title the same as he could do by deed. In such case of the real estate devised is not worth more than $1,000, and the devisee, if he has a family, is entitled to a homestead under the provisions of the General Statutes, and it takes the property devised to make it, is not subject to his debts made prior thereto, because property acquired by descent or will is not subject to the prior debts of devisee, to the

extent of a homestead therein; nor is it subject to the debts of the devisee created after the property was thus acquired.

In this case the widow is entitled to a homestead in said property, she having a family. It is, however, urged that as there was a motion to dissolve the injunction, and as it was dissolved, the appellants' remedy was to apply to have the injunction reinstated, and the remedy can not be reached by appeal. But the facts stated in the petition and amended petition show that the appellants were entitled to have the levy of the executions upon the house and lot quashed, which the court ought to have done, but instead it dismissed the petition and both the dismissal and the dissolution occur in the same judgment; and as the dismissal of the petition is a final judgment and appealable, and as the order of dissolution occurs by the same judgment, the proper remedy is to appeal the whole case. Sections 296 and 297 of the Civil Code, that provide for an application to one of the judges of this court to reinstate an injunction that is dissolved upon motion, applies to the dissolution of injunctions upon motion in advance of the rendition of a final judgment in the case. In such case no appeal can be taken from the order of dissolution, because no final judgment has been rendered. Hence the remedy is by motion to reinstate; but if the injunction is dissolved upon rendering the final judgment in the case, then the remedy is by an appeal of the whole case. But, as said, the court should have quashed the levies of the executions upon the house and lot.

And the case is reversed, with directions to quash said levies.

LOUISVILLE & NASHVILLE RAILROAD CO. v. BRYANT, BY, &c.

(Filed May 25, 1893—Not to be reported.)

Railroads—Failure to furnish coupling stick or give warning of danger—Where a railroad brakeman is injured in coupling cars when he would not have been injured if he had used a coupling stick, the fact that the company failed to furnish him a coupling stick does not render it liable for injuries received, the rule of the company requiring the use of coupling sticks being generally disregarded by brakemen. Nor does the fact that the company failed to warn the injured brakeman of the danger of not using a coupling stick render it liable, as the injured brakeman, who had been in the service for nearly a month, must be presumed to have known by that time of the dangers of his position; and this is true, although he was a minor, he having represented himself as of full age and having that appearance.

Hill & Denham for appellant.

C. W. Lester for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Pryor.

The plaintiff, an inexperienced railroad man, applied to one in charge of the freight trains of the appellant for the place of brakeman, and was assigned to duty.

He represented himself as being of full age, and had that appearance, but was, in fact, not twenty-one years of age, and now sues by his next friend. He alleges that he was put to work without instuction or warning as to his danger in discharging the duties connected with the employment, and that proper ap-

pliances were not furnished him to enable him to discharge those duties. What was not furnished him is known with brakemen as a coupling stick, and the superintendent or conductor is required by the rules of the company to furnish each brakeman with this stick and take their receipt for the same.

The appellee did, in fact, give a receipt, but no stick was furnished the appellee. He was in the employ of the company about one month when, in coupling the cars under the order of the conductor, his hand was mashed, and his arm had to be amputated. It seems to us that a service of one month with the company ought to have furnished the plaintiff with the experience he now says should have been taught him with reference to coupling cars. The facts show that none of the brakemen use this coupling stick and regard it as a useless appliance in the coupling of cars. It is true that the conductor says if the appellant had used the stick it would have prevented the injury, and it might also be said, if the appellee had used proper precaution in coupling the car, the injury would not have happened. This rule is adopted by the company for the safety of the employes, and they may use it or not, as they think best, and because a stick is not handed to them, and they happen to receive an injury in the discharge of their duties, affords no reason for imposing a penalty on the company in the way of damages.

The question, it seems to us, is, what was the ordinary mode of coupling cars as practiced by brakemen in the employ of the company? If this mode was followed by the plaintiff and he received the injury, the fact of his not having been furnished with a coupling stick does not authorize a recovery. This plaintiff must be presumed to have known the danger of his position after having been on the train for nearly one month, and if he undertook to couple cars as the other brakeman did, and was required to do so by the company, it was his duty to perform the service.

This judgment must be reversed and is now remanded for a new trial, and for further proceedings consistent with this opinion.

SPENCER v. COMMONWEALTH.

(Filed May 25, 1893—Not to be reported.)

1. To constitute the crime of false swearing the oath must not only be false, but knowingly and willfully false.

2. Evidence—Upon the trial of appellant for false swearing, alleged to have been committed by making a false affidavit before a justice of the peace, the justice who wrote the affidavit, having stated that he did not write it as the defendant told him to write it, should have been permitted to tell the jury what statement the defendant made to him.

A. F. Byrd and Z. T. Hurst for appellant.

W. J. Hendrick for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was found guilty of false swearing upon the following affidavit: The affiant "deposes and says he did buy whisky or brandy from Rachel Creech, in Wolfe county, Ky., on or about

the 10th of October, 1890, without her having license to sell the same," etc.

W. B. Duff, the justice that wrote the affidavit, says that "he did not write the affidavit as the defendant told him to write it," but the court would not allow the witness to tell the jury what statement the appellant had made to him, holding the appellant to the staement contained in the affidavit and not allowing the justice to tell wherein he failed to write the affidavit as the appellant told him to write it.

The appellant, in his testimony says that Duff wrote the affidavit at his request and read it to him, and he signed it; but he stated to Duff, when he applied for the affidavit, that Mrs. Creech had sold him brandy without paying the tax on it; that she had brandy in a whisky barrel with stamps on it, and she told him it was whisky and not brandy. He says that he thought the affidavit which was read to him, he not reading it, meant the same as the foregoing statements; and that it required a separate tax to sell brandy, and that it could not be sold under a whisky tax; and as the brandy was in a stamped whisky barrel, and as Mrs. Creech claimed that it was whisky and stated that she had no brandy license, she was selling the brandy in violation of the United States revenue laws.

Now it seems that the justice ought to have been allowed to state what the appellant did say when he applied for the affidavit, because it was a part of the res gestae, and the jury had a right to consider the whole statement as explanatory of the written statements and as bearing upon the question of motive.

He states that he believed that it required a special tax to sell brandy, and that Mrs. Creech did not have such tax. He tells why he believed it.

Now, to constitute the crime of false swearing, the person should not only be guilty of making a false statement, but it must be willfully and knowingly false. The person's evidence may be false, but if it is not willfully and knowingly false, he is not guilty of the crime of false swearing. Therefore, the testimony was competent to show that the affidavit was not willfully and knowingly false. The court ought to have given an instruction submitting this phase of the question to the jury.

The judgment is reversed, and a new trial is ordered.

KLOTZ v. KLOTZ, JR.

(Filed May 20, 1893—Not to be reported.)

Benefit societies—Beneficiaries—Where a member of the Knights of Honor, a benevolent order, has had his benefit certificate issued payable to an adult son to the exclusion of the widow, the widow can not complain, his son being a member of "his family" within the meaning of the charter of the society, although not residing with or dependent on him.

Andrew A. Haggan for appellant.

Chas. A. Wilson and Geo. B. Eastin for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hazelrigg.

In 1876 one Peter Klotz became a benefit member of Diamond Lodge, No. 3137, of the order of Knights of Honor, a corporation, having among its powers the right to carry on mutual aid insurance. The insurance certificate of Klotz was payable to his wife, Christina, who, however, susbequently died, and the certificate was then surrendered to the lodge and by it cancelled.

In August, 1888, the member married Susan, the present appellant. In November, 1888, in pursuance with the prescribed regulations of the order, a new certificate of insurance was issued, which, at the direction of the member and with the approval of the lodge, was made payable to Peter Klotz, jr., a son of Peter Klotz, the member.

In 1889 the latter died, and his widow and son each claiming the insurance fund of $2,000, the lodge sought the aid of the chancellor to indicate the proper beneficiary under the policy. The court below adjudged favorably to the son. The judgment was affirmed by the Superior Court, and the widow has appealed.

In the case of Leaf v. Leaf, 13 Ky. Law Rep., 486, the provisions of the constitution of this order, bearing on the right of the member to nominate the beneficiaries in the certificate, were discussed, and the particular sections applicable to the subject were quoted in full. The decision was reached that a member might control the fund "by designating a beneficiary or beneficiaries coming within the class of those who, by the constitution and by-laws of the corporation, would be the objects of its benevolence, * * * and the proper construction of the charter would authorize one with a family, not dependent on him, to have a benefit certificate issued, payable to all or some member of it;" but in that case, owing to the peculiar equities arising in favor of the widow, she was given the fund over the adult son.

In this case the son, Peter, was an adult, and not living with his father and not dependent on him, but, it will be observed, he was selected as the beneficiary by the member, and the selection was approved by the order. The assessments to secure the insurance were paid by the son and accepted by the lodge. Ordinarily this must be conclusive.

It is only where are peculiar intervening equities that the deliberate choice of the member, as approved by the lodge, may be ignored.

As said by the Superior Court "that, though a child, he (Peter, jr.) was in no sense a dependent is conceded, but that he was a member of his family, within the meaning of that phrase as used in the application, is, we think, clear." We are of the same opinion. We can not give to this term a restricted or illiberal meaning. We think the son was a member of the father's family, as contemplated by the organic law of this order, though not living under the same roof with him.

The judgment of the lower court is, therefore, affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. EARL'S ADM'X.

(Filed May 23, 1893.)

1. New trial—Plaintiff required to remit part of verdict--In this action to recover damages for personal injuries the court had no power to require the plaintiff, in order to avoid a new trial, to accept judgment for a less amount than that found in his favor by the jury, and upon appeal by defendant

from the judgment for the reduced amount, which plaintiff accepted under protest, there must be a reversal, either upon the appeal or cross appeal, as the court should have granted defendant a new trial, if there were errors to its prejudice, and, if not, should have rendered judgment for plaintiff in pursuance of the finding of the jury.

2. It was inexcusable negligence on the part of a fireman acting as engineer to leave a detached car standing on the side track of a railroad in such close proximity to the main track as not to allow a man's body to pass between the car and moving cars on the main track, and a brakeman riding on the ladder of a car on the main track, going from one point of work to another, was not guilty of such contributory negligence as to preclude him from recovering of the company for injuries received by him by being crushed between the moving car and the car on the side track, it being the custom of brakemen to ride in that way in the discharge of their duties.

3. Evidence—Res gestæ—Statements made by the injured brakeman as to how the injury occurred having been brought out by defendant, it was competent for plaintiff to prove all that was said, as all the statements were made within a few seconds and evidently formed part of the same conversation. Besides, as the expressions were within a few seconds after the accident, they were competent as forming a part of the transaction.

4. Instructions—An uncontradicted fact may properly be assumed in an instruction.

5. Punitive damages—Gross negligence is sufficient to warrant the finding of punitive damages, and, therefore, so far as the instructions in this case required the jury to find willful neglect, in order to give punitive damages, they were too favorable to defendant.

6. Contributory negligence—Although the plaintiffs' intestate was guilty of contributory negligence, the defendant is liable if the fireman in charge of the engine could, by reasonable diligence, have discovered his danger in time to avert the injury. To authorize a recovery it is not necessary that the defendant should have had actual notice of the injured party's fault in time to protect him.

7. Limiting time for argument—The court did not abuse its discretion in limiting the time of counsel in their argument to twenty-five minutes, there being comparatively little conflict of testimony, and the instructions being unusually simple and direct.

8. Excessive damages—A verdict for $4,000 for the "pain, anguish, loss of time," etc., suffered by the plaintiffs intestate during the ten days he lived after the accident, was not excessive.

H. C. Martin and Lewis McQuown for appellant.

J. C. Poston, J. P. Hobson and J. J. Stamp for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hazelrigg.

The first paragraph of the appellee's petition sought damages of the appellant company, by reason of its gross and willful neglect in crushing her intestate husband between two of its cars and causing him great pain, anguish, loss of time, etc.

The second sought damages for the loss of his life, caused by the willful neglect of the appellant.

Being required to elect, she proceeded on the cause of action set up in the first paragraph and obtained a verdict for $4,000. The court regarded this as excessive and required her to take judgment for $2,500; otherwise, as announced, a new trial would be granted. Accordingly, judgment for the latter sum was entered. Both parties complain, and it is evident that if the company was entitled to a new trial, it should have been granted with-

out the imposiiton of any terms; if not, the appellee should have had her judgment in pursuance of the jury finding. In either event the judgment for $2,500 is erroneous and must be reversed. (Brown v. Morris, 3 Bush, 82.)

The question then is, shall the appellee have judgment in conformity with the verdict of the jury, or shall the appellant have a new trial?

The solution of the question depends on whether or not there were errors committed on the trial of the case to the prejudice of the company. If yea, then a new trial must be ordered; if nay, judgment for $4,000 must be entered.

From the testimony it appears that Earl was a brakeman in the service of the company. When the train reached Munfordsville moving north the engineer turned over the engine to the fireman. The conductor was also off the train. It was a freight train and some switching had to be done. Earl got off the cars at Logston's store, some eighty yards from the switch. The engine moved north with some box cars attached toward and over the switch. There a box car was "kicked in" on the siding. Some four or five minutes are saved by this process of "kicking in," and the conductor proves that they were in a hurry.

After this the engine backed to where Earl stood, who coupled it to the "dead" cars, when, on Earl's signal, it again started north "pretty fast." Earl, as was the usual custom, caught up with rear car and was riding on the ladder on the side, intending to get off at the switch, where other switching was to be done; but the "kicked in" car had not been rolled back far enough on the side track to allow a man's body to pass between it and the moving cars. This close proximity was noticed by the fireman, the acting engineer, on backing down a few moments before, and he testifies that he slowed up to see if his cab would pass.

Earl knew nothing of this, and when he noticed it, as he rode rapidly towards it, he could neither let go nor reach the top of the car. He tried the latter means of escaping the danger but was caught and badly crushed. He lived ten days in torture and died. The plaintiff's evidence was to the effect that Earl took no part whatever, by signals or otherwise, in placing or locating the "kicked in" car, and while he might have seen its dangerous position, if his attention had been attracted in that direction, he was engaged in the work of coupling the live to the dead cars, and then in watching the ladder he was reaching for, and could not have observed the danger.

It is insisted in the first place that the defendant was entitled to a peremptory instruction because of the negligence of the deceased, but we fail to perceive wherein he was negligent. The custom of brakemen riding on the ladder from one point of work to another was clearly estalbished. This was the well-known way of doing such work as was before Earl on this occasion.

It was inexcusable negligence to leave the "kicked in" car so close to the main track that the engineer's cab could barely pass it. This negligence caused the injury, and Earl is shown in no way to have contributed in thus locating this car. The fireman slowed up to insure the safe passage of himself, but unfortunately failed to observe similar care for the safety of others.

Secondly, it is urged that incompetent evidence was permitted to go to the jury, prejudicial to the company.

Immediately after Earl fell from the ladder the conductor testified that he (Earl) said to him that "he had tried to get to the top of the car, but it caught him before he could do so."

Brasehear was then recalled for the plaintiff and proved that he was present all the time after Earl fell, and there was no such talk, but that Earl did say that the accident was caused by the fool fireman, etc.

What Earl said as to how the injury occurred was first asked for and brought out by the company, and as all the talk took place within a few seconds, it was evidently the same conversation, and if part was detailed all should be.

Moreover, the expressions were immediately upon the heels of the occurrence, within a few seconds of it, and can fairly be said to form a part of the transaction.

Thirdly, the instructions are complained of because number one authorizes a recovery from the evidence and not from the preponderance; but in number eight the jury were told that "before plaintiff can recover in the case it is her duty to establish, by the preponderance of the evidence, that the employes of defendant were guilty of willful or gross neglect. Ordinary neglect will not authorize a recovery.'"

It is said that numebr two "assumes loss of time, pain and suffering, and then authorizes the jury to give punitive damages 'if the negligence was willful.'"

It is well settled that an uncontradicted fact may properly be assumed in an instruction, and the deceased confessedly did suffer as indicated. To the extent that the right of recovering punitive damages was based on the establishment of willful neglect, the instruction was too favorable to the defendant. It required the greatest degree of nelgigence, when only gross negligence was sufficient to warrant the finding of such damages. (L. & N. R. R. Co. v. Mitchell, 10 Ky. Law Rep., 211; same case, 87 Ky., 332; Same v. McCoy, 5 Ky. Law Rep., 397; same case, 81 Ky., 411.)

Instruction number nine required the jury to find for the defendant if they believed that Earl, in the performance of his duty as brakeman, failed to properly set the car on the side track and left it so as to injure him in the further discharge of his duty, "unless they further believe that the fireman in charge of the engine could, by rasonable dilignce, have discovered his danger, and by the use of reasonable diligence averted the injury."

It is urged that the fireman owed no duty to Earl, if guilty of contriubtory negligence, unless he became aware of the danger to him, and then, by the exercise of care, could have averted the injury. But in L. & N. R. R. Co. v. McCoy, supra, it is said, "we do not understand the law to be that the party charged with gross neglect is released from responsibility in every case by the contributory negligence of the injured party unless he had actual notice of the injured party's fault in time to protect him. If the appellee, by his own negligence, contributed to such an extent to produce the injury to himself, that but for his negligence it would not have happened, then he has no cause of action, unless the appellant's agents, in managing and coupling the train, knew, or could have known by ordinary attention, of the peril in which appellee's negligence had placed him, and failed to observe reasonable care to avoid the injury which followed."

This is substantially the instruction complained of. In number seven the jury had been told that if they "shall believe from the evidence that Earl negligently and carelessly undertook to ride on the side of the car at the time he was injured, and by the use of ordinary care and diligence he could have discovered his dan-

ger in time to avert the injury, then the law is for the defendant and the jury should so find."

Taking the instructions together, the modification of number nine referred to the danger to Earl in his placing the car on the side track. That was the subject-matter of the instruction, and the concluding clause referred to that danger and not to the peril Earl may have placed himself in by riding on the ladder; but if otherwise the instruction was right. In switching and handling cars the fireman must be diligent and wide awake to dangers in the rear as well as in front. Indeed, the only danger to life was in the rear where the men were engaged in this hazardous work.

If Brashear is to be believed, the slightest attention on the fireman's part to the frantic appeals and signals of himself and Earl to stop the train, would have given Earl time to have reached the top of the car. A moment more and he would have escaped

The fireman says he saw nothing of these signals, but the other witness swears that he made them in plain view of him and when his eyes were turned toward him.

Lastly, it is urged that the court erred in limiting the time of counsel in their argument to twenty-five minutes. It will be observed that while there are some twelve witnesses in the case, there is comparatively little conflict of testimony. The instructions are unusually simple and direct, and we do not think the court abused its discretion in this regard, nor do we think the verdict excessive.

On the appeal of the company the judgment is affirmed, but reversed on the cross appeal and remanded, with directions to enter judgment for $4,000 in conformity with the verdict of the jury.

HOLTZHAUER v. CITY OF NEWPORT.

(Filed May 25, 1893.)

1. Constitutional law—Limitation as to tax rate—Section 157 of the present Constitution, limiting the tax rate of towns and cities, is not self operative, but is addressed to the legislature indicating the limitations on the powers it shall give the several classes of towns and cities when it shall come to provide for their classification and government by general laws; and until this is done, which must be within four years from January 1, 1891, the existing charters of towns and cities continue in force, including their tax rates and methods of raising revenue.

2. Same—Limitation as to indebtedness—Even conceding that section 158 of the present Constitution, limiting the indebtedness of towns and cities, does not require legislation to make it operative, yet by the express terms of this section the limitaiton of 10 per centum provided for therein as to certain classes of cities may be exceeded when the proposed indebtedness was authorized under laws in force prior to the adoption of the present Constitution, and there is no limit to this excess; and, however great the amount of the existing and authorized liabilities of any town or city at the time of the adoption of the Constitution, there may be an increase of indebtedness beyond that amount to the extent of 2 per centum upon the value of the taxable property therein.

3. Same—Section 159 of the present Constitution, which proivdes that whenever any county, city, etc., "is authorized to contract an indebtedness it shall be required, at the same time, to provide for the collcetion of an annual tax sufficient to pay the interest," etc., requires legislation to make it operative.

4. Same—Uniformity of taxation—Sections 171 and 174 of the Constitution,

which require uniformity of taxation and taxation according to value, announce nothing new, but are merely declaratory of what was always the law of taxation in this State.

C. L. Raison, jr., for appellant.

Root & Root and George Washington for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

On June 2, 1892, the city council of the city of Newport, Ky., acting under and by virtue of the authority conferred on it by an act of the legislature of Kentucky, entitled "An act to amend the charter of the city of Newport, authorizing the reconstruction of its streets, and to pay for same by an issual of bonds of the city," approved April 24, 1890, passed a resolution providing for the reconstruction of Monmouth street by grading, curbing, etc., and paving same with brick.

In September thereafter a contract to do the work was entered into with one Charles Spinks in conformity with the terms and requirements of the act named, and he at once began the reconstruction of the street under his contract.

About the same time the city council entered into contracts with Regan and others for the construction of certain sewers in the city, as it was authorized to do under and by virtue of an act of the legislature, entitled "An act to provide for sewerage in the city of Newport," approved April 16, 1890.

The sewers were to be built as provided by the act, the issual of the bonds of the city in payment therefor, and the collection of the assessments on the real estate in the respective sewer districts were to be made as directed by the act, and these contractors were proceeding to execute their contracts.

Thereupon the appellant, Holtzhauer, a citizen and taxpayer of the city, owning property on Monmouth street, and living in one of the sewer districts, brought this action seeking to enjoin the city from the further prosecution of the work of reconstructing the streets or building the sewers under the provisions of the acts named, contending that by the present Constitution the authority to increase the indebtedness of the city to the extent required by the work at hand had been revoked.

The facts alleged and conceded are, in substance, that the city has already and has for years a tax rate of $1.65 on the $100 upon the value of her taxable property, not including the tax for school purposes; that these contracts incurred an expense largely in excess of the current income and revenue of the city for the year 1892, after deducting its ordinary or necessary expenses, and that this was done without the assent of two-thirds of the voters in the city voting to determine whether or not it should be done, no vote being in fact taken.

Second, that the indebtedness of the city at the time of the adoption of the present Constitution and at the time the contracts in question were entered into, was in excess of 10 per centum on the valuation of her taxable property during that time; that the authorized indebtedness, if added to the existing debt of the city, exceeded 12 per centum of that valuation, and that the authorized indebtedness was in excess of 2 per centum thereon; and third, that the city at no time provided for the col-

lection of an annual tax sufficient to pay the interest on the indebtedness incurred by these contracts, or created a sinking fund for the payment of the principal thereof.

By reason of the existence of the facts grouped in our first enumeration, it is insisted that the proposed issual of bonds and the consequent increase of the tax rate are in violation of section 157 of the Constitution, which reads as follows: "The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not at any time exceed the following rates upon the value of the taxable property therein, viz: For all towns or cities having a population of fifteen thousand or more, $1.50 on the $100, * * * unless it should be necessary to enable such city, town, county or taxing district to pay the interest on and provide a sinking fund for the extinction of indebtedness contracted before the adoption of this Constitution. No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void; nor shall such contract be enforcible by the person with whom made; nor shall such municipality ever be authorized to assume the same."

The section immediately preceding this one is the first under the general head of "municipalities." By its direction the general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and by a general law provide how towns may be organized and enact laws for the government of such towns until the same shall be assigned to one or other of the classes named.

By section 166 "all acts of incorporation of cities and towns heretofore granted, and all amendments thereto, * * * shall continue in force under this Constitution * * * until such time as the general assembly shall provide, by general laws, for the government of towns and cities and the officers and the courts thereof; but not longer than four years from and after the first day of January, 1891, within which time the general assembly shall provide, by general laws, for the government of towns and cities, and the officers and courts thereof, as provided in this Constitution."

From the very nature of the case this last section is self operative. It provides for the continuation of existing laws—of acts and amendatory acts of incorporations. There shall come a time, says the section, when the general assembly shall enact general laws for the government of these towns and cities in conformity with this Constitution. In the meantime their present governmental regulations must remain in force. Their charters and amended charters must for the present suffice.

If section 157 is held to be self-operative, or the law governing towns and cities, instantly upon the adoption of the Constitution, there is an irreconcilable conflict between the two sections. Two laws fixing different rates of taxation can not both obtain the same time in the same city.

We are required, upon every principle of construction, "to maintain, if possible, every part of the fundamental law." Effect is to be given, "if possible," says Cooley, "to the whole instrument and to every section and clause." There is, to speak, a formative period in the government of these cities and towns. Until such time as "the general assembly shall provide, by general laws," for their government, which must be within four

years from January 1, 1891, the existing laws of these incorporations, their tax rates included and methods of raising revenue, must continue in force if the express letter of the Constitution is to be observed. The contraction of the indebtedness in question and the consequent increase of the tax rate, or a continuation of the same for a longer period, were authorized by the legislative acts of April, 1890. The manner of its contraction was specifically pointed out. No vote other than that taken was required. Their constitutionality under the former organic law of the State was tested in the case of Maddux v. The City of Newport, and they are as full in force to-day as when their constitutional validity was upheld by this court in December, 1890. (Case supra, 12 Ky. Law Rep., 657.)

We are of opinion that this section was addressed to the legislature, indictating the limitations on the powers it shall give the several classes of towns and cities when it shall come to provide for their classification and government by general laws.

The second group of facts enumerated above are supposed to bring the case under the prohibitory provisions of section 158 of the Constitution.

So far as applicable it is as follows: "The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur an indebtedness in the aggregate exceeding the following-named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz: Cities of the first and second classes, and of the third class, having a population exceeding fifteen thousand, 10 per centum: * * * Provided, any city, town, etc., may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution; and, provided further, if, at the time of the adoption of this Constitution, the aggregate indebtedness, bonded or floating, of any city, town, county, taxing district or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no such city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding 2 per centum * * * in the aggregate upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless, in case of emergency, the public health or safety should so require. Nothing herein shall prevent the issue of renewal bonds or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality."

It may be admitted that to the extent that this section provides for a state of case in existence at the time of the adoption of the Constitution, it is applicable to all towns and cites resting under the conditions named; but in express terms the limitation of 10 per centum may be exceeded when the proposed indebtedness "has been authorized under laws in force prior to the adoption of this Constitution."

There is no limit indicated to this excess. From the very nature of the case there could be none. At least the actual condition of the cities and towns, with respect to the sums they owed, could not be affected by the Constitution. These debts, however large and to whatever extent they might in fact exceed

the conservative limit imposed under the Constitution, could not be legislated out of existence.

They could not be repudiated or the means denied whereby they could eventually be paid, and yet some restriction, some limit may be imposed beyond which even these cities shall not go; therefore, if the limit already has been reached, such city may not be authorized or permitted to increase its indebtedness —existing and authorized—in an amount exceeding 2 per centum on the value of its taxable property.

It does not matter that the existing and authorized liabilities exceed the 10 per centum and the 2 per centum. This can not be prevented or remedied, but such indebtedness as may be contracted subsequently to the adoption of the Constitution, and, independently of liabilities authorized to be contracted before that adoption, must not exceed the 2 per centum limit.

The "increase of indebtedness" meant by this second provison is that over the aggregate indebtedness already in existence, or already authorized under laws then in force. This construction necessarily determines the question at issue, and we do not think that section 159 affects the case. It provides that "whenever any county, city, town, taxing district or other municipality is authorized to contract an indebtedness it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest," etc.

The geneal assembly, by general laws yet to be enacted, must see to the imposition of these limitations and restrictions. Future legislation is necessarily implied from the very language of the provision.

It is thought, however, that the method of assessment provided for in the acts in question is in violation of sections 171 and 174 of the Constitution. These sections require uniformity of taxation and taxation according to value. While they were not in the former Constitution, the principles contained therein have always been recognized as the basis of all taxation. They announce nothing new, but are merely declaratory of what was always the law of taxation in this State.

The methods of assessments provided by these acts were held to be in accord with the old Constitution in the case of Maddux v. City of Newport, supra, and we adhere to that opinion.

We are of opinion that contracts for the reconstruction of the streets of Newport and for the building of the sewers, as provided for by the acts of April, 1890, may lawfully be made, that the plans of assessment proposed are constituitonal, and that there can be no question of the legal and constitutional validity of the bonds of the city issued or to be issued as authorized by the acts in question.

Judgment affirmed.

HESSEY, &c. v. HESSEY.

(Filed May 25, 1893.)

Partition—Estoppel—A widow verbally agreed with two of her three children (a son and daughter) that if they would convey to the third child their interest in a tract of land left by their father, they should jointly occupy and use with her, and at her death have the whole of the "home place," which was owned jointly by her and their father, she owning an undivided third.

The two children conveyed accordingly and occupied the home place jointly with their mother for many years and until the daughter married, when the son found another home. In this action by the mother for a partition of the home tract, and the allotment of one-third to her and one third each to the son and daughter, the chancellor adjudged a division into two parts—one to be allotted to the son and one to the daughter, the son being required to pay annually such a reasonable sum for the support of his mother as will be sufficient for that purpose when added to what the daughter should contribute. Held—That the judgment is, under all the circumstances, just and equitable. The mother can not claim one-third of the land absolutely, the agreement by her with her children, although verbal, being an effectual estoppell against her; and being too old to manage any part of the land, the allotment of one-third to her for life would be of no benefit to her.

Geo. S. Fulton for appellants.

John S. Kelly for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Lewis.

In 1848 Abraham Hessey died in Nelson county, owner of 78 acres of land on Cox creek and an undivided third of a tract of 171 acres, whereon he resided. He had contracted for another third of that tract, which was, after his death, paid for with proceeds of his estate. His widow, Mary Hessey, owned by an inheritance the remaining third of that tract, and was, after her husbands' death, allotted dower in the Cox creek land.

Abraham Hessey left three children by Mary, all infants, viz: William B., Elizabeth and Precious. In 1874 Elizabeth married ——— McGee, and, at the request of the mother Mary, the other two children, William B. and Precious, conveyed to Elizabeth McGee, or her vendee, the tract of 78 acres on Cox creek, in consideration of her conveyance to them of her undivided third interest in the home tract of 171 acres.

It is not disputed, but admitted by parties to this action, that William B. and Precious Hessey were induced to make the conveyance to the vendee of Elizabeth McGee by the request and verbal agreement of their mother that they were to have the whole of the home tract of 171 acres; and they both have testified they would not have parted with their entire interest in the Cox creek land, worth about or perhaps a little more than one-third of the home tract, but for the agreement of their mother for them to jointly occupy and use and at her death to have the whole of the home place, including her undivided third, which was necessary in order to make their respective shares equal to what Elizabeth McGee had gotten in the manner mentioned.

That the arrangement might be carried out the mother Mary relinquished her dower interest in the Cox creek land, and thereafter she was supported and resided on the home place, which was jointly occupied, used and claimed by William B. and Precious, without dispute or contention, until 1888, when Precious married Barton Snyder.

During that period William B. and Precious had, with money accumulated by their own efforts, purchased jointly two or three small tracts adjoining the home place; and he had built and occupied a dwelling house on another part of the land, the mother and Precious continuing to reside at the old homestead.

There was, in 1888, after Precious married, a division made by commissioners of the home tract and the two small tracts into

two parts, one of which, including his dwelling house, was allotted to William, and the other, whereon was the homestead, was allotted to Precious. But although both Precious and her mother had agreed to make the division, and commissioners had been agreed upon for the purpose, who, as appears, made an apparently fair and just division, they, for some reason not satisfactorily explained, refused to abide by it, though the two lots were thereafter separately occupied and cultivated until this action was brought in 1891.

The purpose of the action instituted by Mary Hessey, the mother, Precious Snyder and her husband, Barton Snyder, against William B. Hessey, is to have the home tract of 171 acres divided into three parts, one to be set apart and conveyed absolutely to Mary Hessey, and the other two to William B. and Precious respectively.

The lower court, however, refused prayer of the petition, and instead adjudged a division into two parts, one to be allotted to William B. and the other to Precious Snyder; but the former is required to pay annually, for support of his mother, a sum fixed by the commissioners, who attempted to make a division in 1888, which sum appears to be reasonable and sufficient, and added to what Precious Snyder should contribute, to comfortably support her.

It seems to us the judgment rendered is the only one a chancellor could, under the circumstances, render that would be just and equitable under all of the circumstances. For it is evident an allotment of one-third to the mother, who is too old to manage it successfully, would be of no benefit to her; and to allot one-third to her absolutely would be unjust to William B. For although the agreement of his mother, upon the faith of which he parted with his interest in the Cox creek land in 1874, was verbal, we think it should be treated as an effectual estoppel as against his mother. Besides, she admits in her testimony as a witness the agreement was made, and makes it very clear she does not even now wish to violate it or deprive William B. of ultimate acquisition of one entire half of the home place.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD CO. v. SCHMETZER, BY, &c.

(Filed May 25, 1893.)

1. Railroads—Movement of detached cars—A railroad company is guilty of willfull neglect if it permits cars detached from an engine to move along its track in a city or town without some servant in a position to give warning of the approach of the cars and to control their movement. And where the company is guilty of such neglect a pedestrian on the track who is struck by the cars and injured may recover of the company, although he failed to look to see whether cars were approaching.

2. Same—Duty to persons walking on track by license of company—Negligent breaking of train—A person who uses a railroad track as a passway, whether by the license or mere acquiescence of the company, must be held to know the danger attending the running of railroad trains, and to assume the ordinary risks attending such a use of the track. Therefore, where cars have become detached from an engine by accident, and are moving in that way without any servant in position to give warning of their approach, a pedestrian on the track who is struck by the cars and injured can not recover of the company unless the break in the train was due to negligence on the part of the servants in charge, or to some defect in the machinery which the company had failed, after notice, to repair, as such a person can not exact of the company a higher degree of diligencee than it owes to an employe. Nor

does the fact that such breaks in a train are frequent at a particular part of the track, by reason of the grade, impose upon the company the duty of placing servants in a position to give warning to persons walking on the track.

Wm. Lindsay, Lyttleton Cook and Edward W. Hines for appellant.

Kohn, Baird & Speckert for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellee, Jacob Schmetzer, a boy about sixteen years of age, was employed as a laborer by the Eclipse Woolen Mills, located in the city of Louisville. While engaged in his work, and in order to reach his place of employment, he was in the habit of walking upon the railroad track of the appellant.

In using this track as a way he saved walking a distance of three or four squares, the testimony showing that if he used the streets as a way to his work the distance would be five times as great as that of the company's railway track. While on this track, and on his way to work, he was struck by the car of the appellant, knocked from the track and his arm so badly injured that it had to be amputated.

He instituted this action to recover damages for the injury on the ground of negligence on the part of the employes, and recovered $6,000 in damages.

He left his home on the morning of the day he was injured, about 6 o'clock (in the month of November), and when on the track north of Broadway, and going toward Baxter avenue, he heard a train approaching and, stepping from the track, let the engine and the train pass him. The morning, according to the testimony, for the plaintiff, was dark and foggy.

After the train had passed, supposing he was out of danger, he stepped back upon the track and began his walk to his place of business, and after he had gone some eight or ten yards he was struck by the rear section of the cars that had broken loose from the engine, knocked down and his arm mashed off. This section, loosened from the engine, consisted of twenty-six loaded freight cars.

The appellee claims that he had the right to use this track for the reason that the company had licensed the public to use it; that it was constantly used by pedestrians, and had been used by the appellee for two or three years, and no objection had been made by the company or notice given that the track was not to be used as a foot path. From these facts a license to walk upon the track, it is contended, must be presumed, and the company required to exercise that degree of care that must be exercised at public crossings, or where, by contract, the party injured has the right to use the track as a foot path.

While the mere acquiescence of the company in the use of its road in such manner would authorize the court to say that the plaintiff was not a trespasser, it certainly placed the company under no greater obligation to protect the injured party than one of its own employes. It is not pretended that the accident took place at any crossing, and the license to be on the track at the point where the injury occurred is to be inferred from the fact that the pedestrians in that part of the city had converted that part of the road into a foot path, and were using it in common with the railroad company.

It is evident, as has been held in the case of the same appellant against Potts, 13 Ky. Law Rep., 844, that a railroad company is guilty of willful neglect if it permits cars that have been detached from an engine to move along its track in a city or town without placing some of its servants in such a position as to give warning of its approach and control the movement of cars.

This doctrine is well understood, and if there was no one on these detached cars, and they were turned loose to guide themselves, it was negligence.

The appellee, when he went upon the track after the engine and cars attached to it had passed, never looked to see whether other cars were or not approaching, and, with this neglect on his part, the company would have still been held liable, if guilty of such gross neglect as to turn cars loose, when they knew that persons were using this track, whether by license or mere acquiescence, and from which an injury resulted.

The plaintiff's witnesses saw no one on the detached train, and the plaintiff, presenting a case where he had been injured by those cars with no one to control them, would have been entitled to a verdict upon the testimony, and the court, therefore, refused properly, on the plaintiff's evidence, to instruct as in a case of a nonsuit.

The defense is not only contributory negligence, but a denial of all negligence by the company. It is plain that this company owed no special duty to the plaintiff, and was compelled only to use ordinary care for the protection of those who had voluntarily undertaken to use this track by the acquiescence of the appellant.

Here was a train of over twenty cars upon the track, detached from any engine, and, from the testimony of the plaintiff, negligence must be presumed when unexplained. How is this explanation made by the defense, and when the facts are developed can the railway company be said, as a matter of law, to have been guilty of any negligence whatever?

The testimony, uncontradicted, is to the effect that the train broke or was severed at or near Broadway, leaving ten cars attached to the engine, and the remaining cars were left with two brakemen upon the top of them, one about five cars back from the first detached car and one on the last detached car. These brakemen stopped the train (the detached cars) by applying brakes as quickly as possible, and not one of them seem to have seen the unfortunate boy. The engine with the cars attached had passed the appellee, and was increasing its speed so as to keep out of the way of the loosened cars, and those on the detached cars were busy with their brakes, and it was perfectly natural that they did not see him or notice the unfortunate occurrence.

It is not an unusual occurrence for these heavy freight trains to sever, as the proof shows, and particularly in going down the grade at this point. It does not appear that the pins were defective or the machinery, to which they were attached, out of repair.

One of the witnesses for the defense says the pin may have been too small, but whether so he does not pretend to say. He was only attempting to assign a reason for the breaking of this train, and, from all the testimony before us, the employes were not guilty of any degree of neglect, causing the injury. There is no reason to discredit them, and the fact that they were not seen on the top of the cars by two or more who testify, affords no reason for disbelieving their statements; and if they had not been on the detached cars, but on one of the ten cars following

the engine, this would not have been such negligence as would authorize a recovery, because their being at the one end of the train or the other, could not have caused the severing of the train.

The witnesses for the defense state that the morning was clear and bright, while those for the plaintiff say it was foggy and dark; but let it be either way, the endeavor to stop the detached train prevented them seeing the plaintiff, and every effort was made by those on the train to check its progress.

The company was using its road in the ordinary way, and the mere passive acquiescence in the use of its track by those who were not passengers, or to whom the company owed no special duty by contract or otherwise, did not make it responsible for an injury resulting from causes that the employes could not prevent.

If this had been an employe injured, he would have been held to have assumed the ordinary risks pertaining to such an employment, and one who undertakes to travel on foot on a railway track can not exact a higher degree of diligence on the part of those in charge of the train than an employe.

Pedestrains using railroad tracks must be held to know the danger ordinarily attending the running of railroad trains, and there is no reason for holding the company responsible unless it is shown that the defects in the machinery were known to the company, and its failure to repair so as to prevent injury.

It is argued that the company knew that such severing of the cars frequently took place at this down grade, and should have used such precaution as to have prevented it, and to so rule would impose on the company the duty of surrendering its track to those passing up and down it, or have employes stationed along its track to caution those using it of the danger.

The case of the Illinois Railway Co. v. Dick, 12 Ky. Law Rep., 772, sustains this view of the question raised. If the breaking of the train was caused by the negligence of the employes, there might be some reason for sustaining this verdict, but we have been unable to perceive in what this negligence consisted, and after a careful reading of the record it must be held that this verdict has no evidence to support it.

The judgment below is reversed and remanded for a new trial, and for proceedings consistent with this opinion. (Hogan v. Chicago Ry. Co., 15 Am. & English R. R. Cases, 440.)

HAZELETT, &c. v. FARTHING, &c.

(Filed May 27, 1893.)

1. Construction of devise to "wife and children"—A devise by a testator "to my beloved wife and children," naming the persons intended, and including in the list a stepson and omitting one of the testator's own children, gives to the persons named a joint and equal interest in the property devised, and not merely a life estate to the wife, remainder to the other persons named.

2. Where a testator disposes of his homestead by his will and the widow accepts the provision of, the will, neither she nor the testator's children can claim a homestead right, a person having the right to dispose of his homestead by his will as he may choose, subject only to the right of the wife to renounce the will and claim under the statute.

A testator having devised his homestead to his wife and a portion of his children, an excluded child having inherited an interest by the death of one of the devisees is entitled to have the property divided and her interest allotted to her.

Rufus S. Dinkle for appellants.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

The land in question is included by the fourth clause of the will of George Farthing: "I will and devise to my beloved wife and children, namely, Susan Francis Farthing, Charles W. Farthing, H. M. Pulliam, N. J. Farthing, C. B. Farthing and J. C. Farthing, all the balance of my personal property and real estate, of whatever kind, and I hereby declare this writing to be my only and last will and testament."

It is plain the testator intended to give to his wife not a life estate, remainder to the others named in that clause, but a joint and equal interest in the fifty-two acres with them. For one of his children, plaintiff and appellant, Mary E. Hazelett, was purposely excluded from any interest, while one of those named, H. M. Pulliam, was not his child, but a stepson, he having been twice married and having at his death two sets of children.

It is alleged in the petition of plaintiff that the widow, who is her step-mother, accepted provisions of her husband's will, and has, together with infant children, occupied the land under it for twelve years past. The relief prayed for is sale of the land and division of the proceeds, a portion of which plaintiff claims in right of her full brother, one of the persons named in the fourth clause, but since deceased.

Section 14, article 13, chapter 38, General Statutes, it seems to us, was intended to apply in case of the husband dying intestate, when, as thereby provided, "the homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the unmarried infant child arrives at full age."

It is true the widow may, by renouncing the will, not, however, done in this case, claim and have benefit of the homestead or dower right in land, but not both. But a person was not intended, by what is called the homestaed law, to be precluded from disposing of his homestead by will in any manner he might choose, though, of course, subject to right of his wife to renounce the will and claim under the statute.

In our opinion the case of Elmore v. Elmore's Adm'r, 5 Ky. Law Rep., 580, is conclusive of the right of both the widow and children of the testator, George Farthing. It was there held that the widow having accepted the provisions of the will, she had no right of homestead, and if she has none the children, in such state of case, have none.

The latter part of section 14 provides: "But the termination of the widow's occupancy shall not affect the right of the children, but said land may be sold, subject to the right of said widow and children, if a sale is necessary to pay debts of the husband."

It has accordingly been held by this court that the widow could not, by terminating her occupancy or otherwise, deprive the infant children of their homestead right. But such rule applies only in cases where the widow and children became entitled to a homestead by operation of law; not where the husband and father has otherwise disposed of his land by will.

Neither the widow nor infant children had, when this action was commenced, a homestead right to the land of testator, George Farthing, but appellant was entitled to have the land

sold, not being susceptible of division, and the share of proceeds of sale she inherited from her deceased brother allotted to her.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE RAILROAD CO. v. LONG, &c.

(Filed May 27, 1893.)

1. Railroads—Gross negligence as to passenger—The servants of a railroad company in charge of a mixed freight and passenger train were guilty of the grossest negligence in leaving the passenger car on the main track at a station without using proper care to flag an approaching freight train in time to avoid a collision.

2. A passenger was not guilty of contributory negligence in entering the passenger car of such a train without notifying the conductor, although the car was fifty feet from the platform, the rules of the company requiring persons taking passage on such trains to get on from the roadbed or wherever the convenience of those in charge of the train required, and such being the custom of passengers. Nor does the fact that the passengers other than plaintiff were warned of the danger and succeeded in getting out of the car before the collision show that plaintiff was guilty of contributory negligence in not doing so.

3. Excessive verdict—Although the case was one for punitive damages, and the plaintiff, in addition to serious external cuts and bruises, received a shock which greatly affected her entire nervous system, yet as it does not satisfactorily appear that her injuries are permanent, a verdict for $26,000 appears to a rational mind at first blush to be excessive and must, therefore, be set aside.

4. Willful neglect has no place in law except in actions for loss of life under section 3 of chapter 57, General Statutes; and in actions like this to recover damages for personal injuries not resulting in death the word "willful" should not be used in the instructions in fixing the degree of neglect.

5. Damages—If defendants were guilty of gross neglect, both compensatory and punitive damages may be awarded.

Winslow, Bridges & Winslow and Wm. Lindsay for appellant.

Gaunt & Downs and J. A. Donaldson for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Pryor.

The verdict and judgment in this case was for $26,000.

In the month of June, in the year 1889, the appellee, Nettie Long, the wife of her coappellee, Thomas Long, or her husband for her, purchased tickets for travel on appellants's car from Eagle Station, where she lived, to Sanders Station, on the same road, but a short distance below.

She entered the caboose, with her husband and daughter, that constituted a part of freight train No. 32. This train was a local freight train, but was carrying passengers as a carrier under certain regulations by the company from station to station, located between certain designated points on the road.

When the freight train reached Eagle Station, where the passengers entered the caboose, the conductor detached his engine

from the caboose and a part of the cars, leaving them on the main track, and took the engine, with the cars attached to it, on the switch to unload some freight, or for some other purpose.

The caboose seems to have been the only car designed for passengers on this train, and when the appellees entered it was a distance of forty or fifty feet from the platform of the depot. The conductor of this combined freight and passenger train, knowing there was a through freight train coming after him, sent one of his men, or an employe, to flag any approaching train.

It is shown that it was customary for the flagman to go a distance of near 1,000 yards to flag coming trains, but in this case the proof conduces to show that the flagman went only about 200 yards, and was then, from his movements, paying but little attention to his duties, and on the trial of this case seems not to have been present to aid in solving the mystery connected with the collision of this passenger train on the main track and the through freight train.

It may be assumed, from the testimony as to his conduct, that he neglected to flag the through train to slow up, and before they could slow up, or the brakemen properly apply the brakes, the caboose was run into and demolished by this through train.

It is shown by the testimony of those in charge of the train that the whistle was blown at the proper time and place, signifying its approach, and that the accident resulted from the failure of the brakes, for some cause, to work properly as they approached the station.

No reasonable explanation has been given of this sudden stubborness on the part of the brakes at this particular place, having worked well during the entire trip until it reached this station, and it is, therefore, manifest that the flagman either failed to notify those on the through train to slow up, or that those in charge of it were so reckless as to continue the speed of the train until they saw the danger ahead, when it was too late to avert it, and we are inclined to conclude that the flagman failed to give the proper signal, and from that fact the injury resulted.

The caboose was left on the main track by the conductor when he knew the freight train was approaching, and, knowing that fact, it was his duty to have exercised the highest degree of caution in notifying the through train that another was on the track. That there was negligence on the part of these employes of the grossest degree is evident from this record, and this conclusion is reached from the undisputed facts, looking alone to the testimony for the defense.

The appellee, Mrs. Long, was knocked out of the caboose and found lying between the main track and the switch unconscious and badly bruised about the head, neck and shoulders. She was confined to her bed for near four weeks, with her family physician attending her. Since that time he has not administered to her any medicine or been applied to for relief from the pain she claims she is suffering. It is claimed that her kidneys are affected, with a constant desire to urinate, and that the water flows from her involuntarily; that she is deaf, and one of her eyes effected by the injury.

Her physicians, or those who have examined her, find no objective symptoms that would indicate permanent injury, and the weight of the testimony conduces to show that she has not received any lasting injury, or, if not, her own family physicians, as well as other eminent physicians and surgeons, are not able to say that she is permanently injured, but from carfeul examination of her person are inclined, at least some of them, to the contrary opinion. That the shock was great, and her entire ner-

vous system seriously affected, there can be no doubt, but that she is permanently injured this, court is not authorized to say from the testimony before us.

The other passengers succeeded in leaving the caboose and escaping without material injury, and it is claimed that the appellee was guilty of contributory neglect in not leaving the car sooner, and of like neglect in going upon the caboose without first notifying the conductor, and at a point fifty feet from the depot platform.

As to boarding the train from the platform, the rules of the company required the passenger to get on from the roadbed or wherever the convenience of those in charge of the train required, and such was the custom when converting this caboose into a passenger car, for the train and passengers would all know that it would at times be difficult, and subject the conductor of this local freight train to great inconvenience if required to have the caboose opposite the platform, that passengers might enter. The appellee and her husband were doing what the rules of the company expected of them, and in fact the appellee (husband) had been the depot agent at Eagle for many years, and was the agent when this collision took place.

We have given this record careful consideration, and find no evidence of contributory neglect on the part of either the appellee or her husband, and the issue in the case is as to the negligence of the defendants' employes—if merely ordinary, compensation was the measure of damages; if gross, the jury had the right to find punitive damages, and from the facts of the record as now presented, the jury being authorized to find the highest degree of neglect, which was gross neglect, the only question before us is, were the damages excessive? And upon this branch of the case, if no evidence had been adduced for the defense, when looking alone to the testimony of the appellee and her family physician, the damages were greatly in excess of the sum the appellee was entitled to recover.

That Mrs. Long was an estimable woman, and, at the time of the injury, was in the prime and vigor of her womanhood, possessed of every attribute that endeared her to her family, her neighbors and her friends, is shown by the record, and as presented to this court in eloquent terms by counsel, and no doubt with much greater effect to the jury deciding this case.

The triers were honest, fair-minded men there can be no doubt, but when the wife of the neighbor, of the friend, of the country man, formed of the lovely character pictured by counsel, has been placed in such imminent peril, and suffered so by reason of the neglect of one that has no breath of life except as imparted by the steam that moves it, human sympathy often controls the judgment, and justice is not measured out by verdicts and judgments, as it would be between neighbor and neighbor, where like neglect results in injury. Nor would this or any other court confine juries to only such verdicts as are usually rendered between others than corporations.

Carriers of passengers owe to them a special duty, and that is to exercise the highest degree of care for the protection of their persons from danger by the neglect of those in their employ. This duty should be exacted, and by the imposition by way of punishment when gross neglect appears. This, however, should be done in a rational way, and not, as has been before said in this court, by placing the juror in the position of the husband, whose wife has been injured, or that of the wife, and then asking the question, what sum of money would you take to have your wife placed in such peril or so injured as that skilled surgeons could not say whether the injury was or not permanent?

The apprehension that serious results might follow would not

be entertained by the true husband or wife for the value of the entire railroad; but this is not the way of ascertaining the damages, or is there any fixed rule by which a court or jury can arrive at what is the sum the plaintiff is entitled to, for it is a character of case where the wrong can not be repaired by mere dollars and cents, or the damages sustained of a character that can be imputed in that way.

We have been referred to several cases by counsel where similar verdicts in amount have been sustained, where the party injured was made a mental or physical wreck by the negligence of defendant, but the facts of this case do not show such an injury. There is but little contrariety of opinion with the physicians as to the result of the injuries, and all save one see nothing, after examining the plaintiff, that would indicate permanent disability.

In the case of Shaw v. Boston & Worcester R. R. Co., 8 Gray, 45, the injury was such that the wife lost her left arm and a part of her right hand. Her right arm was broken so that it never united, she could not feed or dress herself, with her health and memory much impaired, and other serious wounds upon her person.

The character of the finding in cases like this is to be tested at last as to the amount by the average verdicts in cases growing out of personal injuries, when we are considering the question of excessive damages, by looking to the finding of juries in the past, and their approval or disapproval by courts of last resort. Such sums as are ordinarily awarded for such injuries, and, when comparing these cases with the one before us, can it be said that the damages, at first blush, are for too much, and such as the mind, free from passion or prejudice, would say was excessive?

Taking, therefore, the verdict in this State, without enumerating them, as found in reported cases, where the injury was as great or greater than here, and the largest verdict sustained is one for $15,000, and this was a case where both legs were amputated and the neglect as great as in the case before us (Ky. Central R. R. Co. v. Smith, ante, page—). The damages and finding by juries in cases of willful neglect, where death was the result of the injury, have not exceeded this sum. These cases having been passed upon during the existence of corporations for many years, conduce to show what courts and juries would consider as a reasonable sum to be awarded in this class of cases, the verdict in each case lessened or increased by the particular facts and circumstances surrounding it.

In the case of the Louisville Southern R. R. Co. v. Minogue, 12 Ky. Law Rep., 378 (90 Ky., 369), the plaintiff sustained external bruises and her nervous system was greatly shocked. She was confined in bed for eight weeks, and since she left her bed had been unable to walk. The verdict was for $10,000. This court held the verdict excessive, because it was not shown with reasonable certainty that there was a permanent injury, the medical testimony being as unsatisfactory in that case as in the one before us.

It is truly said that a court of last resort should be careful in interfering with the verdicts of juries in cases where the sum to be awarded in damages is within the discretion of the jury, even to the extent claimed by the plaintiff; but this discretion on the part of the jury must be a legal discretion, and in its exercise if the damages are erroneous, and so appear to a rational mind at first blush, it is not only the right but the duty of the court to interfere and set the verdict aside.

We perceive no objection to the instructions save the word willful, in fixing the degree of neglect, has now no place in the

law, and in fact had no place in this case, as the common law rule governed. and not that fixed by statute where death ensues. The question, as already indicated, is, was the injury caused by the neglect of the appellee's employes when in the discharge of their duties? If so, was it ordinary or gross neglect? If the first, compensation is the measure of damages; if the last, both compensation and punitive damages may be awarded.

On another trial contributory neglect may be shown, and we have only said that none appears from the facts as they are now presented.

Reversed and remanded for a new trial consistent with this opinion.

PERKINS v. STEIN & CO.

(Filed May 27, 1893.)

1. To constitute an assault and battery within the meaning of section 1 of chapter 10 of General Statutes, which provides that actions for assault and battery shall die with the person, the act complained of must be done with a hostile intent. Mere acts of negligence do not constitute an assault and battery within the meaning of the statute, even when trespass would lie.

2. Survivor of actions—An action against a master to recover damages for personal injuries resulting from the negligent driving of his servant survives to the personal representative of the person injured.

F. Hagan and A. H. Marret for appellant.

Ed. M. Louis for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The petition of Perkins averred that the appellees were the owners of a large brewery in Louisville, Ky., and of numerous brewery wagons, used for the purpose of delivering beer; that whilst so engaged the agents and drivers of the appellees carelessly, negligently and recklessly ran into, over and upon the plaintiff and bruised and injured him externally and internally, the wagon running over his left ankle and the shafts striking him in the breast; that thereby he was knocked down and trampled upon by the horses of the defendants' wagon, and confined to his room, etc., all to his injury, in the sum of $5,000.

The defendants, by answer, put in issue the material allegations of the petition, and by an amended petition pleaded contributory negligence on the part of the plaintiff. Whilst the action was pending, the plaintiff, Perkins, died, and thereupon his administratrix, the appellant here, moved to revive the action, filing the proper evidence of her qualification.

The court overruled the motion. She has appealed to this court, and the sole question presented is, does the action survive to the personal representative?

Section 1 of chapter 10, General Statutes, provides that "no right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for

any injury other than those excepted, an action may be brought or revised by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract."

It is contended by the appellees that the negligent act of the servant or driver in running over the plainitff was a trespass, and, therefore, an assault and battery in the meaning of the statute, and that for the injury growing directly out of this act, an action of trespass would lie at the common law, even against the master. Such an action, they contend, under the authority of Anderson v. Arnold's Ex'or, 79 Ky., 370, dies with the person.

We do not think, however, that the action is one of trespass. While the injury was the immediate consequence of the act, and in this particular the requirements of the rule in actions of this class is met, yet it was not the act of the master; the latter may be responsible in damages, indeed ordinarily is, for the negligence of his servant, but case and not trespass is the proper remedy.

It was said in Johnson v. Castleman, &c., 2 Dana, 377, that in considering these forms of action "the distinction that exists between the defendant himself doing the act complained of and its being done by an agent," must be borne constantly in mind. But, though care be the proper form of action, yet, if the cause of action arise from or grow out of an assault and battery, it dies with the person. The vital question then is, what is an assault and battery in the meaning of the statute?

"An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect." (2 Greenleaf on Evidence, section 82.)

"The intention to do harm is of course the essence of an assault." (Ib., section 83.)

"An assault is an attempt with violence to do a person some bodily harm, as by holding up a fist, striking at another with a stick which does not touch the latter, or throwing any thing at a person which misses him, or by any similar act of inchoate violence, showing an intention to do injury, and the aggressor being within such a distance from the party assaulted that the intention might possibly be executed." (See in general Bac. Ab., Assault; Com. Dig. Battery; 3 Bl. Com., 120.)

Mr. Greenleaf, section 82, says: "A battery is the actual infliction of violence on the person. * * * The degree of violence is not regarded in the law. Thus, any touching of the person in an angry, revengeful, rude or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner to detain him, is a battery. So striking the skirt of his coat or the cane in his hand is a battery; for any thing attached to the person partakes of its inviolability."

"A battery is more than an attempt to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man in an angry or revengeful or rude or insolent manner, such as spitting in his face, etc., is a battery in the eye of the law. * * * It should be observed that every battery includes an assault." (1 Russ on Cr., 9th Am. Ed., page 1020.)

Bishop, in his work on Criminal Law, volume 2, section 72, says that to constitute a battery "there must be some sort of evil in the intent."

We are, therefore, prepared to say that to constitute an assault and battery under the foregoing definitions, the act complained of must be done with a hostile intent.

It is true that Mr. Greenleaf, in his work on Evidence, under the head of Assault and Battery, volume 2, section 85, says that "thus if one of two persons fighting unintentionally strikes a third, or if one uncocks his gun without elevating the muzzle or other due precaution, and it accidentally goes off and hurts a looker-on, or if he drives a horse too spirited, or pulls the wrong rein, or uses defective harness, and the horse, taking fright, injures another, he is liable for the battery;" but an examination of the cases cited as the basis of the text show merely that for these various instances of negligence the person injured has his remedy by action of trespass. They are not meant as instances of assault and battery at the common law. Undoubtedly cases of extreme recklessness, as furiously riding or driving into or upon a crowd, may be instanced, indicating or implying an evil or hostile design, but such is not the case under consideration. Under the petition as drawn, the plaintiff is entitled to recover upon showing any degree of negligence, whether ordinary or gross, and we do not think that mere acts of negligence in any of its degrees are assaults and batteries in the meaning of the statute.

The only authority relied on by the appellee, and upon which it is contended the lower court overruled the motion to revive, is that of Anderson v. Arnold's Ex'or, supar. There Anderson sued the executor of Arnold, alleging that Arnold had "negligently and recklessly, but not intentionally," inflicted a wound upon the body of the plaintiff by shooting him with a pistol, etc. A demurrer was sustained on the ground that the cause of action died with the person, and the judgment of the lower court was affirmed by this court. In that case the distinction between actions of trespass and of case was discussed, and the cause of action was determined to be trespass and not case, and, therefore, did not survive, but it was by no means held that all actions of trespass were common law assaults and batteries. "Following, therefore," says the court, "this common law definition, it was an assault and battery committed upon the plaintiff, although the shot was fired at a third person, and the meaning of the words assault and battery will not be restricted to an actual and intentional beating of another so as to authorize a recovery."

The petition charged that Arnold unintentionally shot and wounded the plaintiff, but the shot was fired intentionally at another, and, therefore, under abundant common law authority, it was an assault and battery. The act of shooting was done with hostile intent, though the wounding of the plaintiff was unintentional.

We do not think the case relied on was meant to decide or decides that unintentional cases of injury, occurring through negligence and without design, even when trespass would lie, are assaults and batteries.

We are of opinion that under the statute quoted the action survived to the administratrix of Perkins, Perkins, and her motion to revive should have been sustained.

Judgment reversed, with directions to enter the order of revivor as herein indicated.

SUPERIOR COURT ABSTRACTS.

WELLS v. WELLS, &c.

Filed May 24, 1893. Appeal from Pendleton Chancery Court. Opinion of the court by Presiding Judge Yost, affirming.

Consideration for mortgage—A creditor having had his execution levied upon land which had been mortgaged to another by his debtor, in this action by him, alleging that the consideration recited in the mortgage was not the true one, and calling upon defendants to answer and set up what the real consideration was, the uncontradicted testimony of the mortgagee to the effect that the consideration was his agreeing and assuming to pay certain debts for the mortgagor and his son, aggregating the amount recited as the consideration, and that no part of this amount had been paid to him, was sufficient to sustain the defense that the true consideration was expressed in the mortgage.

John H. Barker for appellant; Leslie T. Applegate for appellees.

MARKWELL, &c. v. LEWIS.

Filed May 24, 1893. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. Transfer to equity—As this suit was properly commenced by ordinary proceedings, and the first paragraph of the answer contained denials constituting a legal defense, the plaintiff was entitled to have the issue thus made tried by a jury, and, therefore, defendants were not entitled to have the entire action transferred to the equity docket for trial, although the issue tendered by the second paragraph of the answer was exclusively cognizable in chancery.

2. Bill of exceptions—As the judge does not certify that the bill of exceptions contains all the evidence heard on the trial, this court can not consider the complaint that the verdict is not sustained by the testimony.

3. Reversible errors—In the absence of an exception to the exclusion of testimony, the correctness of the court's ruling can not be inquired into.

4. Instructions to jury—The court properly refused an instruction based solely on evidence excluded without objection.

Jones & Jones and Stone & Sudduth for appellants; W. L. Porter for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. WALTON.

Filed May 24, 1893. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. Railroads—Failure to keep crossing in repair—In this action against a railroad company to recover damages for personal injuries received by plaintiff in crossing defendant's track in his wagon, the ground of recovery alleged being that defendant was negligent in failing to keep its roadbed at the crossing in a safe condition, the evidence was sufficient to authorize a verdict for plaintiff.

2. Failure to give notice of filing of mandate—The defendant having announced ready for trial after the mandate of this court was filed, the fact that the mandate was filed without notice on the day the case was set for hearing did not furnish a ground for new trial.

H. C. Martin for appellant; S. M. Payton for appellee.

RISK v. BRIDGEFORD & CO.

Filed May 24, 1893. Appeal from Woodford Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. Negotiable instruments—Liability of indorser—Notice of dishonor—When a negotiable bill is dishonored by nonpayment at its maturity, due notice of dishonor is a condition precedent to the liability of any indorser thereof. To this rule there are several exceptions. One is that if the indorser be himself the accommodated instead of the accommodating party, he is not entitled to notice, because he is under obligation to take up the bill, and has no remedy on so doing against any other party.

2. Same—Any person who signs such a bill otherwise than as drawer or acceptor incurs the liability of and is an indorser.

In this action by the drawers of a bill against the payee, who indorsed and delivered it to them, the petition is fatally defective in failing to allege that the defendant had notice of the dishonor of the bill or that it was drawn for his accommodation alone. If a consideration passed from the drawers to the payee when he assigned the bill, this did not release from them their primary liability to him as drawers.

J. M. Hoge for appellant.

McFARLAND, WALTON & CO. v. PRYSE & ROBINSON.

Filed May 24, 1893. Appeal from Bell Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Contract for grading road— Estimate made after completion of work —In this action to recover for work done in grading a road under a contract classifying the excavations to be made and fixing the price per cubic yard for each class, it was for the jury to decide whether estimates made by plaintiffs' witnesses after the work was completed were as accurate as those made by defendants' witnesses during the progress of the work, practical engineers testifying that estimates could be made as well after the work was done as while it was in progress.

2. Writing not signed competent as evidence—A writing submitted by defendants to plaintiffs as embracing the terms of the contract, and not objected to by plaintiffs, was competent evidence upon the issue as to what the contract was, although not signed by either party, the contract not being one required by law to be in writing.

2. Reversible errors—The rejection of evidence not being assigned as a ground for new trial, it can not be made the basis of a reversal.

Chapman Nicoll, J. R. Sampson and T. G. Anderson for appellants; G. W. Saulsberry and W. H. Holt for appellees.

McCULLOCH v. COOK.

Filed May 24, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Insolvency is not a ground for attachment; nor is the fact that the defendant has not sufficient property subject to execution to satisfy the plaintiff's debt of itself sufficient to authorize an attachment. It must also be both alleged and proved that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found; and while ordinarily the fact that the debtor has not sufficient property subject to execution to satisfy the demand will make a prima facie case, yet this prima facie case is overcome when the facts show that no danger was to be reasonably apprehended from a delay in obtaining judgment, etc.

Sweeney, Ellis & Sweeney and J. L. Dorsey for appellant; J. F. Clay for appellee.

CORN v. McKEE.

Filed May 24, 1893. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Reversible errors—Although the court excluded evidence which was undoubtedly competent, yet as it was not made a ground for a new trial there can not be a reversal on that account.

W. R. Hayes for appellant.

GOODIN & CO. v. FIRST NATIONAL BANK OF ELIZABETHTOWN.

Filed May 31, 1893. Appeal from Larue Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Money set apart to debtor in lieu of homestead—Exemption—Where a debtor who had made an assignment for the benefit of his creditors, reserving his homestead, entered into an agreement with the assignees and creditors, by which he surrendered his homestead to be sold with the other land conveyed by the deed of assignment. In consideration of the payment to him of $1,000 in lieu thereof, the money thus paid to him, having been loaned by him to his brother-in-law without interest, can not be subjected by any of his creditors who consented to its payment to him in lieu of his homestead. What would be the rights of the parties if the debtor had invested the money in property not exempt under the statute is not determined.

2. A cross appeal can only be granted to an appellee against an appellant. Therefore, a cross appeal granted in this case against one not an appellant is dismissed.

I. W. Twyman, Hobson & O'Meara and E. E. McKay for appellants; S. H. Bush for appellee.

GERMAN INS. CO. v. HORAN.

Filed May 31, 1893. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Fire insurance—False statements written by agent in application—An insurance policy is not invalidated by reason of the written answers to the questions in the application being false, where they were so written by the insurer's agent, after they had been truthfully answered by the insured; and this rule applies, although the agent is a mere soliciting agent with restricted powers, which appear in the application itself, as the insured can not be required to read the application to ascertain the extent of the agent's authority.

2. Same—Where the owner of a house, in making application for insurance upon it, told the soliciting agent of the existence of a mortgage upon the land, but added that under the circumstances, which were stated, he supposed the mortgage did not cover the house, and that the agent could consult a lawyer, and the agent in writing the answers of the insured in the application stated, in response to a question as to that matter, that there was no encumbrances; the fact that the insured did not tell the agent of the existence of another and much smaller mortgage upon the land was not material, the agent being put on his guard and there being no purpose to conceal anything.

E. L. Worthington and D. S. Clay for appellant; Coohran & Son and Jas. N. Kehoe for appellee.

FULTON TOWBOAT CO. v. PENDERGRASS.

Filed May 31, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Interrogation of witness by juror after submission of case—It was not error to allow a juror, even after the case had been submitted to the jury and they had retired to their room, to interrogate the plaintiff, in the presence of the court and the parties, as to certain parts of the evidence given by him while on the witness stand.

2. An instruction as to punitive damages, even conceding that it was not authorized by the evidence, was not prejudicial, it being manifest from the amount of the verdict that nothing was allowed in the way of punitive damages.

3. Contributory negligence—Although the plaintiff was guilty of negligence, the defendant is liable if, after it saw the danger in which plaintiff had placed himself, it could have prevented the injury by the exercise of reasonable care.

Geo. DuRelle for appellant; Willson & Thum for appellee.

The Kentucky Law Reporter

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

VOL. 15. OCTOBER 1, 1893. No. 7

KENTUCKY COURT OF APPEALS.

CENTRAL PASSENGER RY. CO. v. ROSE.

(Filed June 1, 1893—Not to be reported.)

1. In this action against a street railway company to recover damages for injuries to plaintiff, alleged to have been caused by defendant's negligence in the sudden starting of its cars as plaintiff was in the act of stepping on the platform, as the testimony for plaintiff tended to show an utter indifference to his safety upon the part of defendant's servants after they discovered his peril, this court can not disturb a verdict for the plaintiff upon the ground that it is not sustained by the evidence.

2. The instructions were as favorable to defendant as it was entitled to ask.

3. Contributory negligence—The court can not say as matter of law that it was contributory negligence on the part of plaintiff to attempt to board a slowly moving electric car. That was a question for the jury.

4. The court properly refused to instruct the jury that plaintiff could recover no damages for any injury so far as the same has been aggravated or made permanent by his failure to obey the reasonable directions of his physicians, as the instruction called attention to certain testimony and not to any issue raised by plea.

Humphrey & Davie for appellant.

J. M. Chatterson for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellee, Rose, was a stairbuilder in Louisville, and on the evening of the 3d of June, 1890, came to a point near the crossing at Jackson and Green streets, as had been his custom for some eight or ten months, for the purpose of boarding appellant's street car en route home.

As the car approached he signaled the motorman, who "slowed up," and then, while the car was running as slowly as was its cus-

tom under such circumstances, he got hold of the rail and started to step upon the platform, when the electric current was suddenly turned on and the car started with a jerk at a fast rate of speed, throwing him off his feet and dragging him some fifty feet or more, when he fell and was struck by the car steps and badly injured. The conductor and motorman saw his peril and made no effort to stop the car until after he fell.

This is the state of case shown by the proof of the appellee. The appellant shows that on the evening in question the car was behind time, and was running as a "through train." It was not stopping to take on passengers. It "slowd up" at the crossing because of possible collision with passing vehicles. When going pretty rapidly near the crossing in question the appellee ran out and grabbed the rear end of the motor car. The force of the car threw him down and dragged him "a foot or two, or, may be, three," upon which the car was stopped within a space of seven or eight feet. The conductor testifying, "When I saw him (appellee) make a rush for the car I grabbed the brake with one hand and the bell cord with the other. * * * I put on the brake when he made the rush for the car about the time he grabbed the car."

The motorman says "after I slowed up the car at the first crossing and saw every thing was clear, I threw the current on and went ahead. After I passed the last crossing, some gentleman, I dont know who it was, stepped off of the sidewalk and threw up his hand. I shook my head—I didn't have time to do anything else—that I would not stop. He started for the car anyhow like he was going to grab it, and I shut the current off and looked back this way to see what had become of him. The car was just rolling and I saw Rose raise up, and I reversed the car and stopped it in about six feet."

Manifestly, if the facts are as stated by the appellee, the company's employes were guilty of the grossest negligence. It might well have been concluded by the jury that they had shown an utter indifference to Rose's safety after seeing his peril; that in their determination not to stop for passengers, but reach their destination on time, they had recklessly disregarded their plain duty in not stopping the car in the shortest time possible upon seeing the danger.

Upon the state of case shown by the appellant's witnesses, there was no negligence on the part of the company's servants, but the injury was the direct result of the appellee's own negligenc. The jury heard the proof, were the judges of it, and if they were properly instructed the judgment must be affirmed.

We can not say, as a matter of law, that it was contributory neglignce on the part of the appellee to undertake to board a slowly moving electric car. The rate of speed at which it was going on the occasion in question, the manner of the attempt to board it by the appellee, and the conduct of the crew in charge of the car after the peril was discovered, were matters put in proof before the jury. Their province was to determine from the proof what state of case actually existed and what acts were or were not negligent acts under all the proof and the instructions. They evidently believed the appellee and his witnesses. We can not disturb their finding as there is sufficient testimony to support it.

The first instruction given to the jury is, that if they believe from the evidence that the plaintiff was injured by the negligence of the defendant or its agents, they shall find for the plaintiff, unless they believe that the plaintiff, by his own negligence, contributed to the injury, in which case they shall find for the

defendant. But if they further believe that after the plaintiff was in a position of peril, which was known to the defendant, and that the said defendant or its agents could have then, by the exercise of ordinary care, avoided the injury to the plaintiff, then the law is for the plaintiff, notwithstanding any previous conduct of his may have contributed to place him in such position of peril or danger."

Substantially correct definitions of negligence and gross negligence were submitted to the jury, and if gross negligence was established, they were told to find exemplary damages or not in their discretion. Their verdict was for $2,500, which was not more than fair compensatory damages.

We are of opinion that the law was properly given, and fully as favorable to the appellant as was authorized. The appellant insists that it was the duty of the plaintiff to use ordinary care and prudence in following the directions of his physicians, and that he could recover no damages for any injury, so far as the same has been aggravated or made permanent by his failure to obey the reasonable directions of his physicians.

An instruction to that effect was offered by counsel for the company and overruled, and we think properly so. It called attention to certain testimony and not to any issue raised by plea. The danger apprehended was from a permanent stiffened knee joint. The damages which the appellee might recover, growing out of a permanent reduction of his power to earn money, must have been such as resulted directly from the injury, as was indicated in the third instruction.

We think that the verdict is sustained by the proof, and that the jury was not misled by the statement of appellee's counsel in the argument, especially in view of the admonition of the court on that subject.

Judgment affirmed.

NATIONAL BANK OF COMMERCE OF PITTSBURGH, PA. v. LICKING VALLEY LAND AND MINING CO.

(Filed June 1, 1893—Not to be reported.)

1. A sale for taxes of land assessed as 18,750 acres, as the property of D., did not pass the title to an undivided fourth interest in a tract of 67,000 acres, owned by D. at the date of the assessment, and sold and conveyed by him to appellant between that date and the date of the tax sale.

2. Limitation—As appellant's land was not sold, or if sold was sold as the land of another, the five years' statute of limitations, which applies to actions for the recovery of land sold for taxes, does not apply to this action by appellant to set aside the auditor's tax deed embracing his land; and even if the statute applied, in no event could it begin to run until the conveyance was made by the auditor, with a boundary embracing appellant's land.

3. The owner of the land may maintain an action to set aside a deed which constitutes a cloud upon his title, although he is not in the actual possession of the land.

4. Right of national bank to hold title to real estate. Although a corporation may have no power under its charter to take title to real estate, a conveyance to it is valid unless assailed in a direct proceeding, the sovereign alone having the right to object. And where a national bank has taken real estate to secure a prior indebtedness, its failure to sell within five years after acquiring title, as required by law, does not authorize the State to declare a forfeiture and enter into the possession.

5. The failure of the clerk to index a deed which is properly recorded can not prejudice the grantee.
6. Failure of nonresident to list land for five years—The statute which formerly provided for the forfeiture of the land of a nonresident who failed for five years to list it, even if constitutional (a question not decided), has no application to such a case as this.
7. Void tax sale—Lien of purchaser—Although the deed executed by the auditor to defendant must be set aside, defendant should be allowed to set up, by way of counterclaim, any liens it may have by reason of taxes paid upon the land, and also any equitable defense for improvements made, if of such a character as would authorize the chancellor to hold that appellant is properly chargeable with their value.

W. P. D. Bush, S. F. J. Trabue, Walter S. Harkins and Ireland & Ireland for appellant.

W. J. Hendrick for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Pryor.

On the 11th of December, in the year 1872, Wm. H. May and G. M. Wilten obtained a patent from the State of Kentucky for 92,021 acres of land, excluding 128 smaller tracts within the survey, aggregating 25,021, leaving 67,000 acres, to which the patentees had title.

The patentees, on the 7th of August, 1873, conveyed three-fourths undivided of the entire tract to one John Jennings, and John Jennings, on the 4th of February, 1875, conveyed one undivided one-half of said land (67,000 acres) to W. L. Durant, and on the 24th of April, 1877, Durant conveyed an undivided one-fourth of this land to Wm. Reed, and Reed, on the 8th of October, in the year 1878, conveyed, in consideration of $5,000, his one-fourth interest derived from Durant to the National Bank of Commerce, doing business in the city of Pittsburgh, in the State of Pennsylvania.

These deeds are of record in the county of Floyd, and show a title in the bank (the appellant in this case) from the patentees by a regular chain to the one undivided fourth interest in this tract of 67,000 acres of land.

The appellee, the Licking Valley Land and Mining Company, claims to have derived title through one Rice, who purchased this interest of the appellant under a tax sale, or by reason of a tax sale made by the sheriff of Floyd county or Auditor's agent for taxes due the State.

The land having been offered for sale for taxes amounting to $38, and no one bidding but the State, the Auditor, under a legislative enactment applicable to such cases, and, as is claimed, in accordance with this enactment, sold this land to Rice, the latter or his agent paying the tax to the State and the costs attending the tax sale.

A deed was made to Rice by the Auditor in October, 1882, and by Rice to the appellee on the 8th of January, 1883.

It seems that this land was sold for taxes for the year 1877 that were due and unpaid. The land was assessed by the assessor of Floyd county, not as the one undivided fourth of 67,000 acres, but as 18,750 acres, valued at $9,375, and belonging to W. L. Durant. Durant was a nonresident, and the assessment and valuation was made by the assessor of the county in January, 1877. A deed was made by the Auditor by metes and bounds, and it is conceded, if not the facts show, that the deed covers and em-

braces the land sold by Durant to Reed and by Reed to the appellant. The other fourth interest was that of one Packard, and how he derived that interest does not appear, and is not involved in this litigation.

The appellant filed its petition in the court below in the nature of a bill quia timet, in which it is alleged that he held the title by purchase from Durant, and that the tax deed is a cloud upon his title, and asks that it be removed, etc.

The defense relies solely upon this deed of the Auditor for title, also claims that the appellant, being a national bank, had no right or power to purchase land, and if the power existed the failure to sell the land within five years after the title was acquired, as provided by the national banking law, forfeited its right to hold it. The court below adjudged in favor of the defendant (appellee) and from that judgment the appeal is taken. Counsel for the appellant has raised many questions, both in his brief and by the pleadings, as to the validity of this Auditor's deed, and the many alleged irregularities in the sale of this land.

The determination of many of these questions is not necessary to a decision of this case, and without passing upon them, or determining whether the sheriff making the sale, or the Auditor in executing the deed to Rice has complied in every respect with the provisions of the statute, it is sufficient to say that the land in controversy was sold as the property of Durant, assessed and levied upon as his land, and the only title the State acquired, or the purchaser from the State, was the title of Durant to the land in controversy.

The assessment is as follows: "Name of owner, Wm. L. Durant; acres of land, 18,750, situated in precincts 3 and 4 adjoining the lands of J. W. Vance; value $9,375."

Under this assessment the sheriff sold this land to the State for $40.25, $37.50 being the tax due, and in March, 1882, the Auditor made private sale of this entire tract to the vendor of the appellees for a like sum.

The land had been valued at near $10,000 by the sheriff, and before the sale the title had been vested in the bank or its vendors by deeds of record in the county court clerk's office of Boyd county. The fact that one or more of the deeds had not been indexed can make no difference; they were of record, and the appellant invested with the title before the sale was made by the sheriff, and long before the deed made by the Auditor to the vendor of the appellee.

The undivided one-fourth interest of Durant in this land was never listed or assessed, for taxation by the assessor or any one else, and there was no right on the part of the Auditor to make any conveyance of this undivided interest to Rice, and it passed no title.

The tax writ may have been against Durant and the property assessed while he was the owner, but in a proceeding to sell for taxes the assessment should be on the property as it is held by the owner. Durant owned an undivided one-half of the entire tract by deed from Jennings, and had sold to the vendor of the appellant an undivided one-fourth, and under this state of case how can it be assumed that appellant's one-fourth undivided interest was sold and not the remaining fourth? And under such a sale as was made by the Auditor's agent in this case the Auditor had no power to make a conveyance of this undivided interest of one-fourth to any one.

There was no definite description of the land sold, and if the levy had been under an ordinary execution, the title to the undivided interest would not have passed.

The land of the appellant was sold without notice to it of the proceeding, when no levy had been made to satisfy the lien for the State upon it, and neither the five-year statute or any other limitation can apply, except such limitation as arises from an adverse holding for fifteen years.

It is not pretended that the land was sold as the bank's land, or that it had notice, express or implied, that its one-fourth interest in 67,000 acres of land was about to be sold for taxes due prior to its becoming the purchaser.

The proceedings authorizing a tax sale to be enforced must be in accordance with the provisions of the statue, and this court will not presume, from the fact of the assessment and sale, that all the steps taken have been regular and as provided by law. The burden is on the vendee, who asserts his title, to make these facts appear, else the sale will be held void.

Here is a sale of 18,000 acres of land, without any definite description, for a tax of $37, without notice to the vendee of the original owner that any taxes were due upon it, and a conveyance of his undivided interest that was at no time assessed attempted to be passed by the deed from the Auditor. The fact that the appellant was delinquent in not assessing its property can make no difference, and all the claim the State has is a lien for the taxes due upon it.

The statute of limitation can not apply because the land of the appellant was not sold, nor could it begin to run, if at all, until the conveyance was made by the Auditor with a boundary embracing it, and this suit was brought within five years from the date of that conveyance.

It is contended that the bank had owned this land five years, and not having sold it forfeits all title.

It can not be that the failure to sell forfeits title in such a mode as that any one can enter claiming the forfeiture and thereby acquires title.

It is said in National Bank v. Matthews, 8 Otto, 621 (98 U. S), that "where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid unless assailed in a direct proceeding. This we think is the correct rule, and if the amended petition offered by the bank had been permitted to be filed it would, as therein alleged, have been made to appear that the bank had taken this land to secure a prior indebtedness, and the failure to sell within five years after acquiring title can not have the effect of authorizing the State to declare a forfeiture and enter into the possession.

This is not a proceeding by a nonresident who has failed to list his lands for taxation, but by a nonresident whose land had been sold as the land of another and the statute can not apply. It is where the land has been sold as the property of the nonresident, to which the statute is applicable, and not where the land of A is assessed as the property of B and sold for taxes upon it. Whether the statute which provides for the forfeiture of the lands of a nonresident where he fails for five years to list it is unconstitutional, is not, in view of what has already been adjudged, necessary to be decided.

The agreed facts show that neither party has had actual possession of this land, but only such a constructive possession as arises from the deeds under which they claim, and it is, therefore, maintained that this petition in equity is improperly brought, as possession in fact is necessary to sustain a bill quia timet.

We perceive no reason why the action to cancel the deeds from the Auditor to Rice and Rice to the appellee should not be en-

tertained. It is the only mode of removing the evidences of title acquired by the State under a proceeding to enforce taxes that, if valid, defeats the title in appellant.

This court, in Simmons v. McKay, 5 Bush, 25, has held that a remainderman may institute an action to remove a title that affects his remainder interest, and it seems to us that this character of case appeals to the equity jurisdiction for relief. It follows, therefore, that the conveyance by the Auditor to Rice and by the latter to the appellee should both be canceled, and the appellees allowed, by an amended answer and counterclaim, to set up any liens it may have by reason of taxes paid upon this land, and also any equitable defense for improvements made, if of such a character as would authorize the chancellor to hold that the appellant is properly chargeable with their value.

Reversed and remanded for proceedings consistent with this opinion.

McCORMICK, &c. v. JONES.

(Filed June 1, 1893—Not to be reported.)

Judgment supported by evidence—As this case involves only a question of fact, which has been passed upon by the chancellor, and the weight of the evidence is with the appellee, the judgment is affirmed.

H. C. Eversole for appellants.

Ewell & Smith for appellee.

Appeal from Laurel Court of Common Pleas.

Opinion of the court by Judge Pryor.

This case has been decided upon the testimony by the chancellor, and the weight of the evidence is with the defense.

The appellee sold to the ancestor of the appellants a tract of land adjoining another smaller tract, and the boundary of the smaller tract was thought might interfere with that of the larger. It is alleged that the appellee represented that the corner of the line of the smaller tract was at a certain point, when, by a subsequent survey, the boundary of the smaller tract took in or embraced a part of the larger tract sold appellant's ancestor, including certain improvements made on the larger tract, and some of the best land.

It appears that the appellants' ancestor subsequently purchased this small tract, and paid a less price for it than he did for the large tract, and also that the appellee had sold the larger tract to McCormick for $700, and there being some trouble as to location of the corner of the smaller tract, the price agreed on was reduced to $650, and this settled, as it appears to us, the dispute as to the real corner of the 85 acres; and, besides, the testimony shows that the appellants have sustained no injury.

Judgment affirmed.

MURPHY v. COMMONWEALTH.

(Filed June 1, 1893—Not to be reported.)

Criminal law—Reckless use of loaded pistol—Upon the trial of appellant for murder the evidence was sufficient to authorize an instruction telling

the jury that even if they believed that the shooting and killing was accidental, "yet if they believe that said accidental shooting and killing was the result alone of the recklessly careless use of a loaded pistol in the hands of defendant, they should find him guilty of voluntary manslaughter."

Wilson & Rawlings for appellant.

Wm. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

The only ground suggested by counsel for reversal of judgment in this case is the third instruction, as follows: "Even if the jury believe from the evidence that the shooting and killing of William Gray was accidental, yet if they believe that said accidental shooting and killing was the result alone of the recklessly careless use of a loaded pistol in the hands of defendant, they should find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary of the State for a period of not less than two nor more than twenty-one years, in their discretion."

We do not see any error in that instruction; for an offense, which may be either murder or manslaughter according to attending circumstances, is correctly described in that instruction. The only reason that could exist for condemning the instruction is lack of evidence authorizing the court to give it, and even in view of the evidence in the case it was proper for the court to give it.

The deceased was a boy eleven years of age, accused being fifteen or sixteen years old. The deceased, accompanied by a woman, went to a place in the woods for the purpose of carrying dinner to two men, who, with the accused, were engaged in getting saw-logs. The deceased was asked by one of the men to preach, but upon his refusal accused drew a loaded pistol, and, pointing it at his toes, told him he would shoot him if he (deceased) did not preach; and continued pointing it at him until deceased ran under a log for protection, in the meantime crying from fright.

Afterwards accused started away from the place, and by persuasion deceased was induced to accompany him. When they had gotten away about 150 yards, and ought of sight, a pistol shot was heard by the others, who, when reaching the place, found the little boy with a wound in the breast and dead.

Accused stated that the shot was purely accidental, and resulted from his falling and striking the pistol that was in the scabbard against a rock, and that he did not, at the time, have the pistol pointed at deceased, or even drawn, but to another person he admitted, on the day after the killing, that he had the pistol pointed at deceased, and the shot was caused by his finger accidentally slipping upon the trigger.

There was evidence sufficient to authorize the jury to believe and find death occurred under circumstances of such reckless and gross carelessness as to make the homicide manslaugher, of which accused was found guilty.

Judgment affirmed.

CARTER v. JOLLY, &c.

(Filed June 8, 1893—Not to be reported.)

Judicial sales—Purchase by agents—Where a nonresident who had purchased land at judicial sale gave bond with her attorney as surety, and the attorney paid off the bond when due and instituted an action in equity to enforce his lien by substitution, and at a sale made to satisfy the lien became the purchaser, in this action by the nonresident to set aside the sale of the land upon the ground that the attorney was her agent to rent the land and apply the rent and other claims placed in his lands to the payment of the sale bonds, which he failed to do, the evidence falls to establish the alleged agency. The fact that the attorney did rent out the land one year is not sufficient to show the agency claimed, as he testifies that for his own protection he rented out the land, which had been abandoned, and applied the rent and the other claims collected by him to the payment of his fee.

W. T. Owen and Wilfred Carrico for appellant.

Wm. H. Holt. R. S. Todd and C. S. Walker for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant's husband died several years ago intestate, leaving a small tract of land, which was encumbered by some claims against him. The persons that held the claims sought to subject the land to their payment.

The appellee and Riley & Walker, attorneys, were employed to resist the claims and establish dower in the land for the appellant. They succeeded in reducing the claims and establishing dower for the appellant.

The land was sold to satisfy the claims allowed; the appellant bought it for the sum of between $400 and $500, and the appellee and the other attoreys named went on her bonds as sureties for the purchase money. When said bonds fell due Riley & Walker paid them off, and then instituted an action in equity to enforce their lien, by substitution, on the land. They obtained a decree for its sale; the appellant was proceeded against as a nonresident, and the appellee was appointed to defend for her. He bought the land at the decretal sale, gave bond for the purchase money, and thereafter his surety bought the land from him and the court made him a deed. Eight or nine years afterward the appellant returned to this State, and brought this action to set the sale aside upon the ground that the appellee, Jolly, was her agent, employed to rent out the land and apply the rent and some other claims which she placed in his hands to the payment of the said sale bonds, but he failed to apply the rent and other claims to payment of said purchase money; but he suffered the land to be sold and purchased it at the sale, and that his vendee, at the time he purchased it, was apprised of the foregoing facts. The appellant in her evidence swears to the foregoing facts.

The appellee in his evidence denies that he was the appellant's agent for any purpose whatever. He says that he collected the claims placed in his hands, and applied the proceeds, as was the understanding, to the payment of the fees that appellant owed to him and his associates; that he was one of the appellant's sureties; he took charge of the land, which was abandoned, and rented it out for one year, to keep it from going to waste, and

also applied the rent to the payment of said fees; that at the decretal sale he bought the land to save himself as one of the appellee's sureties.

There is no evidence, other than that of the appellant, contradicting the appellee's version of the matter.

The appellant, however, relies upon the fact of taking charge of said land and renting it out, and taking charge of said claims and collecting them as corroborating her evidence in reference to the agency. But we think that said facts do not contradict the appellee, but are consistent with his contention of self-protection, and that the judgment of the lower court, that there was no agency established, must be affirmed.

The judgment is affirmed.

HALL v. MILES, &c.

(Filed June 8, 1893—Not to be reported.)

Judgment supported by evidence—In this action, in which the controversy is over the boundary line dividing the farms of the appellant and the appellee, as the testimony is very conflicting, the judgment in favor of appellee will not be disturbed.

Rives & Spalding for appellant.

J. P. Thompson for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

This controversy is over the boundary line dividing the farms of the appellant and the appellee. A small branch is said to be the true line, and the contention by the appellant is that the branch, by the falling of a large tree, changed its natural channel and left a strip of his land on appellee's side of the creek.

Both parties introduced testimony sustaining their respective claims, but the weight of the testimony for the appellee is made apparent from the fact that the vendor of the appellant, whilst he lived on this land, and before he sold it, purchased of the husband of the appellee, who was then in possession of the farm now occupied by the appellee, his widow, timber from the disputed territory, and besides there is other proof of a convincing character supporting the judgment below.

The testimony is certainly very conflicting, and in such a case it is well settled that this court will not disturb the finding.

Judgment affirmed.

BRAMMELL v. EASTERN KENTUCKY RAILWAY CO.

(Filed June 8, 1893—Not to be reported.)

Judgment supported by evidence—In this action by which the plaintiff seeks to recover damages from defendant for operating a tramway through his lands, and to enjoin the further operation of the tramway, the evidence is sufficient to establish the defense that defendant's entry upon plaintiff's land and the use of it for its tramway was with plaintiff's consent.

J. A. Scott and J. D. Jones for appellant.

E. B. Wilhoit for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Bennett.

This action of vi et armis was brought by the appellant against the appellee to recover damages for operating a tramway through his enclosed lands. He obtained an injunction enjoining the further operation of the tramway.

The appellee relied upon a license from the appellant to operate the tramway through his land, and enjoined him from tearing up and removing the tramway.

The question is, did the appellee have the liberty to operate its tramway through appellant's lands? Upon that subject the appellant swears that he did not give the appellee the liberty to operate its tramway through his land, and that the licenses given the appellant by the former owner was by agreement revoked.

The evidence shows that the former license was revoked; but did the appellant give the appellee the liberty to pass through his land after he purchased it? As said, he swears that he did not. On the other hand, Mr. Worthington, the agennt of the appellee, says that he obtained the right to operate the tramway through the appellant's land from him; that he was to pay a reasonable price for the use of the land, and if the appellant and appellee could not agree upon the price, they were to arbitrate it; that the appellant refused to arbitrate and commenced tearing up appellee's track, etc.

Two other witnesses corroborate Mr. Worthington as to the appellant granting the appellee the liberty to go through his land.

We think that the lower court's judgment that the appellee's entry upon the appellant's land, and the use of it for its tramway, was with the consent of the appellant.

The court enjoined the appellant from tearing up and destroying the appellee's tramway. We think that was proper.

The judgment is affirmed.

PHILLIPS, &c. v. THOMAS LUMBER CO.

(Filed June 3, 1893.)

Whether a writing is a deed or a will depends upon the intention of the maker as gathered from the whole instrument.

A writing by which the maker recites that a specific boundary of land "is deeded" to his wife for life and at her death to go to his grandson, further reciting that "this deed is not to take effect" until his death, and that he is "to have and keep full possession of said farm during his life," is to be regarded as a deed taking effect at once, and reserving to the grantor merely a life estate; and the deed having been recorded, one to whom the grantor subsequently sold and conveyed all the valuable timber standing on the land, is not entitled to enter for the purpose of taking the timber, the grantor being dead.

A. J. Auxier, Jas. M. York, R. T. Burns and Stewart &. Stewart for appellants.

L. T. Moore and John F. Hager for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Pryor.

Jesse Phillips, in consideration of the kind treatment of his wife, Vicey, and the love and affection he had for his grandson, John Phillips, as he expresses it, granted and conveyed to them his lands upon which he lived, describing them by a special boundary, in the following manner: "This land is deeded to Vicey E. Phillips during her life, and she is to live on and have control until her death, and at the time of her death it is to go to and belong to John Phillips, son of Wm. Phillips, deceased, and his heirs forever."

"This deed is not to take effect until the death of Jesse Phillips, and Jesse Phillips is to have and keep full possession of said farm during his life, and to have all proceeds of said farm until his death; and if said John should get in debt, or anything that would sell the land, then, at the time of sale, it is to go to his children," etc.

The deed was lodged for record, and recorded in the county of the grantor's residence and where the land is located, and the grantor lived upon it until his death, that occurred not long before this action was instituted.

After this conveyance to his wife and grandson the grantor sold and conveyed to the appellee, the Thomas Lumber Co., all the valuable timber standing upon this land, the consideration being some $2,300. This deed was also admitted to record.

After the death of the grantor the appellee claimed the right to use and occupy this land, for the purpose of getting the timber from it and asserting its right to the timber, by reason of this conveyance made subsequent to that made to the appellant.

The appellant filed this petition, claiming the land under the conveyance from his grandfather, and sought to prevent the appellee lumber company from entering upon the land to cut this timber, or removing it from the premises, alleging that its deed was a cloud upon his title, and that the timber gave to the land its principal value; that the appellee had obtained the deed by fraud from his grandfather, and the evidences of his (appellant's) rights were of record and known by the defendant.

A demurrer was sustained to the petition and the petition dismissed.

It is insisted by counsel for the appellant that no estate of any kind was created by Jesse Phillips before his death, and that his right to dispose of either the timber or land, so as to pass the fee, never having been parted with, the conveyance to the appellee gave it a full and perfect right to the timber.

This contention of counsel is based upon the provision in the deed to his wife and grandson, which says: "This deed is not to take effect until the death of Jesse Phillips," and the sale of the timber having been made before that deed took effect, the title to the purchaser is complete.

The case of Leaver v. Gauss, 62 Iowa, 314, used the language, "to commence after the death of the grantors, it being understood between the grantors and the grantee that the grantee shall have no interest in the premises as long as the grantors, or either of them, shall live," and it was held that the provision in that instrument was testamentary in its character, and revocable at any time by the grantor.

Other cases have been cited and proceed on the idea that a postponement of the enjoyment of the estate by the grantor leads to the conclusion that the gift or grant is testamentary and

revocable, unless it plainly appears that a future interest was presently given and irrevocable. (Babb v. Harrison, 9 Richardson's Equity, 111; 70 Am. Dec., 203; Turner v. Scott, 51 Pa. State, 126.)

It may be said that where no interest is vested or contingent in the grantee until the death of the maker, and no intent to pass title, the doctrine contended for must prevail. The language used must fix the intent of the grantor and determine whether the instrument is a deed or merely testamentary in its character.

The fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used, as found in the entire writing.

It is manifest to us, after reading carefully the conveyance to the wife and grandson, that the grantor's intent was to retain possession and control of the land, in so far as the right to its cultivation and its products were concerned, during his life, and after his death to his wife for life and then to his grandson.

He conveyed the estate to his wife for life, and then to John; but the draftsman, seeing that this would deprive the grantor of all interest, provided that the deed was not to take effect until his (the grantor's) death, and Jesse Phillips is to have full possession of said farm during his life, and to have all proceeds of said farm until his death.

The plain meaning and intention of the testator was to give, and he did give after his death, a life estate to his wife, with remainder over to John. It was a vested remainder in John from the moment the deed was executed and recorded or delivered to him, and while the grant is expressed in awkward terms, it is in no manner ambiguous, but a plain conveyance to his wife for her life (after his death) and then to John. It is like any other estate in remainder where the title vests at the execution and delivery of the deed, but the enjoyment of the estate is postponed until the preceding particular estate is ended.

The grantor, by using the language, "this deed not to take effect until my death," meant only that neither John nor his wife were to have the control of his farm or the proceeds until he dies, nor is this only an inference from the words used, but the grantor so states in plain and unmistakable language.

He made no reservation of the right to sell the land before he died, but retained as a life tenant the power to control and manage it and use its products as he pleased, postponing the time of occupancy by his wife or John until his death. The grantor by the grant divested himself of all title save his life estate. (Reynolds v. McFarland, 10 Ky. Law Rep., 932.)

It is further urged that as this deed was only for a good consideration, that of love and affection, and the appellee had paid full value for the timber, it should be allowed to hold it unless there was actual notice of the grantor's deed to the appellant, and the failure to make such an averment rendered the petition defective, if the main ground relied on is held to be insufficient.

We think the petition, from which we have already quoted, presents a cause of action, and the allegations must be in some manner controverted, else the appellant is entitled to recover.

The judgment sustaining the demurrer is reversed and the cause remanded for proceedings consistent with this opinion.

DARNELL & SON, &c. v. LEWIS.

(Filed June 6, 1893.)

Preference of creditor—A mortgage executed by an insolvent debtor to an antecedent creditor with the design to prefer operates as an assignment under the statute, although executed pursuant to a promise made at the time the debt was created.

Willson & Thum for appellants.

John C. Russell for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

The Cornell Wind Engine & Pump Co. made a general assignment for the benefit of creditors The lower court adjusted all the questions of attachments, priority of liens, etc, and all the parties are satisfied with the court's adjustment, except its action in sustaining the appellee's mortgage, dated October 18, 1890, upon the company's property, given by the company to secure a loan of $4,300 made by her to the company.

The appellee loaned to the said company $750 on August 26, 1890, $750 October 4, 1890, $750 October 10, 1890, and $2,000 October 18, 1890. On the latter date the company executed a mortgage to secure the whole sum loaned.

The appellants contend, first, that as the mortgage to secure the payment of the $2,300 was not executed simultaneously with the creation of said debt the mortgage as to said sum comes within the provision of the act of 1856, which declares that all mortgages, etc., made in contemplation of insolvency and with a design to prefer one creditor over another, shall operate as an assignment of all his property for the equal benefit of all his creditors.

The appellee contends that as she would not have loaned said sum to the company except upon the faith of a verbal agreement made with it at the time of the first loan, and repeated at every subsequent loan, that a mortgage should be executed to secure the loans as soon as the president of the company, who was then absent, should return home to sign the mortgage bonds, which were to be delivered to the appellee as security for the loans; that on October 18th, the pesident, having returned, signed and delivered the bonds to secure the payment of the loan of $2,000, that day made, and the loan of $2,300, theretofore made.

The appellee's contention is, that, as the money was loaned upon the faith of the contract to thereafter execute a mortgage to secure its payment, and as it was executed pursuant to the contract and before the right of third persons had intervened, the mortgage should be considered as relating back to the contract and as a part and parcel of it, and, therefore, binding.

Now the language of the act of 1856, in this connection, is significant. It is: "Nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage," etc. Now the statute speaks of a mortgage executed to secure a debt or liability created simultaneously with the execution of such mortgage. A promise at the time the debt or liability is created to execute a mortgage to secure its payment, upon the happening of some particular event in the future, or at some particular time in the

future, is not a compliance with the statute supra, for the statute certainly means that the mortgage must be executed—not promised to be executed—to secure the payment of a debt or liability created simultaneously with its execution.

The object of the statute was to prevent debtors in contemplation of insolvency from preferring one creditor over another by sale, mortgage or assignment of his property, but at the same time to give him a chance to recover from his embarrassment by allowing him to mortgage his property to secure a debt or liability simultaneously created; but the promise to give a mortgage in the future to secure a debt or liability, that day created, is not equivalent to the execution of a mortgage to secure the debt or liability simultaneously created.

The language of the statute means that the execution of the mortgage and creation of the debt or liability must be simultaneous acts. The promise to execute the mortgage in the future to secure a debt or liability that day made, is not a simultaneous act. It may never be executed. Besides, to substitute the promise to execute the mortgage for the act of executing would allow a debtor, in contemplation of insolvency, to make the preferences that it was the object of the statute to prevent.

Second, the weight of the evidence is that the mortgage was executed on October 18th instead of November 12th.

The case of McCutchen & Co. v. Caldwell & Son, 2 Ky. Law Rep., 145 (90 Ky., 249), takes up the case of Brooks, Waterfield & Co. v. Staten's Adm'r, 2 Ky. Law Rep., 56 (79 Ky., 174), and others referred to by appellee, and disposes of them consistently with this opinion.

The judgment is reversed as to the matter of $2,300, and affirmed in all other particulars.

HARPER, RECEIVER v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.

(Filed June 3, 1893—Not to be reported.)

1. Railroads—Contract for exchange of freight—Consideration—Where a railroad company which had recently completed twelve miles of its road from a station on the line of a road owned and operated by another company entered into an agreement to deliver to the latter company all freight passing over its road destined for points on the line of the latter road, in consideration of the payment to it by the latter company of 15 per cent. of the proportion of revenue produced by such freight traffic, the contract was supported by a sufficient consideration, and the former company having complied with its part of the contract, is entitled to recover the agreed 15 per cent. of the proportion of revenue thus produced. Beside, the latter company, having for about four years acquiesced in and enjoyed all the benefits arising from faithful performance by the former company of its part of the contract, can not now be heard to say there was no consideration for what is sued for.

2. Fraud—A party is not entitled to have a contract set aside on account of false representations, which he must have known to be false, and by which he was not deceived.

D. S. Oliver and D. W. Lindsey for appellant.

J. W. Alcorn and C. B. Simrall for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Lewis.

July 1, 1885, the Cincinnati & Green River Railroad Company, having recently completed twelve miles of its road from King's Mountain, a station on the line of the Cincinnati, New Orleans & Texas Pacific Railway Company, to a place called Yosemite, in direction of Nashville Tennessee, entered into a written contract with the other, which was signed by the president of each company, and subsequently approved by the two boards of directors.

In the first clause of that contract the Cincinnati & Green River Company, called party of the first part, agreed to deliver to the Cincinnati, New Orleans & Texas Pacific Company, called party of the second part, at King's Mountain Station, all business originating at any station on the line of its road, including business from Nashville and all that should pass through Nashville over said line of road for the cities of Cincinnati, Louisville, Lexington, Chattanooga, Junction City and all points beyond reached by passing through said cities.

The party of the first part, in clause fourth, further agreed, so far as it had power, to order all business destined to points on its line, originating beyond Cincinnati, Lexington, Louisville or Chattanooga, or any other junction point, to be delivered at such points to the party of the second part.

Clauses second and fifth relate to agreed freight rates on business originating on the line of the party of the first part and delivered to the party of the second part.

Clause three is as follows: "It is further agreed that the said party of the first part shall receive fifteen (15) per cent. of the proportions accruing to the party of the second part on all freight traffic beyond local stations on the line of its road, and local stations on the line of the railroad of the party of the first part. It is further agreed that the party of the first part shall receive fifteen (15) per cent. of the proportion of revenue accruing to the party of the second part on all noncompetition freight passing to and from local stations on the railroad of the party of the first part to and from stations on the line of or points reached via the railroad of the party of the second part, and to include traffic going to and coming from points beyond the terminus of the railroad of the party of the second part."

By clause six it is provided "that on the completion of the Cincinnati & Green River Railroad to Nashville, Tennessee, all the receipts from the freight traffic of the parties hereto between Cincinnati and Nashville and points beyond passing over the lines of the parties hereto, shall be divided pro rata between the said parties, based on actual mileage. The party of the second part agrees it will not charge mileage upon its cars when delivered to the party of the first part, to be sent to local stations on the Cincinnati & Green River Railroad until completion of that road to Nashville, when it will become a connection in the usual understanding of that term, and will be prepared to exchange cars with the party of the second part upon the customary rates."

It was provided for the contract to take effect at once and to remain in force for the period of seven years, and thereafter until one year's notice be given to terminate it.

In 1888, in an action by a creditor, judgment was rendered, appointing George B. Harper, receiver of the Cincinnati & Green River Compay, with power to take into his possession and operate its road, and to sue for, collect and take into possession the goods, chattels, rights, credits and moneys of the company.

This action was brought March 15, 1889, by George B. Harper, as such receiver, against the Cincinnati, New Orleans & Texas Pacific Railway Company, to recover $10,092.25, being 15 per cent. of the alleged proportion of revenue that accrued to defendant from freight traffic produced by the Cincinnati & Green River Railroad during the period from November, 1886, to January, 1889, and which the plaintiff claims to be due under clause three of the contract referred to.

The defendant does not deny either execution of the contract nor alleged performance by the Cincinnati & Green River Company of its part thereof; nor does it controvert the alleged amount of revenue accrued to it during the period mentioned, but relies upon the two grounds of failure of consideration and false and fraudulent representation.

By agreement of the parties, trial by jury was waived, and the law and facts submitted to the court; the finding of the judgment being, first, that the contract was procured by fraud and is void; second, that the contract is without consideration.

We will first consider the finding of the court, that the contract is without consideration. It is manifest that the parties had in view and made the contract to suit each of two conditions of the road, viz., as it then was, unfinished, and as it would be when, if ever, completetd to Nashville; and the provision in the third clause, that the Cincinnati & Green River Company was to have 15 per cent. of the revenue accruing to the Cincinnati, New Orleans & Texas Pacific Company from the business originated by the former, had reference to the road in an unfinished state, and was intended to continue operative until it was completed to Nashville, or for the indicated period of seven years. Whereas, clause six was intended to apply "on completion of the Cincinnati & Green River Railroad to Nashville," when payment of the 15 per cent. would cease, and, in the language of the contract, "all the receipts from the freight traffic of the parties hereto between Cincinnati and Nashville and points beyond, passing over the lines of the parties hereto, shall be divided pro rata between the said parties, based on actual mileage."

So that it is very clear allowance and payment of the 15 per cent. was not, according to plain meaning of the contract, to await, or be at all contingent upon the completion of the road to Nashville. Whether defendant was induced to enter into the contract by fraudulent representation, we will consider hereafter. The simple question in this connection is, whether the agreement to pay the 15 per cent. is based on a valuable consideration, and about that there is, in our opinion, really no room for dispute.

In the first place, having for about four years acquiesced in and accepted and enjoyed all the benefits arising from faithful performance by the Cincinnati & Nashville Railroad Company of its part of the contract, the defendant can not be now permitted to say there was no consideration for what is sued for.

Second. Every person of observation knows that a new railroad creates business not previously existing, and beyond question the Cincinnati and Nashville Company has brought business to defendant it would not have otherwise gotten. In fact the uncontroverted allegation of the petition is, that the revenue which has accrued to defendant from that source during the period of 1880 to 1889, is more than $67,000.

The statement in the answer of the other ground of defense is, in susbtance, that the Cincinnati & Green River Railroad Company did, by its president, Eugene Zimmerman, prior to and at

time of execution of its contract in question, represent to defendant that his company then intended to and would, without delay, extend its line of road from Yosemite, where it terminated, to Nashville, and was in possession of the means to do so; that such representation was false and made with the fraudulent intention to deceive, and defendant was thereby deceived and induced to sign the contract which it would not otherwise have done.

We do not agree with counsel that allegation stands admitted because not denied in the reply; for it is expressly denied that the company made the alleged representation, and it was not necessary to say any more, because the allegation as made was thereby effectually put in issue, and the defendant thereafter took testimony in support of its side of that issue.

It is clear the contract does not expressly or impliedly bind the Cincinnait & Green River Company to ever extend the road to Nashville. And a very pertinent question, not attempted to be answered, arises, why, if defendant was induced to enter into the contract upon the sole consideration of the road being so extended, and relied upon intention and ability of that company to do so without delay, a clause was not put in the instrument making allowance and payment of the 15 per cent. conditional upon its being done.

It is not pretended the failure to have such clause made part of the written contract resulted from mistake. So the only rational answer that can be given is, that the president and directors of the Cincinnati, New Orleans & Texas Pacific Company knew, as well as did Zimmerman, that the Cincinnati & Nashville Company was not then possessed of means to complete the road to Nashville; and, consequently, if they had insisted upon such condition the Cincinnati & Nashville Company would have been compelled to make the contract with another company.

The two witnesses, whose testimony was taken to prove the alleged representation by Zimmerman are Bond, their president, and Schiff, their vice-president, and now president of defendant; and that they did not, before making the contract, inquire about and make themselves acquainted with the financial conditions and prospects of the Cincinnati & Nashville Company is too absurd for belief. Although they both state at the outset of their examination as witnesses, Zimmerman made the alleged representation, and that they entered into the contract upon the faith of it being true, and took no pains to find out whether it was true or false, yet an examination and analysis of their testimony shows they did know the Cincinnati & Green River Company was not then possessed of means to build the road to Nashville. For it is fully developed during their examination that Zimmerman informed them he was relying for completion of the road upon local subscriptions not yet obtained, and aid from the city of Nashville which he had not certainly secured. It is true they testify he represented to them that C. P. Huntington, a very rich capitalist, and railroad owner, would back the enterprise. But at that time, as the evidence shows, and these two witnesses knew, Huntington owned and controlled the Kentucky Central Railroad, which extended from Covington to Rowland, only twelve miles from King's Mountain, and, of course, was as anxious as defendant to have a connection beween Cincinnati and Nashville. So that it can not be true that the president and directors of defendant believed, or that Zimmerman tried to make them believe, Huntington would back him in completing the road to Nashville, knowing, at the same time, that defendant would, in virtue of the contract we are considering, get all

the benefit of the extension to Nashville to the entire exclusion of Huntington's own road.

The evidence in this case, when properly considered, we think, totally fails to show that Zimmerman represented to defendant or its president, as an existingfact, that the Nashville & Green River Company was possessed of means sufficient to complete the road to Nashville.

Besides, it appears to us too plain for dispute that the president and directors were not deceived or misled as alleged by representation of Zimmerman respecting means of the company to complete the road to Nashville. On the contrary, the president and vice-president of defendant, as clearly appears from their own admissions, were well aware the Cincinnati & Nashville Company was not possessed of means sufficient to do so.

In our opinion both grounds of defense to this action are wholly unsustained by the evidence.

The judgment is reversed and cause remanded for a new trial consistent with this opinion.

POLLIT v. BLAND.

(Filed June 6, 1893—Not to be reported.)

1. Boundary—Adverse possession—In this action involving the true location of the division line between adjoining tracts of land in which defendant also claims title by adverse possession, the judgment of the chancellor in favor of plaintiff is fairly supported by the proof.

2. Parties to action—As plaintiff claimed the land in controversy as one of the heirs of her father, the court properly allowed the other heirs to be made parties and to quit claim in favor of plaintiff, it being doubtful whether the boundary allotted to plaintiff in the division of her father's lands embraced the land sued for, although manifestly so intended.

T. C. Campbell, Wm. Lindsay and Edward W. Hines for appellant.

E. L. Worthington for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Hazelrigg.

Two brothers, Thomas and Charles Marshall, were the joint owners of a large tract of land in Lewis county, which they divided into two equal parts by deed of March 29, 1838.

The correct location of the division line then established between them, at or near Phillips creek, running eastwardly and westwardly, is the matter now in dispute between the appellant and the appellee.

The chancellor determined that the true division line between the land of the plaintiff (appellee) and that of the defendant (appellant) was a line described in the old partition deed of the Marshalls, of March, 1838, so far as it ran between their lines, the calls of which are definitely set forth in the judgment; he adjudged that the appellee recover of the appellant all the ground bewteen that line and the worm fence on the north side of the southeast branch of Phillips creek.

The contention of the appellant is that the worm fence north of the branch is the true line; that whether or not it is the original line it was built by his vendor in about 1858, and he and those under whom he holds have been in the undisputed adverse possession of all the land south of it for more than fifteen years next before the institution of this action

There is much testimony on the issues presented, and some of it contradictory. The appellee proves that her father built the fence on the north side of the branch, and her uncle built one on the south side. There was thus a lane between them, used by the neighbors in passing up and down this creek; that the true line was substantially with the meanders of the branch, and was so recognized by the Marshalls; that from 1858, when her land was allotted to her, she owned and claimed to this line, which was well known and marked.

She is corroborated abundantly as to the erection of the two fences on either side of the branch, and the maps and surveys seem to sustain the location of the line as determined by the court. By Nash she proves that he carried the chain for Pollit (the appellant) when he bought the land. He says that "the line ran right with the creek, crossing the little crooks in it up to a spring."

It would seem that the appellant has not succeeded in establishing that his deed from Harn included any land north of this old partition line between the Marshalls.

When attempted to be so run out his survey fails to close or a loss is sustained in some other part of his farm. His claim must, therefore, depend on his alleged adverse holding; but while he says he claimed to the fence north of the creek, he appears unwilling to swear that he claimed any land not embraced in the deeds from Harn and Kilgore.

Diminitt testifies that he and the appellee came to an understading in 1870 or 1871, after examining the deed from Chas. Marshall to Kilgore, that the branch was the dividing line between the two surveys. The disputed ground was not cultivated until about 1878, or 1879, and before that both claimants occasionally exercised acts of ownership over it, and it is evident claimed only adversely up to the true line, wherever that was.

The actual possession is claimed by both, the law presuming it to have been with him who has the right. Upon these issues of fact we think the judgment of the chancellor is fairly supported by the proof. Nor do we think the court erred in permitting the other heirs of Thomas Marshall to be made parties, although we are by no means certain that it was necessary.

The partition line between the Marshalls was clearly the line intended as the boundary of appellee's land on Phillips branch. No deed seems to have been made by the commissioners. The line run by them was casual, and not intended to be exact. It was clearly meant to be the old Marshall line at the point in controversy, otherwise a strip of a few feet would have been left undivided.

The appellee claimed to that line, and no one could complain save the other heirs, and by their pleadings they quit claim for the benefit of the appellee.

Judgment affirmed.

SCHWEITZER v. WAGNER.

(Filed June 8, 1893.)

The wife is not entitled to dower in land of the husband sold to satisfy a lien created by mortgage in which she joined, a mortgage being a "deed" within the meaning of section 5, article 4, chapter 52 of the General Statutes.

Crawford & Irwin and Gabriel Hubbell for appellant.

Wm. Lindsay and John S. Ducker for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Hazelrigg.

The appellant and her husband, at some time prior to 1876, conveyed by way of mortgage the real estate in which she now claims dower.

In the year named, by proceedings in bankruptcy, the property was sold to satisfy the mortgage liens. It appears that there were in fact several mortgages, in all of which the wife joined and expressly relinquished her inchoate right of dower. The property was sold for the amount of the mortgage debts, which was its full value, as disclosed by the proof.

The assignee in bankruptcy sold it as clear, free and unencumbered, and this was done, as the proof conduces to show, in the presence of the appellant, then the wife of the bankrupt, and without objection on her part or assertion of any claim.

The husband died in 1879, and in 1886 his widow, now the appellant, instituted this action for dower in the property against the appellee, who was the purchaser at the assignee's sale in 1876. The chancellor dismissed her petition, and by her appeal the question is presented whether she is entitled to dower.

Section 5, article 4, chapter 52 of the General Statutes, provides that the wife shall not be endowed of land sold to satisfy a lien or encumbrance, created by deed in which she joined, or to satisfy a lien for purchase money; but if there is a surplus of the land or proceeds of sale after satisfying the lien, she shall have dower or compensation out of such surplus unless the surplus proceeds of sale were received or disposed of by the husband in his lifetime.

It is urged by the appellee that by the term "deed" in the statute is meant "mortgage," or rather that the former embraces the latter, and that the appellant, having joined in the mortgage or deed creating the lien to satisfy which the sale was made, it is not endowed of the land.

There is much plausibility in this construction. The intention certainly seems to be that if the wife joins in a conveyance creating a lien, and the land so encumbered be sold to satisfy it, she shall not be endowed thereof, but may have compensation out of the suplus, etc.

A deed in the ordinary sense of that term, is not what is meant in the statute, as by it no lien is created against the grantors to satisfy which a sale of the land can be made. A mortgage of land is a conveyance of it for the purpose of securing the payment of debt. It is a deed creating a lien, and seems to be the very instrument designated in the statute in which, if the wife join, she is divested of dower, save in the surplus proceeds of the sale, if one be made, to satisfy the lien so created.

Such has been the construction of this statute in cases of sale for the purchase money.

In Malone, &c. v. Armstrong, 79 Ky., 248, it is said: "This statute evidently contemplated that a sale might be made by the husband, and that he might sell the whole or only so much as would satisfy the lien, but whether sold by the husband or under the judgment of a court, if the whole be sold bona fide because there is a lien for the purchase money, and with a view to satisfy it in the manner deemed by the husband to be most beneficial to him and with no design to deprive the wife of her potential right of dower, she will not be entitled to dower, although less than the whole would have satisfied the lien."

So, it would seem, if it be sold in good faith because there is a lien for a debt created by a deed of mortgage in which the wife has joined, and with a view to satisfy it, she should not be entitled to dower in the absence of any design to deprive her of her inchoate right.

The statute makes no distinction between sales made under an order of court and those made by the owner; and liens for purchase money are placed in the same class with liens created by deed in which the wife joined. She occupies the same relation to the one class as to the other. In neither case had the husband or wife any beneficial interest in the lands not subordinate to the lien.

In this case the lien consumed the property when sold at its full value, and, moreover, the wife is shown, in the judgment of the chancellor, to have been present at the sale. There is a conflict of testimony on this point, but it appears reasonably well established that she was present when the property was offered for sale.

The land was sold without reservation, with clear, free and unencumbered title. The sale included her interest; she stood silently by, acquiescing in these announcements of the assignee in bankruptcy, doubtless in view of the fact that she had theretofore conveyed her entire right and interest.

Her silence for more than seven years thereafter is consistent with this view, and we think it would be unjust and inequitable to allow her dower in the property at the expense of one who has paid its full value.

Judgment affirmed.

SLAUGHTER v. COMMONWEALTH.

(Filed June 8, 1893—Not to be reported.)

Shooting in sudden heat and passion—Degree of offense—Under an indictment for willfully and maliciously shooting and wounding another with intent to kill, the court in instructing the jury as to the offense of shooting and wounding in sudden heat and passion, which is a lower degree of the offense charged, erred in adding to and qualifying the phrase "in sudden heat and passion" by the words "created by considerable provocation," and defining "considerable provocation" as no less than "assault and battery of some force, which, by reason of its violence or circumstances attending it, is calculated to excite, and does excite, sudden heat and passion;" as the jury were thus required before they could find defendant not guilty of the felony charged, but guilty of the misdemeanor only, to believe that he was not only assaulted, but actually struck with force, either violent enough or inflicted under circumstances calculated to excite sudden heat and passion.

Phil. B. Thompson, sr., for appellant.

Wm. J. Hendrick for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Lewis.

The jury in this case were instructed that if they believed from the evidence, beyond a reasonable doubt, the defendant willfully and maliciously shot and wounded Frank Ely without killing him, but with intent to kill him, not in his necessary or reasonably apparent necessary self-defense, they should find him guilty as charged, and fix his punishment at confinement in the penitentiary for not less than one nor more than five years.

It seems to us to be plainly enough indicated for any jury to understand without difficulty that the offense described in that instruction is the one with which defendant was charged in the indictmen , and the instruction is not, therefore, subject to the objection made to it by counsel in argument.

But we think instruction two, as explained by number six, was erroneous and prejudicial to the substantial rights of defendant, because it prescribed a condition upon which the jury might find him guilty of only a misdemeanor not authorized by the statute. The lower degree of the offense charged in the indictment is thus described in section 1, article 17, chapter 29, General Statutes: "If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice and not in self-defense, shoot and wound another person * * * without killing him, he shall be fined not less than $50 nor more than $500, or confined in the county jail not less than six months nor more than one year, or both, in discretion of the jury."

Instead of describing the offense in language of the statute, the court, in instruction two, added to and qualified the phrase "in sudden heat and passion" by the words "created by considerable provocation;" and in instruction six defined "considerable provocation" as no less than "assault and battery of some force, which, by reason of its violence or circumstances attending it, it is calculated to excite and does excite sudden heat and passion."

So that before the jury could find defendant guilty of the felony for which he was indicted, but guilty of the misdemeanor merely, they were improperly required to believe he was not only assaulted but actually stricken with force, either violent enough or inflicted under circumstances calculated to excite sudden heat and passion.

Judgment reversed for a new trial consistent with this opinion.

STANFELL, &c. v. LEWALLEN.

(Filed June 8, 1893—Not to be reported.)

Joint owners—Liability for purchase price in proportion to interest—Where several persons purchased land jointly and one of them executed his note for the whole of the purchase money, and deed was made to him alone as matter of convenience, in an action against all the purchasers to recover the purchase money, it was error to render judgment against them jointly for the whole of the debt, the weight of the evidence showing that the vendor agreed to look to each of the defendants for the purchase money only in proportion to his interest, and separate judgment should be rendered against each of the defendants for his proportion of the balance of the debt remaining unpaid after selling the land.

A. K. Cook for appellants.

Knott & Edelen for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellee conveyed to the appellant, J. T. Stanfell, by deed a lot of ground in the town of Barbourville, for the sum of $2,500, and took his note for $2,192.50 for the unpaid purchase money.

The note was not paid, and the appellee brought this action against the appellants, Stanfell, T. F., John V. and Geo. M. Faulkner, Henry Tye, W. J. Campbell, Geo. R. Herndon and J. H. Logan, to recover said purchase money, alleging, as a cause of action against all of them, that they purchased the land jointly, but by their request and for their convenience the appellee made the deed to Stanfell, and took his said note in trust for the other appellants, they agreeing to be bound for said price.

The appellants admit the joint purchase of said land, and that they requested the appellee to make the deed to the appellant, Stanfell, and to take his note for the price; but they say that they were to own the land in the following proportions: Stanfell, two-fifteenths; T. Faulkner, two-fifteenths; Henry Tye, two-fifteenths; W. J. Campbell, two-fifteenths; John W. Faulkner, two-fifteenths of two-fifteenths; Geo. W. Faulkner, one-third of two-fifteenths; Geo. R. Herndon one-third of the whole; and that they were to be bound to the appellant for the price in that proportion, to which he agreed. This agreement was in writing, which was made on the occasion of the making of the deed and note.

Geo. R. Herndon and Henry Tye swear positively that the agreement was as above indicaed with the appellee in reference to their liabiliy for the price.

The appellee, on the other hand, swears that it was his understanding from Geo. R. Herndon, with whom he made the contract the day before, that all of the appellants were to be jointly bound for the whole amount of the purchase money, and that the deed was made to Stanfell, and the note executed by him as a matter of convenience only.

Now we have Herndon and Tye swearing positivley that such was not the agreement, and the writing they produce as having been made on the occasion of the making of the deed, and to which they say the appellee consented, corroborates their understanding of the matter.

The appellee says: "I do not know that all the appellants did individually say that they would pay me the $2,500. They were all present at the time the deed was made except W. J. Campbell. I do not think that all of them that were present spoke and said they would pay me the $2,500."

It will be seen that the appellee gives his understanding merely of what the contract was. He is not certain, but the other two witnesses state positively what it was, and the agreement among themselves, made at the time the appellee made the deed to them, corroborates their recollection of the matter.

We think that the weight of the evidence upon the subject of the appellants' being bound to the appellee in proportion to their respective interests, is with the appellants, and the court should have so adjudged. Taking that view of the case, there can be no question as to the statute of frauds, for the appellants agree that

they held their respective interests in the land by a writing, and that they were to pay the appellee for it in proportion to their respective interests.

The judgment is reversed, with directions to sell as much of the land as will pay the debt, interest and costs; and if the land be insufficient for that purpose, then to give judgment against the appellants for the balance in proportion to their respective interests in the land.

CITY OF LOUISVILLE v. MULDOON, &c.

(Filed June 10, 1893.)

1. Contract for construction of street—Agreement to keep in repair—Retention of part of cost of work as security—Where a contractor undertook by contract with a city to construct an asphalt pavement, and to keep it in repair for a term of five years from the completion of the work, the city to retain 10 per cent. of the cost as security for the performance of the contract to keep the street in repair, in an action brought at the end of the five years by persons who had succeeded by purchase to the rights of the original contractor, seeking to recover of the city the 10 per cent retained, it was essential to the plaintiffs' cause of action that they should allege that the street was kept in repair as covenanted by the original contractor. It was not sufficient for them to allege that they were without knowledge or information sufficient to form a belief as to that matter, or that it was either kept in repair or was not kept in repair, and that they did not know which was true.

2. Same—Parties to action—A company which covenanted with plaintiffs to keep the street in repair was improperly joined as a defendant, there being no contract between that company and the city.

3. Transfer of suits—If there had been an issue made by the pleadings concerning the fact of the original contract or having kept the street in repair, it would have been the duty of the chancellor, upon motion, to transfer the action for trial by jury.

H. S. Barker for appellant.

T. L. Burnett and Barnett, Miller & Barnett for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

In 1888 T. P. Shanks, principal, and M. Muldoon and J. L. Smyser, sureties, made a contract with the city of Louisville for reconstruction of Third street, by laying an asphalt pavement from Kentucky street to Shipp avenue, at a price per yard fixed and payable upon monthly estimates during progress of the work, which was to be done according to plans and specifications of the city engineer, made part of the contract.

One clause of the specifications is as follows: "Good and sufficient bond to the city of Louisville, in a penal sum equal to the estimated amount of the contract, with sureties to be approved by the mayor, will be required from all contractors, guaranteeing that their contracts will be strictly and faithfully performed to the satisfaction of and acceptance by the mayor; and that the contractors will keep new pavements or other new works in repair for a term of five years from the date of the completion of their contracts, and from that date 10 per centum of the cost of all new work will be retained as an additional security and guarantee fund to keep the same in repair for said term, which said per centum will be invested in registered bonds of the United States, with interest thereon paid to said contractor."

February 11, 1890, M. Muldoon, Theodore Harris and J. L. Smyser brought this action in equity against the city of Louisville, T. P. Shanks, the Barber Asphalt Co. and the Louisville Banking Co.

It is stated in the petition that soon after the contract was made the firm of T. P. Shanks & Co. was formed, composed of Shanks, Muldoon & Symser, for the purpose of carrying out the contract in question, Harris very soon becoming also a partner; and that August 11, 1888, the work of reconstructing said street was completed by the firm, accepted by the city of Louisville, and final estimate of the cost thereof made by the city engineer and paid.

It is further stated that prior to commencement of this action the three plaintiffs purchased the interest of T. P. Shanks and thereby became equitable owners of the 10 per centum retained by the city of Louisivlle.

In respect to the covenant of T. P. Shanks and his sureties, Muldoon and Smyser, to keep said street in repair for the period of five years from August 11, 1888, when the work of reconstruction was completed, it is stated that about 1887 the firm of T. P. Shanks & Co. sold its plant and machinery to the Barber Asphalt Co., which undertook and agreed to keep in good order and repair the street for the remainder of the term of five years, and to save the plaintiffs and Shanks harmless of damages arising from said covenant to the city of Louisville; and that the Barber Asphalt Co. at once took charge of that part of Third street and its repairs, of which said city, through its chief engineer, was duly informed.

An allegation in the petition that the Barber Asphalt Co. did make some repairs on said street under direction of the city engineer and agents, is followed by this statement: "But whether said Barber Asphalt Co. did keep said pavement in good order and repair until the 21st day of August, 1889, as the said Shanks had been by his contract bound to do, plaintiffs do not know. It is either true that said Barber Asphalt Co. did so keep the same in good order and repair, or that it did not; whether it did or not plaintiffs do not know. If so kept in good order and repair, then plaintiffs are entitled to the whole retained percentage, with interest; and if not, then plaintiffs are entitled to and ask judgment against said Barber Asphalt Co. for any sum that said city may show itself entitled to longer retain of said percentage.

In another part of the petition they pray judgment directly against the city of Louisville for amount of the several installments of interest that accrued on the bonds mentioned and interest on each installment, or equivalent thereof, in case the fund was not invested in bonds; also for $9,896.56, being 10 per cent. of the estimated cost of reconstructing the street and interest thereon from March 1, 1889. The Barber Asphalt Co. and the city of Louisville each filed a general demurrer to the petition, which was overruled as to both.

Thereupon the Barber Asphalt Co. filed an answer, alleging performance of its contract with T. P. Shanks & Co., and praying simply for dismissal of the action as to it.

The city of Louisville filed its answer, in which it is averred that neither T. P. Shanks, the firm of T. P. Shanks & Co., the Barber Asphalt Co., nor any other person, kept the street in good order and repair during the period mentioned; but that it was, a long time prior to August 28, 1889, allowed to fall into decay and ruin, and become almost impassable, so that it will require at least $12,000 to put it in that state of repair T. P. Shanks and his sureties covenanted to keep it in during said term of five

years, and making its answer a counterclaim against Muldoon and Smyser, and cross petition against Shanks, it prayed judgment for $12,000 in damages and dismissal of the petition.

To that answer the plaintiffs replied merely that they did not know or have sufficient information to form a belief whether the street had been kept in good order and repair; but Shanks answered the cross petition, denying the allegations thereof.

Afterward, the city of Louisville moved for submission of the case to a jury for trial, but the chancellor overruled that motion; and on final hearing rendered judgment against the cityof Louisville for amount claimed in the petition, at the same time dismissing the counterclaim and cross petition, and also the action as to the Barber Asphalt Co. No judgment was rendered for or against the Louisville Banking Co., nor does it appear to have any interest in the case.

The first question we will consider is whether facts sufficient to constitute a cause of action against the city of Louisville are stated in the petition.

Whether the street was reconstructed as required by the contract does not appear to have been put in issue by the answer of the city of Louisville filed, nor do we think it is now an open question, for as that work was completed and final estimate of cost made and paid without objection, it must be regarded as having been accepted. But, besides the agreement to reconstruct the street, Shanks and his sureties, Muldoon and Smyser, covenanted to keep it in repair for five years, and according to terms of the contract the city of Louisville had the right and did retain 10 per cent. of the estimated cost of reconstruction, in the language used, "as an additional security and guarantee fund to keep the same in repair for said term."

That undertaking was made entirely distinct from the contract for reconstructing the street, which had necessarily to be completed and ended before the period of five years commenced; and it is clear a full, not partial, performance of it was intended by the parties to be a condition precedent of Shanks' right to demand and recover the 10 per centum at the end of five years. Otherwise, retention of the fund by the city of Louisville for five years would have been without any use or purpose whatever.

Such conditions in contracts about public works are not unusual or unreasonable; in fact they are in most cases necessary to secure full and faithful performance by contractors of their undertakings. Here the city of Louisville was going to make the experiment of constructing an asphalt pavement, about which neither the city engineer nor the contractor appear to have had any practical knowledge. The work was to be very expensive, costing nearly $100,000, and in case the pavement proved insufficient for the purpose intended, by reason of either defective construction or failure to keep in repair, loss to the city would be great and possibly total; for, as shown by the evidence, if cracks and holes in such pavement are not immediately and effectively repaired, rapid disintegration and decay begins, and before long a great outlay will be required to restore the street to a state fit for use.

If then, as we think is unquestionable, the right to demand and recover the 10 per centum was intended by the parties to depend upon Shanks' having kept or caused kept the street in repair during the period mentioned, it results that an allegation that condition was performed would have been indispensable in order to constitute a cause of action therefor against the city of Louisville, he being the plaintiff; and, if so, we do not see by what process

such allegation by the plaintiffs in this case can be dispensed with, for the right to Shanks' interest in the fund sued for was acquired by them subject to all the conditions prescribed in the contract. Indeed two of them were parties to that contract, and the other being a member of the firm of T. P. Shanks & Co. had full notice of the nature of it.

It is not alleged by plaintiffs in their petition that condition was complied with by Shanks or any person for him; nor do they, in their reply, deny the statement made by the city of Louisville in its answer that he had failed to comply with it, their allegation being simply want of knowledge or sufficient information to form a belief concerning that matter. But the presumption is they did know whether the street had been kept in repair, for it was the contract duty of two of them and interest of the other to have it done; and, consequently, their reply must be regarded a mere evasion, not tolerated by the Civil Code.

Section 114 makes it the duty of the court, upon or without motion, to compel parties before trial to form a material issue concerning each cause of controversy; and for that purpose they, or the one in fault, may be required to reform his or their pleading. But we have the case here of plaintiffs recovering judgment against a defendant without alleging in their petition existence of the material and only fact upon which their action can be maintained, and actually evading an issue concerning that fact when tendered in defendant's answer.

It is true Shanks denied he failed to keep the street in repair; but he is not a party plaintiff in this action, nor has he any interest in the fund sued for, being merely defendant to the cross-petition and interested in defeating recovery by the city of Louisville of damages in excess of the 10 per centum.

It is, however, contended that the judgment of the chancellor, being supported by evidence bearing upon the main question, was authorized by subsection 4, section 113, Civil Code, which provides that "a party may allege alternatively the existence of one or another fact, if he states that one of them is true, and that he does not know which of them is true."

That section has no application to this case, because there are not here two facts upon one or other of which plaintiffs may alternatively base their right of action, but only one, that is the fact that Shanks kept or caused kept the street in repair for five years from August 23, 1884, as he covenanted to do; and in order to maintain their action, it is necessary for them to allege and prove that fact. But the petition does not contain such allegation, nor have plaintiffs really alleged, alternatively or otherwise, existence of any fact at all; but they simply say that "it is either a fact or not a fact that the Barber Asphalt Co. kept the street in repair; whether it did or did not they do not know." And it was evidently their purpose to avoid stating whether the street was kept in repair, because if they had done so they would have been without a cause of action against either the Barber Asphaalt Co. and the city of Louisville; but there was no contract relation between the Barber Asphalt Co. and the city of Louisville, and they were, therefore, improperly joined as defendants.

If there had been an issue made by the pleadings conncerning the fact of Shanks having kept the street in repair, it would have been the duty of the chancellor, upon motion, to transfer the action for trial by jury; but it has never been in a state for trial, except of the general demurrer, which was improperly overruled,

much less for judgment in favor of the plaintiffs against the city of Louisville.

For the errors indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

GREER v. CLERMONT DISTILLING AND MILL CO.

Filed May 31, 1893. Appeal from Kenton Chancery Court. Opinion of the court by Judge Barbour, reversing.

Consideration for guaranty—A person can not be held liable as surety or guarantor for the pre-existing debt of another when neither he nor the principal receives any benefit, and the party to whom the promise is made sustains no detriment or change of condition by reason thereof.

An undertaking to save a person harmless on account of a liability already incurred by him by accepting drafts for another, is without consideration, and not enforcible.

Simmons & Simmons for appellant; Chas. H. Fisk for appellee.

HILSE'S ADM'R v. HILSE'S GD'N.

Filed May 31, 1893. Appeal from Madison Circuit Court. Opinion of the court by Judge Barbour, reversing on original and affirming on cross appeal.

1. Guardian of husband is guardian of wife—Marriage operates as a discharge of the guardianship of the wife then existing, and if, because of the infancy of the husband, he can not take upon himself the management of her estate, that right and power devolves upon his guardian. Therefore, the appointment of a guardian for the wife is a mere nullity.

2. Upon marriage the husband becomes the absolute owner of all the personal estate in the possession of the wife, and is invested with the right to the use of her real estate and the power to rent it and receive the rents for not more than three years at a time. And where the husband is an infant, his guardian has the same powers and rights as to the wife's estate that the husband would have had if he had been an adult.

3. Neither husband nor guardian can encumber wife's land—It is the duty of the husband to support the wife, and he has no right, either himself or through his guardian, to make her real estate liable for what he or his guardian representing him has expended for her support and maintenance.

One who was appointed guardian for both husband and wife (the husband having no estate except that which came to him by virtue of the marriage) was allowed for expenditures and for his services an amount which consumed all the estate which had come to his hands as guardian, leaving the estate of the wards indebted to him in a sum which the court ordered the administrator of the wife to pay out of any assets he might have in his hands as administrator. Held—That this was error, as the judgment can only be enforced by subjecting the wife's land, which neither the husband nor his guardian had any right to encumber, the appointment of a guardian for the wife being a nullity.

A. R. Burnam for appelllant; Smith & Mobberly for appellee.

KIRBY, &c. v. BUNCH.

Filed September 13, 1893. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Sale of personal property without delivery of possession—The statute which provides that a sale of personal property shall be void as to creditors unless the actual possession in good faith accompanies the same, does not apply where there is a delivery of possession at any time previous to the creditor's obtaining a lien by process. The sale is completed as to everybody when the delivery is made.

2. Modification of instructions after submission of case—While the alteration or modification of instructions after the submission of a case to the jury should, if possible, be avoided, it is not ground for a reversal.

John M. Williams and Edward W. Hines for appellants; Galloway & Gaines for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. HOLLAND.

Filed September 13, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Killing of stock on railroad track—Presumption of negligence overcome—In this action against a railroad company to recover damages for the killing of plaintiff's horse through the alleged negligence of defendant's servants in charge of one of its trains, a verdict for plaintiff was flagrantly against the evidence, the statutory presumption of negligence being overcome.

C. H. Darby, John C. Gates and W. S. Chelf for appellant; Thomas H. Hines for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. HOSKINS.

Filed September 13, 1893. Appeal from Bullitt Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Joinder of actions—A cause of action against a railroad company growing out of the unlawful entry upon and hauling over plaintiff's land, and a cause of action against the same company for the damages caused by the filling of a ditch and the consequent obstruction of the natural flow of the water, were joinable under section 83 of the Civil Code.

2. Continuance—The court having granted defendant one continuance on account of the absence of its witnesses, properly refused to grant it a second continuance asked upon that ground, the affidavit as to what the absent witnesses would state being read as their deposition.

3. Sending jury to view premises—The court did not abuse its discretion in refusing to order the jury to be conducted to the land, which was twelve miles from the place of trial, there being nothing so unusual or peculiar in the nature of the case as to require it.

Charles Carroll and Wm. R. Thompson for appellant; Fairleigh & Straus for appellee.

TODD v. MARTIN.

Filed September 13, 1893. Appeal from Powell Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

Use of deposition in ordinary action—Witness presumed to be unable from infirmity to attend court—The plaintiff in this ordinary action, who lived within twenty miles of place of trial, having given his deposition more than four years before the trial, in which he stated that he was over sixty years of age, was afflicted with stricture of the bladder, had to use an instrument, and had not been on horseback for more than three years, the court should, considering the age of plaintiff, the character of the disease and the length of time he had been afflicted, have presumed, in the absence of any evidence, that he was still suffering from the affliction under which he was laboring

when he gave his deposition, and should have permitted the deposition to be read without requiring proof that he was still "unable to attend from infirmity."

J. B. White for appellant; Wood & Day for appellee.

MIDDLETON v. DAVIS, &c.

Filed September 13, 1893. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, affirming.

Judicial sales—Advertisement—Upon a trial of exceptions to a commissioner's report of sale of land upon the ground that a notice was not posted at the nearest town as required by the judgment, the commissioner having testified positively that he posted the notice, this court can not say that the lower court erred in overruling the exceptions.

Thomas H. Hines and Jones & Jones for appellant; W. L. Porter and G. M. Bohannan for appellees.

BLACKBURN v. COMMONWEALTH.

Filed September 13, 1893. Appeal from Harlan Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Repeal of statute—The special liquor law for Harlan county, approved February 9, 1884, was not repealed by either the revenue and taxation law or the local option law of 1892.

2. Indictment—Where an indictment under that law specifically set out the acts necessary to constitute the offense charged, following the words of the statute so closely as to enable the court to readily see under what statute it was framed, the mere fact that the indictment recited that the act was approved February 19, 1884, instead of February 9, 1884, was immaterial and did not render the indictment insufficient.

Forrester & Forrester for appellant; W. J. Hendrick for appellee.

LITTLE v. COMMONWEALTH.

Filed September 20, 1893. Appeal from Pike Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Indictment—Arrest of judgment—If an indictment shows that a public offense has been committed by the accused within the jurisdiction of the court, the judgment will not be arrested, although the alleged offense may be so defectively stated as to make the indictment bad on demurrer.

An indictment for assault and battery, which charged that the defendant on a certain day, "in the county and circuit aforesaid, did unlawfully assault, beat and bruise" a person named, stated a public offense within the jurisdiction of the court.

Auxier & Auxier for appellant; W. J. Hendrick for appellee.

FESSLER v. DRESMAN.

Filed September 20, 1893. Appeal from Kenton Chancery Court. Opinion of the court by Judge Yost, reversing.

A promise to answer for the debt of another, if made to the creditor, is within the statute of frauds, if the original debtor remains bound and there is no new consideration.

Applying these rules to the verbal promise relied on in the case at bar, it is within the statute and can not be enforced.

Orlando P. Schmidt for appellant; D. A. Glenn for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. JENKINS.

Filed September 20, 1893. Appeal from Bullitt Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Railroads—Putting passenger off at wrong station—A passenger on a railroad train has the right to rely upon the information given by a conductor or brakeman upon the train that it has reached the station to which he is destined, and if, relying upon such information, he leaves the train at that place, and it proves not to be the station he was informed it was, the company is liable for all the proximate damages which may ensue therefrom.

2. Same—Excessive verdict—As plaintiff, by being put off of one of defendant's trains at the wrong station, was compelled to walk alone and carry her baggage a distance of over a mile through the country, a verdict in her favor for $250 was not excessive, taking into consideration the carelessness of the brakeman in calling the wrong station and his reckless indifference in neglecting, upon his error, to stop the train and carry the plaintiff on to her destination.

Charles Carroll and William R. Thompson for appellant; Ben Chapeze and C. P. Davis for appellee.

LAMBERT v. HICKS.

Filed September 20, 1898. Appeal from Henderson Circuit Court. Opinion of the court by Judge Yost, reversing.

New trial—Newly discovered evidence—In this action to recover the alleged value of services rendered by plaintiff in the conduct and management of defendant's tobacco business, in which the defense was that plaintiff was to receive as compensation for his services one-fourth of the net profits of the business, and that instead of realizing any profit a loss was sustained, there having been a verdict for plaintiff, the court should have granted defendant a new trial upon the ground of newly-discovered evidence, a witness having been discovered since the trial who will testify as to a conversation with plaintiff in which he admitted that he was to share the profits of the business for his services. This evidence would have a preponderating influence upon another trial, and it can not be called cumulative, as it refers solely to statements made by plaintiff which were not in evidence on the former trial. Nor can it be said, in view of the short time that elapsed between the filing of the petition and the trial, that defendant failed to use due diligence merely because he failed to learn before the trial what this witness knew about the case, the suit having been instituted in the Henderson Circuit Court September 8, 1891, and the trial had on the 30th day of October following, the newly-discovered witness living during this time in Frankfort, Ky.

C. C. Ball and J. L. Dorsey for appellant; M. Merritt for appellee.

ROBERTSON v. MOORE, &c.

Filed Septmbeer 20, 1898. Appeal from Crittenden Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Local option—Mandamus to compel comparing board to purge poll-books—In these proceedings by mandamus and injunction to have the comparing board of a local option election to purge the poll-books of alleged illegal votes and to prevent the result of the vote being spread on the record until this was done, the trial court having ordered the board to examine the poll-books and purge them of illegal votes if they determined there were any cast, seven days from the making of the order was not apparently too early a date to fix for the meeting of the board; and the board having met at that time, compared the vote and reported its action to the court without any exception being taken to the report, plaintiffs can not now complain that the time for the meeting of the board was fixed too soon. If, when the board met, the plaintiffs, for any good reason, were not ready to present their side of the matter and wanted further time, they should have applied to the comparing board.

Nunn & Cruce and James & Moore for appellant; Blue & Blue for appellees.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. OCTOBER 15, 1893. No. 8

KENTUCKY COURT OF APPEALS.

SHORT, &c. v. TERRY, SR., &c.

(Filed June 10, 1893—Not to be reported.)

1. Deeds—Estate tail—A conveyance to C. "and the heirs of her body," with covenant of warranty to C. "and the heirs of her body," creates in C. what would have been at common law an estate tail, which by our statute is converted into a fee simple.

2. Parol testimony to show grantor's intention—The conveyance itself must determine whether the grantor intended to convey a life estate or an estate tail, and evidence aliunde of an intention to convey a life estate only will not be heard to control the language of the deed.

W. L. Hurst and D. B. Redwine for appellants.

J. P. Gillum, C. O. Cardwell and J. M. Sebastian for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Bennett.

Thomas Johnson, in 1857, conveyed by deed to his daughter, Patsy Combs, a tract of land.

The conveyancing clause is: "I, Thomas Johnson, have this day sold unto Patsy Combs and the heirs of her body the following boundary of land" (describes it). The covenant of warranty warrants the title to "Patsy Combs and the heirs of her body."

Patsy Combs in her lifetime having sold the land to one of her sons, the appellants, the other children of said Patsy bring this action to recover their interest in said land upon the ground that Patsy Combs took only a life estate under said deed, remainder to her children.

It has been held by this court time and again that a conveyance to a person and the heirs of his body would, at common law, create an estate tail, and that such an estate, by chapter 63, article 1, section 8, General Statutes, is converted into an estate in fee simple. But the appellants contend that grantor

intended, by the language used, to convey to the grantee a life estate only, remainder to her children. Such intention does not appear from the deed itself. The language used in former times would create an estate tail, which, by the statute referred to, is converted into an estate in fee.

It has been often held by this court that the conveyance itself must determine whether or not the grantor intended to convey a life estate or an estate tail, and that evidence, aliunde, of an intention to convey a life estate only would not be heard to control the language of the deed. (Mitchell v. Simpson, 88 Ky., 125, and other cases that might be cited if necessary.)

The fact that the expression "heirs of the body" is repeated in covenant of warranty can not aid the appellants' contention.

Such expression is only a repetition of what had already been said, and added nothing to the meaning of said expression, nor did it change its intended meaning.

The judgment is affirmed.

SEBREE v. COLEMAN, &c.

(Filed June 13, 1893—Not to be reported.)

1. Liens—Parties to action—In these consolidated actions, brought for enforcement of liens on land, it was error to direct a sale before all holding liens were made parties; and the error was not cured by a proviso in the judgment that there should be no distribution of the proceeds of sale until this should be done.

2. Judicial sales—Survey—It being necessary to survey the lands in order to properly identify and describe them, the survey ought to have been made prior to judgment of sale. It was not sufficient to direct in the judgment that the commissioner make and file survey and plats.

3. Same—Division of land—Each of the two tracts of land directed to be sold ought, if susceptible of advantageous division, to have been divided, and sold in lots.

J. C. B. Sebree for appellant.

Isham G. Hamilton and H. P. Montgomery for appellees.

Appeal from Scott Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is an appeal by the defendant from a judgment rendered against him in consolidated actions brought for enforcement of liens on his land.

Section 692, Civil Code, provides that "the plaintiff, in an action for enforcing a lien on property, shall state in his petition the liens held thereon by others making them defendants."

It is stated in the answer of defendant and also in the judgment rendered that there was another action pending in the same court against defendant, in which one Parker was seeking to enforce a lien on a portion of the land directed to be sold in the consolidated actions. But instead of causing said Parker made a defendant prior to rendition of the judgment for sale, the court directed a sale of the land, with a proviso there should be no distribution of the proceeds of sale until Parker was made a party to the consolidated actions.

It seems to us, according to proper meaning of the section quoted, it was error to direct a sale in these cases before all hold-

ing liens were made parties and given an opportunity to set up their demands and have judgment of court determining validity and priority of the respective liens.

By the judgment the commissioner was directed to have each of the two tracts of land surveyed and the survey and plats filed in the action. But it seems to us if, as appears to be the case, it was necessary to survey the lands in order to properly identify and describe them, it ought to have been done prior, not subsequent, to judgment of sale. Besides, each of the two tracts ought, if susceptible of advantageous division, to have been divided and sold in lots.

For the reasons indicated the judgment is overruled and cause remanded for further proceedings consistent with this opinion.

WILLIAMS' EX'OR v. PETTIT, &c.

(Filed June 13, 1893—Not to be reported.)

Judgment sustained by evidence—In this action in which a creditor seeks to subject his debtor's share of the profits of a venture in which the debtor and defendant were jointly interested, the evidence fails to show that there were any profits after reimbursing defendant for all advances made by him.

Powers, Atchison & Miller and H. A. Williams for appellant.

Sweeney, Ellis & Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

On a former appeal, involving the construction of the contract set up by the present appellant, it was held that Price voluntarily quit Pettit's employment, and further that with no amount of energy could the profits of the factory have been sufficient to discharge the debts of the firm and reimburse Pettit the amount advanced by him. (Price v. Pettit, MS. opinion, September, 1878.)

Upon a return of that case and its dismissal without prejudice, Price having abandoned the country, the appellee, Williams, who was his creditor and the owner of any interest Price may have had in the Pettit contract, qualified as his administrator upon the supposition that Price was dead and instituted this action. His recovery depends on whether Pettit has been reimbursed for allowances made by him to the concern out of the profits of the stave contracts or other partnership property, and before there could be any profits the debts, aggregating some $26,000, must have been paid.

Towards the establishment of these facts the appellant, by his proof, makes very little headway. Price, who is shown to be alive and at Little Rock, Arkansas, does not testify. He was the only person besides appellee acquainted with the transactions. The appellee, on the other hand, testifies fully as to all the facts and shows conclusively a state of case upon which neither Price nor appellant, claiming through him, can recover, and the judgment of the chancellor to that effect is affirmed.

FRANCE'S ADM'R v. L. & N. R. R. CO.

(Filed June 13, 1893—Not to be reported.)

Railroads—Duty to trespassers on track—A railroad is not bound to be upon the lookout for trespassers on its track at places where it has no reason to believe they will be, and when such trespassers are discovered it is not an act of neglect for those in charge of a train to assume that they will leave the track so as to permit the train to pass, unless the trainmen have some reason to believe that they did not hear or see the approaching train or will not quit the track.

H. Helm for appellant.

Wm. Linsday for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellant brought this action to recover damages from the appellee for killing his intestate, Allen France.

It appears that appellant's intestate, at the time he was killed, was about 80 years old; that he and his wife were walking on the end of appellee's railroad as trespassers; that Mrs. France was only a few steps behind the deceased; that she heard the whistle blow a long way back; that she heard the train coming close and notified her husband of the fact and he said, "We will get to that little 'dug out' on the side of the track," which was ten or twelve steps distant, but before they could reach the place her husband was struck by the train and killed.

It has been often decided by this court that the appellee is under no obligation to look out for trespassers at places that the appellee has no reason to believe that they may be, and that the appellee is not guilty of negligence in assuming that they will quit the track in time to let an approaching train pass, unless there is something tending to show that those in charge of the train, after seeing the trespasser, have reason to believe that he does not hear the approach of the train or will not quit the track; that they have time to stop the train afterwards before running over him, but neglect to do so. There is no evidence tending to show that such was the case here.

The judgment is affirmed.

DOORES, &c v. VARNON, &c.

(Filed June 13, 1893—Not to be reported.)

1. School tax—When election concerning may be held—Where the county judge orders an election to determine whether a certain district shall pay an annual tax to maintain a free graded school therein, at the same term of the county court at which the petition praying for such order is presented to him the order of election and election held pursuant thereto are invalid, and the school tax thereby attempted to be imposed can not be collected, since the act of May 4, 1888, empowers the county judge to enter the order for such election only at the next regular term after he receives the petition.

2. Same—Mandatory provisions concerning school tax election—The provision of said act directing that the order of election be entered at the next regular term of the court after the petition therefor is presented to the

county judge is mandatory and not merely directory, and since the only authority for the imposition of the tax is found in the act its provisions must be strictly pursued.

Miller & Owsley for appellants.

W. G. Welch for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

It is only necessary to refer to one of the grounds relied on for a reversal of the judgment below.

A tax was voted to create a graded school district within a certain boundary, including the town of Crab Orchard, in the county of Lincoln.

The first section of the act under which the vote was taken makes it the duty of the county judge, upon a written petition signed by at least ten legal voters who are taxpayers in any civil district, town or city in his county, to make an order on his order book, at the next regular term of his court after he received said petition, forming the boundary of any proposed graded free school district, etc., * * * directing the sheriff to open a poll, etc., * * * for the purpose of taking the sense of the legal white voters * * * upon the proposition "whether or not they will vote an annual tax for the maintenance of the school," etc. (See act approved May 4th, 1888.)

On the 14th of September, in the year 1891, it being the regular term of the Lincoln County Court, a petition purporting to be signed by the proper number of legal voters and taxpayers was presented to the county judge and filed. On the same day the petition was filed or presented to the county judge an order was entered directing the sheriff to open a poll on the 17th of October, 1891, for the purpose of sustaining or rejecting the application made for this tax, as provided by the act in question.

The tax having been voted, some of the taxpayers obtained an injunction enjoining its collection on the ground that the order calling the election was premature and, therefore, void.

The statute in plain terms empowers the county judge to make an order for the election, at the next regular term after he receives the petition, and from this enactment the right to impose the tax alone arises.

The recognized rule is, in cases of this character, where the power to impose the burden is delegated to others upon the result of a popular vote that the act conferring the power must be strictly complied with, and the question arising in this case is, "is the power given the county judge to enter an order for the election at a term succeeding the filing of the petition merely directory, or is it mandatory?"

The legislature, doubtless, had some reason for postponing the entry of the order to a subsequent term, and the county court, being a court of record, the application made to the county judge and filed was notice to the taxpayers of the purpose of the petitioners to submit the question of taxation to the popular vote.

The postponement of the order to a subsequent term gave additional time for considering the question, and enabled those who were interested to ascertain whether those making the application were legal voters or taxpayers, and it being in the nature of an ex parte proceeding, the greater the necessity for giving to the voters all the time provided by the statute for considering such questions as might arise from the nature of the application.

We are constrained, therefore, to hold that as the act authorizing this tax required the order for the election to be made at a term succeeding that at which the petition is received, it must be regarded as mandatory.

The judgment dissolving the injunction is reversed and remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

SPALDING v. SPALDING.

(Filed June 15, 1893—Not to be reported.)

Estoppel—Laches—Where the heirs of a decedent, none of whom knew definitely the real boundary line of decedent's land, make a survey and plat of it, showing its lines and corners, and sell it in lots at auction, one of the heirs who claimed some title to a part of the land, but who acted as auctioneer at the sale and pointed out the lines and corners to bidders and who himself bought four of the lots, will not be permitted, thirteen years after said sale and long after he has accepted a deed from the other heirs, to maintain an action against them for selling his own land, which he claims to have purchased at the auction, especially when the damages he seeks to recover amount to less than the costs of the suit.

Hugh P. Cooper for appellant.

Rives & Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

Joseph Spalding owned at his death a tract of knob land in the county of Marion of but little value. The heirs concluded to sell the land, and for that purpose divided it into lots, making a survey with a plat showing the lines and corners.

The appellant was one of the heirs and asserted title to some part of the land, and in fact the parties in interest were in ignorance as to the real line. He was the auctioneer that sold the land and became the purchaser of four of the lots. For one he paid $2.50 per acre, another 40 cents, a third lot 65 cents and the fourth 85 cents. The sale was made in February, 1878, and possession delivered and a deed made and accepted in August, 1886.

The deed described the land as containing 226 acres, more or less, and bounded the land as was done by the map and survey made at the time of the sale. After the lapse of thirteen years the appellant is claiming that the survey embraced 38 acres of land in a tract that he owned adjoining.

The appellant is electing to hold the land and claim damages that, if he were entitled to recover, would not exceed the costs of this litigation; nor is it by any means certain that he purchased any part of his own land, and being perfectly familiar with the land that he himself owned and that owned by his father, he entered into the possession thirteen years ago and now seeks to disturb the right of others in a court of equity, when his own conduct produced the injury, and to recover an amount less than the actual expenses of the litigation. He pointed out the lines and corners, as the auctioneer, to induce others to bid, and, having bid himself and with his eyes open, he should be compelled to abide by his purchase.

Judgment affirmed.

KING v. COMMONWEALTH.

(Filed June 17, 1893—Not to be reported.)

Criminal law—Election to prosecute for misdemeanor—Re-reference to grand jury—Before the trial of appellant under indictment for a felony, at the instance of the Commonwealth's attorney, an order was entered that he would not be tried for the felony, but for a lower degree of the offense—a misdemeanor. At the next term of the court the case was dismissed and referred to the grand jury, and another indictment for the same felony returned against appellant. He was tried and convicted for the felony. Held —That his contention that the election of the Commonwealth's attorney to try him for a misdemeanor only under the first indictment not being set aside, was a bar to a prosecution for the felony under the second indictment, can not be sustained.

R. A. Hurst for appellant.

William J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was indicted for maliciously cutting John Noble, and sentenced to serve in the State penitentiary for the term of one year. Before trial, at the instance of the Commonwealth's attorney, an order was entered that the appellant would not be held for trial on the charge of a felony, but for a misdemeanor only. At the next term of court the case was dismissed and referred again to the grand jury, which again returned an indictment for malicious cutting, and under which the appellant was tried and sentenced to one year's service in the penitentiary. The contention of the appellant is that the order entered by the Commonwealth's attorney that the appellant would be held and prosecuted under the first indictment for a misdemeanor only, not being set aside by any subsequent order, not even the subsequent indictment, confined the Commonwealth to that charge. But the lower court took a different view of that question. It held that the grand jury had a right to say, for the purpose of the second indictment, what offense the appellant was guilty of, the opinion of the Commonwealth's attorney to the contrary notwithstanding, and that the Commonwealth's attorney could not control the court's action as to the questions upon trial that the court would submit to the jury. In other words, the court was master of the situation. We agree to that view. There is no error in the instructions.

The judgment is affirmed.

MARKS v. COMMONWEALTH.

(Filed June 17, 1893—Not to be reported.)

Criminal law—Malicious cutting with intent to kill—Degree of offense—On the trial of one for maliciously cutting another with the intent to kill, he is not entitled to an instruction on the subject of sudden heat and passion merely because there is some evidence before the jury "tending to show lack of previous design to do the cutting;" such instruction is authorized only when the evidence tends to show also that the cutting was done in a sudden affray or in sudden heat and passion.

Hallam & Myers for appellant.

Wm. J. Hendrick for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was tried under an indictment for maliciously cutting one McNamara with intent to kill him, was found guilty, and his punishment fixed at confinement in the penitentiary for the term of two years.

The indictment was sufficiently specific to apprise the defendant of the accusation upon which he was to be tried, and to constitute a bar to any subsequent prosecution for the same crime.

The necessary averments required by the statute under which the indictment was drawn—section 2, article 6, chapter 29, General Statutes—were appropriately made, and the only remaining question raised on the appeal is whether the evidence required the court to give an instruction on the subject of sudden heat and passion. It is not contended that the cutting was done in self-defense; but it is urged that there was at least some evidence before the jury "tending to show lack of previous design to do the cutting." But if this were true, there must also have been evidence tending to show that the cutting was done in a sudden affray or in sudden heat and passion before the felony would be reduced to a misdemeanor.

We have examined the record in vain for evidence of such a character. The testimony of the defendant himself furnishes no clue whatever to the cutting; certainly shows no provocation or sudden affray in which he was engaged.

The appellant was the brother-in-law of one McCourt, who was charged with embezzlement, as we gather from the record, and against whom the injured man McNamara had been a damaging witness in 'Squire Gar's court. The parties being in the same locality on the night of the cutting, although McCourt, and McNamara had not met since McCourt's trial, the appellant, without suggestion from McCourt, went to McNamara and told him that some person wanted to see him around the corner. The latter accompanied him, and when they came up to McCourt (then talking to his friend McHugh), appellant and McHugh stopped, while McCourt took McNamara some distance away and engaged him in conversation. They soon became engaged in a scuffle.

The defendant then described what then took place: "I happened to look up and John and McNamara appeared to be scuffling, and I ran up and said, 'don't let him pull a gun,' and I separated them, and threw John in one direction and him in the other, and never knew that he was cut or anything else about it, and when I came to look at him I saw blood running down his face, and I never knew that he was hurt and never had any idea of hurting him."

Just before the difficulty the defendant says he was standing with McHugh, picking his finger nails with "a little penknife—a little broken-handled penknife"—and denies having the razor which another witness swears he sharpened that evening. The wound was a very deep, clear cut, some eight inches in length, ranging downward on the neck from below the ear, and made with a very keen-edged instrument and one other than the "penknife" as shown by the proof.

As already indicated, we fail to find from any of the proof a

place for an instruction based on the existence of sudden heat and passion or sudden affray.

There was no error in the introduction of the proof showing the defendant's flight and subsequent arrest in New Orleans.

The judgment is affirmed.

COMMONWEALTH v. WARREN.

SAME v. SAME.

(Filed September 7, 1893—Not to be reported.)

Indictment—Obtaining the signature of another to a paper with intent to commit a fraud—The indictment against the appellee for obtaining the signature of another to a writing, the false making whereof would be a forgery, by false pretenses, with the intent to commit a fraud, does not allege a public offense, since the alleged false pretense consisted merely of a false statement concerning appellee's intention concerning something to take place in the future.

Wm. J. Hendrick for appellant.

W. J. Lisle and John D. Fogle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The sufficiency of the following indictment is in question on this appeal: "The grand jury of the county of Marion, in the name and by the authority of the Commonwealth of Kentucky, accuse William Warren of the crime of obtaining the signature of another to a writing, the false making whereof would be a forgery by false pretenses with the intent to commit a fraud, committed in manner and form as follows, to wit: The said Wm. Warren, in the said county of Marion, on the 9th day of July, A. D. 1890, and before the finding of the indictment herein, did falsely pretend to A. Lee that two notes, to wit, negotiable promissory notes promising to pay to the Marion National Bank of Lebanon, Ky., at the said bank, $350.00 each, and executed by said William Warren as principal, and the said A. Lee as security, were then due, and the said William Warren did then present to the said A. Lee another negotiable promissory note, payable to the said Marion National Bank, in Lebanon, Ky., dated 9th day of July, 1890, and due in four months thereafter for $700.00, which said note was all drawn up in due form and signed by the said William Warren, and the said William Warren did then and there falsely represent and pretend to the said A. Lee that the said note so drawn up and signed by the said William Warren was a renewal of the former notes aforesaid, and by said false and fraudulent representations so made did obtain the signature of the said A. Lee as security to said note. Said first notes were not then due when said representations were so made, and said second promissory note was not a renewal note for said first two notes, and was not so used, but was made and prepared by the said William Warren, and at his instance, to satisfy other notes which he owed said bank, and which he did so satisfy other notes by exchanging said $700.00 for two other notes which he owed and upon which A. Lee was not bound, and said false representations were made by the said

William Warren with the intention to commit a fraud, as aforesaid, and said second note and the signature of A. Lee were writings, the false making whereof would have been a forgery, and said false representations were feloniously made and the said A. Lee as security and William Warren as principal at the time said false representations were made did owe said bank two notes for $350.00 each, all of which was contrary to the form of the statute, etc."

A demurrer to the indictment filed by the appellee, Warren, was sustained by the circuit court, and the Commonwealth has appealed, insisting that the indictment is a good one under section 2, article 13, chapter 29, General Statutes, which is as follows:

"If any person, by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, or if he obtain by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

Obviously the false pretenses or representations attempted to be charged against the appellee are that the notes for $350.00 each were due when they were not due, and that the note for $700.00 when presented to Lee for his signature was a renewal of the smaller notes, when it was in fact afterward used otherwise. Now it is clear that Lee was not induced to sign the alleged renewal note upon the mere representation that the other notes had matured. If the representation had been that they would fall due on the next day, the same necessity would have existed for Lee's signature to the alleged renewal note. The statement as to the maturity of the paper was not a moving or controlling cause or inducement in obtaining the signature. It is in fact not so alleged in the indictment. It is apparent that the appellee obtained the signature of his friend to the new note by the promise that it would be used in renewal of the old ones upon which he was bound at the bank.

The language of the pretense as laid in the indictment, that the note "was a renewal of the former notes," can intelligently mean nothing else than that it was intended to be used as such renewal note. Of course a note can not be a renewal of another note until it is signed by the obligor and delivered to the obligee, and by him accepted as such renewal. The plain meaning of the charge in the indictment is that after Lee should sign it, the note was to be delivered in renewal of the old notes, but that the appellee violated his promise and used it otherwise.

This is not a violation of the statute, as has been repeatedly held by this court. "It is essential to a conviction for obtaining property or money under false pretense to allege and prove that the pretense was a statement of some pretended past occurrence, of existing fact, made for the purpose of inducing the party injured to part with his property. No statement or representation of anything to take place in future is a pretense in the meaning of the statute, whether it be in the form of a promise or not." (Glackan v. Commonwealth, 3 Met., 333.)

The judgment sustaining the appellee's demurrer and dismissing the indictment is, therefore, affirmed.

SCOTT v. COMMONWEALTH.

(Filed September 9, 1893.)

1. Criminal law—Letter written by husband to wife incompetent evidence against husband—On the trial of a husband for the murder of a man who had been criminally intimate with his wife, a letter written by the husband to the wife after the homicide is incompetent evidence against him.

And the fact that the husband on cross-examination admitted writing the letter, and identified it, did not make it competent, he having been required by the court to answer questions relative thereto over the objections of his counsel.

2. Same—Prejudicial error—When the defendant was found guilty of manslaughter and sentenced to the penitentiary for sixteen years, it must be assumed that the admission of the letter as evidence was prejudicial to his substantial rights, since it tended to overcome the effect of the palliating fact upon which he based his defense—the seduction of his wife by the deceased.

Smoot & Gudgell for appellant.

William J. Hendrick and C. W. Goodpaster for appellee.

Appeal from Bath Circuit Court.

Opinon of the court by Judge Lewis.

The evidence in this case of witnesses present shows that about or soon after nightfall appellant went through the back door into the storehouse of deceased, situated in a village, where they both resided, and, without other warning than simply pronouncing the given name of deceased, commenced to fire his pistol at, and killed him. So that, although deceased fired also very soon after appellant's first shot, and both continued to fire until as many as seven or more shots were exchanged, there is no ground whatever upon which to base the excuse of self-defense. The jury, however, found a verdict of manslaughter only, fixing punishment at confinement in the penitentiary for sixteen years.

We perceive no error in instructions to the jury, and the single inquiry left is whether the court erred in permitting read in evidence a letter which appellant, while confined in jail, wrote to his wife. Appellant, on being cross-examined as a witness in his own behalf, admitted he wrote the letter and identified it. But that does not seem to us to legalize the evidence, if not otherwise competent, inasmuch as he was required by the court, over his objection, to answer questions relative to the letter propounded by the Commonwealth.

He testified on the trial that he committed the homicide in a state of passion and excitement, caused by belief his wife and deceased were criminally intimate; that his suspicion was aroused by their conduct at the railroad depot in Mt. Sterling the day before, when they were together, as he believed, by prearrangement; that after their return home and on the day of the killing he sought an interview with deceased at his storehouse, and, as other witnesses also testify, harsh language passed, or, rather, was used by appellant; that being harrassed with suspicion, he asked his mother, who lived at his house, if she believed his wife was unfaithful, and the affirmative answer to his question and his mother's statement that about one week previously she had seen his wife and deceased together at night and under circumstances showing they were guilty, caused him to seek deceased and take his life.

In addition to the information given to appellant by his mother, the correctness of which she swore to on the trial, other witnesses testified to conduct on various occasions of deceased and appellant's wife inconsistent with their innocence, and from which the jury was authorized to infer they had been criminally intimate.

Although manslaughter is an offense in every case without legal excuse, still it is the policy of the statute to vary the punishment so as to suit circumstances of aggravation or extenuation, as the case may be, and hence the margins fixed is not less than two nor more than twenty-one years. It thus becomes a substantial error of court to permit incompetent evidence to go to the jury, the natural effect of which is to either increase or lessen the punishment that would be otherwise inflicted.

An invasion of marital rights by a seducer or adulterer is always treated as a great provocation, and juries are prone to palliate the offense and lessen the punishment of a party who takes the wrongdoer's life under sudden heat and passion induced thereby.

The letter in question—we need not quote it—does not contain an admission in terms that appellant then believed his wife innocent of wrongdoing with deceased, but does contain expressions of affection for and desire to see her. It seems to us the natural effect of that letter upon minds of the jury, and from the severity of punishment inflicted, the actual effect was to lessen or break the force of other testimony tending to show the guilt of the deceased, and thereby deprived appellant of that extenuating fact. If, therefore, it was error to admit the letter as evidence, it must be treated as a reversible error.

The rule excluding husband and wife testifying for or against each other in a criminal prosecution, except in case of personal injury by one to the other, is, as stated in Greenleaf on Evidence, volume 1, section 334, founded partly on the identity of their legal rights and interests and partly on principles of public policy which lie at the basis of civil society, "for it is essential to the happiness of social life that the confidence subsisting between the husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solaces of human existence."

In Elswick v. Commonwealth, 13 Bush, 155, this court, citing as authority Greenleaf on Evidence and Phillips on Evidence, uses this language: "Information coming to a husband or wife in consequence or by reason of the existence of the marriage relation is to be treated as confidential, and the confidence which the law creates while the parties remain in the most intimate of all relations can not be broken even after that relation has been dissolved."

In McGun v. Maloney, 1 B. M., 224, it was to the same effect held that policy of the law so far protects that privacy and confidence essential to the marriage relation and necessarily springing from it as not only not to allow, but prevent, even after termination of the coverture, any disclosure by the wife in a court of justice, which implies a violation of the confidence which was reposed in her as a wife.

The evidence in this case shows the letter in question was procured from appellant's wife by a brother of the deceased, and thus came into possession of the Commonwealth's attorney. But it seems to us, whether given up by her voluntarily or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the

marital relation, and the use of it against the husband in this case was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in confidence and privacy of the marriage relation.

The case of Selden v. State, 74 Wisconsin, 271, was a prosecution of a person for perjury, who, in a proceeding against his wife for divorce, made affidavit he did not know her place of residence; and the question on the trial was whether letters written by him to her pending proceeding for divorce, showing he did know her place of residence, and which she had placed in possession of her attorney, were competent evidence against him in the criminal trial. Applying the rule mentioned it was then held that the letters being confidential communications, not even the address on the envelopes could be used as evidence against the husband. And in support of the ruling in that case numerous decisions of English and American courts are cited.

In our opinion admission as evidence in this case of the letter written by appellant to his wife was an error prejudicial to his substantial rights, and the judgment is reversed for a new trial consistent with this opinion.

COMMONWEALTH v. ALEXANDER.

(Filed September 9, 1893—Not to be reported.)

Criminal law—Defacing brands on sawlogs—The indictment against appellee for cutting off and defacing the brands on certain sawlogs in the Kentucky river is sufficient under the statute. (Commonwealth v. Puckett, 13 Ky. Law Rep., 547, approved.)

Wm. J. Hendrick for appellant.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Bennett.

The indictment charges the appellee with the crime of cutting off and defacing the brands on certain sawlogs belonging to the Asher Lumber Company, and which were in the Kentucky river, and which were branded with the brand of said company, which brand was recorded as required by the act of the legislature, and that the brands were cut and defaced in the county where the same was recorded. The lower court sustained a demurrer to the indictment. As there is no brief on file for the appellee the objection, if any, to the indictment is not pointed out. But according to the case of the Commonwealth v. Puckett, 13 Ky. Law Rep., 547, the indictment is sufficient. That case is approved.

The case must be reversed and remanded for further proceedings consistent with this opinion.

COMMONWEALTH v. CARTER.

(Filed September 14, 1893.)

Aiders and abettors in the commission of a statutory offense can not be convicted as principals where the plain intent of the statute denouncing the offense is to punish only those who actually commit it.

But where it is plain from the statute that its provisions were to apply to all persons violating it, aiders and abetters may be punished as well as principals, and the doctrine of Stamper v. Commonwealth, 7 Bush, 613, is overruled in so far as it conflicts with the rule above announced.

Confederates who stand watch while one breaks into a storehouse and steals property therefrom, and who assist to carry away the stolen property, may be indicted and convicted as principals under the statute denouncing that offense.

Wm. J. Hendrick for appellant.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Pryor.

An indictment was returned in the Graves Circuit Court against Mark Hubbard and two others, charging them with breaking into the storehouse of one Boaz. The testimony showed that Hubbard took the window of the house out and his confederates stood watch a short distance from the storeroom, and, when the goods were removed by Hubbard, Carter and James, his confederates, took charge of them.

There was a separate trial demanded, and Ed Carter, being first tried, was acquitted on a peremptory instruction, based upon the case of Stamper v. Commonwealth, 7 Bush, 613. There can be no doubt of the correctness of the rule that in statutory offenses, where the plain intent of the statute is to inflict punishment only on the person actually committing the offense, that others can not be brought within its provisions as principals upon proof that they were aiders and abettors.

The case of Frey v. Commonwealth, 83 Ky., 191, was an indictment under a statute enacted to prevent the destruction of bastard children by the mother. The statute reads: "If any woman be delivered of any issue of her body, which if born alive would be a bastard, shall endeavor to conceal the birth by drowning, etc., she shall be confined in the State prison, etc." This statute was intended to apply alone to the mother, and illustrates the distinction between the cases. In Evans v. Commonwealth, 11 Ky. Law Rep., 573, the statute provided "that if any one shall willfully and unlawfully burn, etc., he shall be confined. This statute was held to apply to aiders and abettors. Those who were present aiding and abetting in such cases are as much principals as the ones applying the torch or entering the building, and the doctrine of Stamper v. Commonwealth makes the rule too broad when saying that where the offense is created by statute against one actually committing the offense that those aiding and abetting are not amenable as principals to its provisions. There is as much reason for punishing those aiding and abetting in a felony created by statute as there is if a felony at common law. So the doctrine of Stamper v. Commonwealth is overruled; but where in cases it is plain from the nature of the offense made a felony by statute, that its provisions were only intended to affect the party actually committing, that the doctrine of Stamper v. Commonwealth should apply.

As this is an appeal by the Commonwealth the clerk is directed to certify the opinion to the court below.

NELSON v. COMMONWEALTH.

(Filed September 19, 1893—Not to be reported.)

1. Prejudicial error—Continuance—The substantial rights of appellant, indicted for murder, were not prejudiced by the refusal to grant him a continuance, even if he had used due diligence to secure the attendance of his absent witnesses, since the evidence could have left no doubt in the minds of the trial jurors that decedent had made against the defendant the threats he expected to establish by his absent witnesses.

2. Criminal law—Mandate—Under section 336 of the Criminal Code, so soon as a judgment of conviction in a criminal case is affirmed on appeal the decision on appeal becomes final and the mandate may issue immediately.

Jeff Henry for appellant.

Wm. J. Hendrick for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Lewis.

From the testimony appellant and Skeggs, jointly indicted with him, were the only persons present when the homicide occurred for which they were indicted. According to their statements, which do not substantially vary Thompson, the deceased, was when shot endeavoring to cut appellant with a large knife at the time he fired the first shot, that was followed by others, resulting in death, Skeggs taking no part in the difficulty; so that the jury were, it seems to us, bound to acquit, if their evidence was credited. But their version of the affair was inconsistent with facts and circumstances proved by other witnesses who went to the place soon after the killing. They both swore deceased was endeavoring to get to appellant around a tree, described and identified, and was cutting at him while the tree was between them, and that appellant did not fire until he had retreated from the tree, followed by deceased. Other witnesses, however, state that while they saw tracks of a person on the opposite side of the tree from where Thompson lay on his back dead, and where appellant confesses he was, there were no tracks to be seen between the body of Thompson, about fifteen feet off, and the tree, though the ground was soft. It was also proved that, though a large knife was laying in Thompson's hand, it was not grasped at all, and consequently may have been put there after he died. These two circumstances may have been reasonably regarded by the jury as sufficient to show deceased was not at the tree, or near enough to appellant to cut him with the knife, but was instead shot by appellant from behind the tree without any legal excuse.

The substantial rights of appellant were not, we think, prejudiced by refusal of the court to grant a continuance on account of absent witnesses, even if he had exercised due diligence in endeavoring to procure their attendance. For threats by deceased to take his life, which he stated he could prove by the absent witnesses, were fully shown on the trial to have been made, and in view of the fact that appellant and deceased had a previous difficulty, during which they shot at each other, and that the general reputation of deceased was that of a dangerous and blood-thirsty man, the jury could have had no doubt of the alleged threats to take appellant's life having been made. Whether appellant was at the time engaged in selling liquor was immaterial, but we do not see how he was prejudiced by that

fact being proven. No attempt was made to prove the general character for veracity of either appellant or Skeggs to be bad. Nevertheless they seem not to have been believed, simply because their statements were shown by indisputable facts and circumstances to be untrue. The instructions are, we think, unobjectionable, and as no error of law occurred during the trial prejudicial to substantial rights of appellant, and there was evidence to support the verdict, the judgment must be affirmed.

(Filed September 26, 1893.)

Chief Justice Bennett delivered the following response to motion for issuing of mandate:

Section 760 of the Civil Code provides: "That no mandate shall issue nor decision become final until after thirty days, excluding Sundays, from the day on which the decision is rendered," etc. Section 336 of the Criminal Code provides as follows: "The appeal is taken by lodging in the clerk's office of the Court of Appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal." It will be observed that the Civil Code is peremptory; that no mandate in a civil action shall issue nor decision become final thereon until after thirty days from the day that the decision was rendered. That this provision applies to civil cases only is made manifest by the fact that in criminal cases the clerk's certificate suspends execution of the judgment "until the decision upon the appeal" only.

As section 760 of the Civil Code applies to civil cases only, and as there is no such provision in reference to criminal cases, but not penal, it follows that in case of an affirmance of a judgment of conviction the mandate may issue immediately.

Let the mandate in this case issue.

VAUGH ALIAS THACKER v. COMMONWEALTH.

(Filed September 28, 1893—Not to be reported.)

1. It will be presumed on appeal in a criminal case, in the absence of evidence in the record to the contrary, that the action of the trial court was in all respects regular and proper.

In this case it is presumed that appellant was regularly tried and convicted, although he complains that he was indicted and tried at a special term of court contrary to the act of June 10, 1893, the record not showing that he was tried at a special term.

2. Criminal law—Continuance—Appellant was not prejudiced by the refusal to grant him a continuance, since at his trial, at a late day in the term to which it was passed, all his witnesses appeared and testified.

J. D. White, W. P. Bentley and Geo. Baker for appellant.

W. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was convicted of the crime of manslaughter and sentenced to confinement in the penitentiary for the term of twelve years. He made affidavit for a continuance of his case, but the court set the trial at a subsequent day of the term, instead of continuing it to the next term. The case being called for trial on the day that it was set, the persons named in the affidavit were present, and it does not appear that the appellant was otherwise prejudiced by the refusal of the court to continue the case. It is contended that the term at which the appellant was indicted and tried was a special term, and that the appellant's case was not one of the cases specified, as provided by the act of June 10, 1893.

It is sufficient to state that the record before us fails to show anything about a special term, therefore, we must presume that the action of the court in reference to the trial of the appellant was proper.

The judgment is affirmed.

CASKEY v. COMMONWEALTH.

(Filed September 28, 1893—Not to be reported.)

Criminal law—Verdict sustained by evidence—The verdict sentencing appellant to the penitentiary for twenty-one years under an indictment for the murder of his brother was authorized by the evidence, and the instructions given correctly stated the law applicable to the case.

W. W. McGuire for appellant.

W. J. Hendrick for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

The indictment in this case charged the defendant, Jefferson Caskey, and one Jesse Caskey, with the murder of Samuel Caskey. The accused did the shooting and Jesse Caskey was present aiding in the commission of the offense. The testimony conduces to show that Jesse Caskey and the deceased were unfriendly, caused by an alleged assault of Jessie Caskey on a son of the deceased. Whether such an assault was made or not, or the circumstances connected with it, is immaterial, the shooting resulting in the killing of the deceased taking place some time after the assault.

The defense is that the deceased had threatened the life of Jesse, and that at the time of the shooting by the accused he killed his brother to save his own life and that of Jesse Caskey.

The parties were all armed at the time and ready for the conflict. The shooting took place in the house of Thomas Caskey, and the latter's wife, when the quarrel began, was invited to leave by the accused, the latter saying to her: "You had better get out of here; you will get hurt." There is testimony to the effect that the deceased fired the first shot at Jesse, and then the accused shot the deceased, both the defendant and the deceased firing at each other about the same time.

The deceased was at the house of Thomas Caskey for the purpose of borrowing his saw, and evidently had not contemplated any trouble, or gone there for the purpose of meeting the accused and Jesse. They both came after the deceased had entered, and, when they found the deceased there, left the room, Jesse

going outside with Billy Caskey and the accused with Thomas Caskey. When the accused re-entered the room the deceased remarked that "he must be going," and the accused then stated that he (the deceased) "wanted to stand and watch him."

Jesse about that time returned, with his hands on his hips, and remarked: "Sam has a pistol." This Sam denied, and said Jesse had told a damned lie. Jesse turned his face to Sam, with his right hand in his pocket, and then the deceased fired, hitting Jesse, and in a moment the accused and the deceased were firing at each other, and which fired first is left uncertain from the testimony. It is plain from the proof that the accused and Jesse provoked the difficulty, and with a view of taking the life of the deceased, who, up to the time of the shooting, had said nothing, or by any act of his induced either the defendant or Jesse to believe he had any murderous intent.

The law of murder and manslaughter was properly given the jury, and they were further told that if at the time of the killing the accused had reasonable grounds to believe, and did believe, that the deceased was then and there about to kill or inflict great bodily harm on either the accused or Jesse, the accused had the right to shoot and kill the deceased, if there was no other apparent means of escape.

The jury, having heard the testimony, returned a verdict of twenty-one years in the State prison, and this verdict was certainly as lenient as could well be returned under the testimony.

Instructions were asked by the defense, based upon the right of the accused to take the life of the deceased in defense of Jesse, and were refused for the reason that a similar instruction had already been given.

There may be in the defense a coloring of excuse for this unnatural crime, but when the testimony is carefully scrutinized it becomes apparent, as the jury doubtless believed, that even the witnesses for the State were attempting, when detailing the facts, to so color them as to relieve the accused from a punishment he so justly deserved for taking the life of his brother.

Judgment affirmed.

ELIZABETHTOWN, &c., R. R. CO. v. ASHLAND, &c., RY. CO.

(Filed June 15, 1893.)

1. Injunction—Supersedeas—Where an injunction is dissolved on the final hearing of a case, the execution by plaintiff of a supersedeas bond and the service of the order of supersedeas leave the order of injunction in force as fully as if the final judgment had not been rendered, and the defendant violating it before decision on appeal is guilty of contempt of court.

2. Same—Final order—The judgment dissolving the injunction and dismissing the petition at plaintiff's costs is final, although it did not in terms dispose of a counterclaim filed by defendant with the answer, said counterclaim being merely the converse of the matters set out in the petition, was, in effect, only an answer.

3. Same—Where plaintiff desired to reinstate the order of injunction dissolved by the final judgment, his only remedy and mode of accomplishing that result was by appeal and the execution of a supersedeas bond. And the fact that the judgment gave him leave to apply for reinstatement of the order of injunction and continued it in effect for twenty days after the rendition of the judgment did not modify the above rule or establish any additional mode for its reinstatement.

J. F. Hager, H. T. Wickham, Wadsworth & Cochran and Humphrey & Davie for appellant.

Knott & Edelen and Fairleigh & Straus for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, desiring to prevent the appellee from crossing its track at grade at a point southeast of Ashland, Ky., on November 2, 1892, filed its petition in the Boyd Circuit Court and obtained an injunction appropriate for the purpose sought.

After filing its answer and counterclaim, and giving notice of motion to dissolve the injunction, the appellee filed a general demurrer to the petition. It was sustained, as was also the motion to dissolve.

The plaintiff declining to amend or further plead, its petition was dismissed and a judgment for the costs of the action was rendered against it.

From this judgment the plaintiff was granted an appeal to this court, where it is still pending. It executed in the office of the lower court a supersedeas bond, the force and effect of which, on the order of injunction thereofore granted, is the sole question on the motion now under consideration.

The appellee, contending that the injunction was no longer in force, proceeded to construct its line of street railway across the track of the appellant at the point where it had been prohibited from building its line, doing its work in the night and without the knowledge or consent of the appellant, hence this proceeding to punish the appellee for contempt; therefore, as has been said, the question is as to the legal effect of the execution of the supersedeas bond with respect to the injunction.

In the case of Smith v. The Western Union Telegraph Co., 83 Ky., 270, the precise question now under consideration was involved. It was held that when, on final hearing, an injunction has been dissolved, the execution of a supersedeas bond by the plaintiff and the service of an order of supersedeas leaves the injunction in full force, and the defendant is guilty of contempt if he disregards it. This doctrine was approved in the case of the Kentucky & Indiana Bridge Co. v. Kreiger, &c., 13 Ky. Law Rep., 219, and may be regarded as the well-settled rule in this State.

Whether, therefore, the injunction be perpetuated or dissolved, when the proceedings on the judgment is stayed by the execution of a supersedeas bond, as provided by the express language of the Code (section 752) defining the supersedeas, the judgment itself, upon the authority quoted, is suspended or stayed, and the parties stand as if it had not been rendered.

The execution of the supersedeas bond and service of the supersedeas may be regarded as operating retroactively on the judgment rendered, rather than as reviving the dissolved injunction. It operates, therefore, not merely to stay proceedings on the judgment, but suspends the judgment itself.

Mr. High is thus quoted as announcing a contrary doctrine: "An appeal, being merely the act of the party, can not of itself affect the validity of the order of the court, nor can it give new life and force to an injunction which the court has decreed no longer to exist. It follows, therefore, that an appeal from a decree dissolving an injunction can not have the effect of reviving

the injunction and of continuing in force, by the mere act of the party appealing, a judicial order which has been set aside." (High on Injunctions, volume 2, section 1709.)

Apparently the learned author is considering the effect of an appeal merely on the order of injunction, and not the stay or suspension provided for by statutory regulation, such as we have seen exists in Kentucky. His language, "nor can it give new life and force to an injunction which the court has decreed no longer to exist," is certainly not applicable to a case where the very judgment which decrees "an injunction no longer to exist," is stayed or suspended by statutory regulation.

The mere appeal of which the author wrote doubtless stayed future proceedings in execution of the judgment, but we must give broader effect to the stay provided for in our Code, and hold that the entire force of the judgment is stayed and rendered temporarily nugatory by the execution and service of the supersedeas, thus leaving the injunction where it was before the rendition of the suspended judgment.

It is contended, however, that the injunction was dissolved pendente lite and the supersedeas issued on an interlocutory judgment that while final in form the judgment was not so in fact. As we have seen, the defendant filed an answer and counterclaim.

It is claimed that "the cardinal fact of plaintiff's petition was the impracticability of joint occupancy at the point of the proposed intersection, and the cardinal fact of the counterclaim was the converse of this averment;" that, therefore, the counterclaim not being disposed of by the judgment, the case to that extent is still pending, and the order sustaining the demurrer and dismissing the petition with costs is not a final order; that the supersedeas, therefore, was issued improvidently and is void, hence has not efficacy toward staying the judgment or reviving the injunction. The bare statement of this contention, and we have made it substantially in the language of the learned counsel for the appellee, carries with it its own answer.

If the cardinal facts of the so-called counterclaim was the converse of the cardinal facts of the plaintiff's petition, the pleading, while in name a counterclaim, was in fact merely an answer.

Certainly it is that the dismissal of the petition disposed of all the issues in the case, and was, therefore, final. It does not occur to us, as is feared by counsel, that the issues were segregated, or that there is danger that they may not find their way together again. It is said, however, that as the judgment of dismissal and dissolution gave the plaintiff leave to apply for a reinstatement of the injunction, and continued it in force for twenty days after its rendition, the remedy was by such application and not by the execution of the supersedeas bond.

It seems clear to us that such a remedy was not open to the plaintiff. In Pendergest v. Heekin, 13 Ky. Law Rep., 180, decided by this court at its present term (May 23, 1893), it was distinctly held that where, on final judgment, an injunction is dissolved, the right to apply for reinstatement does not exist, but that the only remedy is by an appeal. But, say counsel for the appellee, the plaintiff is about to construct an additional track at the point of the proposed intersection, thus so changing the situation that the appellee may not be able to enforce its judgment after it shall have obtained it. It seems to us, however, that while this may be a matter for future inquiry and regulation, it affords no justification for appellee's plain violation of the order of injunction. As to the appellee company and re-

spondents, Ringo, Wellman and Hughes, the rule is made absolute and is dismissed as to the other respondents. The only process of purging the contempt is to remove the obnoxious track placed at the point of intersection on the night of the 10th of May, 1893, which is now directed to be done by July 1st next.

WILCOXEN v. COMMONWEALTH.

(Filed September 7, 1893—Not to be reported.)

1. The instructions qualifying defendant's right to rely on the plea of self-defense was erroneous in this case because not authorized by any evidence, it being clear that the deceased was, at the time, the aggressor in the difficulty in which he was killed.
2. Same—The instruction denying appellant the right to rely upon the plea of self-defense in case he "brought on" the difficulty is erroneous in the use of the term "brought on" the difficulty, which is of too general a character for use in an instruction where life or liberty is involved.
Such an instruction should state the manner and the intent with which accused must have provoked the difficulty with the deceased so as to be deprived of the plea of self-defense.

Lewis McQuown for appellant.

Wm. J. Hendrick for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, a negro, left his cabin in Hart county to go to Young's store, a few miles distant, to get some medicine for his sick child. One Forbis, a colored friend, fell in with him and they went by the house of one William Butler, another negro, which was close by the road leading to the store, where Forbis and Bulter consummated a horse swap.

After appellant and Forbis had left the house Butler followed, and coming up to them told appellant that he wanted him to take a certain woman, a white prostitute, to keep for him at his house. After some discussion appellant refused, upon which Bulter became angry, drew his pistol and insisted that unless appellant would agree to take the woman he would kill him. Forbis interfered, quieted the difficulty and the party proceeded towards the store. Twice after this as they went along Butler drew his pistol and tried to make appellant agree to keep the prostitute for him. He was quieted by Forbis. At length Spencer Butler, the son of William, joined the three, and about this time William told Forbis and his son to go on, that he had gone as far on that road as he was going, and that he had a settlement to make with appellant. Forbis and Spencer walked on and in a short while heard a call of distress from Butler according to the testimony of Spencer, and from appellant according to the statement of Forbis.

Spencer went back, and not seeing his father, supposed he had gone home. He went off to a dance. Appellant ran up to Forbis, told him that Butler had tried to kill him, and using his pocket knife, a small barlow, he had cut him, but didn't know how

badly. They then went to the house of a neighbor, got them to go with them with lights and found Butler dead some twenty feet from where the struggle took place as pointed out by appellant. He was cut on the wrist of the right arm and a stab was found over the left breast, which was supposed to have penetrated the heart. The pistol of the dead man was found near by. Appellant surrendered himself to the authorities, was subsequently tried and convicted. His sentence was for fifteen years and he has appealed.

The principal error of which he complains is in the modification of instruction No. 4, depriving him, as he contends, of the right of self-defense.

Appended to the usual instruction on that subject is this language: "Unless the jury shall further believe from the evidence, to the exclusion of a reasonable doubt, that defendant brought on the difficulty in which Butler was stabbed, in which event the defendant can not avail himself of the plea of self-defense and apparent necessity, unless the jury shall believe from the evidence defendant had withdrawn from the difficulty prior to the stabbing."

We are of opinion that this modification should not have been given.

First, there is no testimony to authorize it. From the beginning of the trouble until the combatants were left alone the deceased was the aggressor. Moreover it was in proof that he was a vindictive, quarrelsome, dissipated negro, and habitually carried a pistol. Appellant's reputation was shown to be good. No one saw the final combat, and there is not the slightest proof on which to base such an instruction. (Hamlin v. Commonwealth, 11 Ky. Law Rep., 348, and Martin v. Commonwealth, 14 Ky. Law Rep., 95.)

In the second place the form of the instruction is objectionable. "The term 'brought about' a meeting is of too general a character, however, for use in an instruction to a jury where life or liberty is involved." (Crane v. Commonwealth, 12 Ky. Law Rep., 162.)

Neither the manner of bringing on the difficulty nor the intent of the accused are supposed to be material by the court in this instruction. Both are vitally important. (Allen v. Commonwealth, 86 Ky., 642).

Judgment reversed and cause remanded for a new trial upon principles consistent with this opinion.

COMMONWEALTH v. DAVIS.

(Filed September 7, 1893—Not to be reported.)

1. Criminal law—Evidence—On the trial of appellee, charged with committing perjury while testifying in his own behalf in a county court during the trial of bastardy proceedings against him, the record of the proceedings in the county court was competent evidence to show that the alleged false oath concerned a matter as to which appellee could be legally sworn and that the oath was administered by a person authorized to administer it.

2. Same—Time alleged in indictment immaterial—The fact that the indictment alleged that the proceeding during which the perjury was committed took place on October 1, 1892, while the proof showed it occurred on September 19, 1892, is immaterial, it being alleged that said trial occurred before the finding of the indictment.

Wm. J. Hendrick for appellant.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, Will Davis, having been indicted for the offense of false swearing, and under a peremptory instruction of the court found by verdict of the jury not guilty, the Commonwealth prosecutes this appeal.

The circumstances under which the alleged offense was committed are stated in the indictment substantially as follows: That upon trial in the Graves County Court of the cause of the Commonwealth against appellee on a warrant charging him with being father of a bastard child, he appeared as a witness on his own behalf, and being duly sworn as such did willfully, falsely and feloniously state and give in evidence that he never at any time had sexual intercourse with Lelia Sawyer, mother of said bastard child, whereas in truth he had, before testifying, such intercourse with her.

Upon trial of this case the Commonwealth offered in evidence duly authenticated record of the proceeding in the bastardy case against appellee, showing the trial, verdict and judgment of the county court. But objection was made and sustained by the lower court to said record as evidence upon the ground that trial of the bastardy case appears therefrom to have been pending and determined September 19, 1892, whereas it is alleged in the indictment such trial was had October 1, 1892.

The Commonwealth then offered to prove the same facts by oral testimony, objection to which was made and sustained because record evidence thereof was the best evidence; and as no other evidence was offered by the Commonwealth verdict of not guilty necessarily followed.

To convict for false swearing, under the statute, it is essential to allege in the indictment and prove on trial that the false oath was taken knowingly and willfully on a subject concerning which the party could be legally sworn, and before a person authorized to administer the oath. (Commonwealth v. Power, 2 Met., 1; Commonwealth v. Still, 275; Richey v. Commonwealth, 81 Ky., 324.)

These essential facts were all fully and sufficiently stated in the indictment. But it would not have been competent or available for the Commonwealth to prove the alleged false oath was knowingly and willingly taken, without first showing it was so taken on a subject concerning which appellee could be legally sworn, and before a person authorized to administer the oath. These two facts could be properly shown alone by the record, which the lower court rejected as evidence, and are fully shown thereby. And it seems to us it was error to sustain the objection made to the competency of that record as evidence, because whether trial of the bastardy case took place September 19, 1892, as appears therefrom, or October 1, 1892, as stated in the indictment, is not at all material, inasmuch as it appears from both that the alleged offense was committed before finding of the indictment.

The statement of facts was made in the indictment quite fully and explicitly enough to enable a person of common understanding to know what particular offense was intended to be charged, and to enable the court, in case of conviction, to pronounce judgment that would bar another prosecution for the same offense; and the Criminal Code does not require a charge to be made in an indictment more directly or with a greater degree of

certainty than that. We are utterly unable to see wherein the variance in date of the bastardy trial as stated in the indictment and shown by the rejected record could possibly defeat the right of the case or prejudice than of appellee. Moreover, it has been expressly held by this court, in Richey v. Commonwealth, 81 Ky., 524, that in a prosecution for false swearing date of commission of such offense need not be alleged at all in the indictment because not material.

In our opinon the lower court erred to the prejudice of the Commonwealth in sustaining objection to said record as evidence, and this opinion is directed to be certified.

COMMONWEALTH v. HIDE.

(Filed September 9, 1893.)

1. Forgery—Alteration of check on bank—The unlawful addition of a figure before other figures following the dollar mark written in the face of a check on a bank is forgery, although no alteration is made in the written enumeration of the amount of money to be paid therein. The alteration or erasure of any material part of such a written instrument, whereby another may be defrauded, may be a forgery, although the whole instrument is not made false or fictitious.

2. Same—Evidence—Where the evidence shows that no one but the payee had possession of a check after its delivery by the maker until it was paid, and that during that time had been so altered as to be a forged instrument, the question as to whether the payee had committed the forgery should be submitted to the jury, although there is no direct evidence that he actually made the alteration.

Wm. J. Hendrick for appellant.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, under an indictment for forgery, was upon trial found "not guilty" by the jury, under a peremptory instruction from the court, and the Commonwealth has appealed.

The indictment charges that the defendant committed the crime named by feloniously and corruptly writing the figure 3 just after the dollar mark and before the figures 70 on the face of a check drawn in his favor by one J. S. Morehead, on J. Potter & Co., bankers, with intent to defraud, etc., thus making the check one for $3.70, when it was in fact one for only 70 cents.

The proof disclosed that Morehead gave Hide a check for 70 cents, writing the figures thus, $\frac{\$70}{xx}$ near the top of the check toward its right-hand margin.

The line below read

. ...seventy cents .....$\frac{70}{}$ dollars.

Shortly after the date of the check Hide presented it to the clerk of Wade & Co., merchants, and asked to be given $2 in cash and balance in goods. The check was unchanged, save the figure 3 stood between the dollar mark and the figure 70. Without observing the writing closely, the clerk made the exchange, and thereafter, upon discovering the mistake, had the accused arrested and put on trial as named.

Clearly the writing was a forgery and the indictment in apt terms charged the defendant with the crime. It is certainly not necessary that the whole instrument should be made false or fictitious; making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. This check, in a material and we may say a prominent part, was altered, and it does not matter that the words "seventy cents" remained as written, or that by close observation the merchant could have detected the forgery and prevented the consummation of the fraud.

While, therefore, the alteration of the check must be held to have been forgery, the question yet recurs whether the proof is sufficent to show that the accused made that alteration, or, in other words, committed the forgery. That he uttered the forged instrument is uncontradicted, but for that he was not on trial. There is no proof directly showing that he inserted the figure in question, but no one else is implicated or interested. He alone got the benefit of the change made, or had possession of the writing, so far as the proof shows, from the time of its execution by Morehead until its delivery to the clerk in its altered condition.

It seems to us that the jury could readily have concluded beyond any reasonable doubt that the prisoner was guilty. The case should have been submitted to it. Quite rarely can the very act of falsifying a writing be shown, and to require the State to show more than it has in this case would furnish a too-convenient loophole for the escape of the guilty, and result in the frequent failure of justice. A like conclusion was reached by the court upon a similar state of case in Mitchell v. The State, 6 Ga., 448, which is ordered to be certified as the law of the case.

HOURIGAN v. COMMONWEALTH.

(Filed September 14, 1893.)

1. Criminal law—Jurisdiction—Change of venue—When on motion of a defendant indicted for murder, entered in the circuit court of the county to which the case had been transferred by change of a venue that was granted on his application, an order is entered remanding the case for trial to the circuit court of the county in which the crime was committed and the indictment found, the defendant, after a trial and conviction in the latter court, will not be allowed to say that the verdict against him is void for want of jurisdiction of the court rendering it. The court in which the indictment was returned had original jurisdiction of the case and still had jurisdiction when the case was remanded to it on the defendant's motion.

2. Same—Transfer of case—The rule that a case does not stand for trial in a court to which it is removed, unless the record has been lodged with the clerk of that court ten days before the commencement of the term, has no application to criminal cases transferred from one court to another by change of venue. It is found in the Civil Code and applies only to civil cases.

3. Misconduct on the part of the attorney for the Commonwealth in his argument to the jury is not a sufficient ground for reversal in a criminal case where it appears the trial was in all other respects fairly conducted, and that no verdict other than that rendered could have been returned by the jury without misconduct on their part.

4. On the fourth trial of this case the refusal of the court to grant a continuance because of the absence of certain witnesses, and indisposition of one of defendant's counsel, was not prejudicial or an abuse of discretion.

Samuel Avritt, S. A. Russell and Charles Pattison for appellant.

W. J. Hendrick and H. W. Rives for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

In June, 1888, the appellant was indicted in the Marion Circuit Court for the murder of Samuel Hays.

At the following term of that court he obtained, in the regular way, a change of venue to Taylor county, and at his first trial there was found guilty and his punishment fixed at confinement in the State penitentiary for life.

He was granted a new trial by that court. The case was brought to this court by the Commonwealth to have the rulings of the lower court reviewed and the law of the case settled. (Commonwealth v. Hourigan, 89 Ky., 305.) Subsequently two other trials were had in the Taylor Circuit Court. The jury failed to agree each time. Finally, in April, 1893, on the motion of the defendant, the Commonwealth not objecting, the case was remanded to the Marion Circuit Court. At the succeeding term of the latter court the defendant appeared on the calling of the case and moved to set aside the order entered at a former term transferring the cause by change of venue to Taylor county, which was done.

His motion for a continuance was overruled and a trial had, which resulted in his conviction for manslaughter, the jury fixing his punishment at confinement in the penitentiary for ten years. His motion for arrest of judgment for want of jurisdiction in the Marion Circuit Court and for a new trial on various grounds being overruled, he has appealed to this court.

The first question is whether the Marion Circuit Court had jurisdiction of the case. Appellant's counsel contend that the case was properly removed from Marion county, after which the Marion Circuit Court had no more jurisdiction over it than if it had never been there; that there is no way known to the law by which it could ever get back there, as chapter 12 of the General Satutes provides that but one change of venue shall be granted in any case; that the Taylor Circuit Court had no authority to set aside the order of the Marion Circuit Court sending the case to Taylor county, and the Marion Circuit Court had no power in 1893 to set aside its order of transfer made in 1888; that while the indictment shows that the alleged crime was committed in Marion county, the record also shows that the Marion Circuit Court, by its order of transfer has lost all jurisdiction over the case, and that as consent can not confer jurisdiction, the consent of the accused to transfer and trial in Marion does not affect the question. With these views we can not concur. The motion of the defendant was simply to remand the case to the court of original jurisdiction. We think the Taylor Circuit Court had jurisdiction over this motion. It had the right to pass on it.

The statute has no application and presents no bar to the jurisdiction of the court in passing on the motion to remand. The object of the law in providing for a change of venue is to afford the accused a trial in a community where the state of public opinion is such as that he can have a fair hearing or is not such as to prevent it. Ordinarily he accomplishes this result by filing his petition and supporting it by the affidavits of others.

But he may obtain the same result without observing these forms, the Commonwealth consenting. Whatever method is observed he is but selecting a tribunal in which to be fairly tried.

These formalities, provided by the statute, may be regarded as so many hindrances to the attainment of his purpose. Therefore, if they are waived and he selects his forum and submits himself to the jurisdiction, upon what principle can he afterwards complain? No constitutional or inalienable right is parted with, or indeed any right. On the contrary, by the overt act of the defendant, he obtains directly what the statute gives him only through the observance of certain forms.

In Lightfoot v. Commonwealth, 80 Ky., 524, it is said "he," the accused, "will not be allowed, after being tried in the county of his own selection, to say that the verdict against him is void for want of jurisdiction in the court trying him. Consent can not give jurisdiction, but the purpose of the statute being to secure an impartial trial and authorizing a removal of the cause by the accused from the vicinage, the spirit, if not the letter, of the statute will sustain a verdict of guilty or of an acquittal, where the accused selects the county in which he is to be tried, although it may not be in a county adjacent to that in which the offense is committed."

The appellant complains because the record from Taylor county was filed in the Marion Circuit Court at the April term, when he was at once tried; that as the statute provides in civil cases that a case does not stand for trial in the court to which it is removed unless the record has been lodged with the clerk of the court ten days before the first day of the next term of court, such rule should be adopted in criminal cases.

It is sufficient to say that there is no such statutory requirement and no reason for any. The case was fixed for a day certain in the order remanding the case obtained on motion of the accused. The motion for a continuance by reason of the sickness of counsel was also properly overruled. The attorney, whose sickness was urged as a ground therefor, was present and participated in the trial. There appears to have been no lack of counsel, either in respect to the numbers or ability, to conduct the defense skillfully and zealously. Some stress is laid on what is charged as misconduct on the part of the attorneys representing the Commonwealth in their argument. But if, as has been repeatedly held, the trial in other respects was fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury, as we clearly think was the state of case here from a careful reading of the evidence, the verdict should not be set aside on such ground. (O'Brien v. Commonwealth, 89 Ky., 361; Rankin v. Commonwealth, 82 Ky., 424.)

The witnesses, on account of whose absence a continuance was asked, were all present and testified, save Hughes, Raney and Pipes, who had repeatedly been absent before and the case continued for them. It was not shown that by a continuance they could be had at the next term. This was the fourth trial, and the discretion allowed the court under section 189 of the Criminal Code, in permitting the affidavit for continuance to be read as the deposition of the absent witnesses, was, we think, not abused in this case. There was no error in the instructions given and none committed in refusing those offered by the defendant. The law of the case was substantially settled on the former appeal.

The judgment affirmed.

SUPERIOR COURT ABSTRACTS.

COMMONWEALTH v. LEACH'S COMMITTEE.

Filed September 27, 1893. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Yost, affirming.

Allowance to harmless lunatics—The act of May 23, 1890, which provides for the payment by the county court of $20 of the annual allowance of $75 a year to a "pauper idiot," does not apply to harmless incurable lunatics who have been confined in and legally released from an asylum, and, therefore, the State is liable for the whole of the allowance to such lunatics.

W. J. Hendrick and John S. Owsley for appellant; J. B. Paxton for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. CARROLL.

Filed September 27, 1893. Appeal from Laurel Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

Railroads—Killing of stock on track—In this action against a railroad company to recover damages for the killing of a horse by one of its trains, as it was clearly shown that after it was discovered the horse was in danger those in charge of the train, although using every means in their power, could not avoid the injury, a verdict for plaintiff should have been set aside. It is not the duty of an engineer to stop the train simply because he sees animals grazing near the track.

Alcorn & Craft for appellant.

OHIO VALLEY RY. CO. v. O'DANIEL.

Filed September 27, 1893. Appeal from Union Circuit Court. Opinion of the court by Judge Yost, affirming.

Railroads—Contract as to fencing of track—Killing of stock on track—When a railroad company enters into a contract with the owner of lands adjoining its track by which the company undertakes to build and keep in repair a fence along one line of its right of way and the land owner along the other line, such a contract operates to relieve those in charge of trains from the duty of keeping a lookout for straying cattle while passing through the lands of the party with whom the contract was made, and the only duty the company owes to his cattle found upon its track within such inclosure is to use all proper means to avoid injuring them after they are discovered to be in a position of danger. But where, as in this case, both parties have seemingly abandoned the contract by neglecting the fences so that they no longer offer any obstruction to the passage of stock a rescission of the contract will be implied and the parties brought within the purview of the statute, which makes the company, whether negligent or not, liable for one-half the value of the stock killed where the owner has not received compensation for fencing his land along the road.

Adair & Morton and P. H. Darby for appellant; S. B. & R. D. Vance for appellee.

HERNDON v. WATERS' EX'OR.

Filed October 4, 1893. Appeal from Hart Circuit Court. Opinion of the court by Judge Yost, granting rehearing and reversing in part.

1. Vendor's lien—In this action by an executor upon a note executed to his testator for the purchase price of a tract of land in which the plaintiff sought a sale of the land to satisfy the debt, as there was no allegation in the petition that the testator had performed his covenant to convey or that his heirs and devisees in whom the title was vested were able, ready or willing to convey, the court erred in rendering a decree for the sale of the land.

2. Mistake in record as to date of attachment—As the affidavit and bond for an attachment are both dated December 8, 1891, and the trial was had and judgment rendered in August, 1892, it is manifest that the attachment was issued prior to December 8, 1892, although the writ, as copied into the transcript, bears that date.

W. Beard and John L. Scott & Son for appellant; Martin & Stamp for appellee.

MARTZ v. SCHWARTZ.

Filed October 4, 1893. Appeal from Campbell Chancery Court. Opinion of the court by Judge Yost, reversing.

Credit pleaded sustained by evidence—In this action upon a promissory note the court erred in refusing to allow a credit pleaded by him, as the evidence clearly established the payment of the amount claimed by him as a credit.

E. W. Hawkins and Butler Hawkins for appellant; M. R. Lockhart for appellee.

RAYMOND v. McCLEERY.

Filed October 4, 1893. Appeal from Bullitt Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Champerty—While the intermeddling of nonprofessionals in the management of suits brought or to be brought should be discouraged as tending to come within the purview of the statutes against champerty and maintenance, yet a party has the right to appoint any person, whether he be a lawyer or not, an agent to settle his controversy for him, out of court if he can, but, if not, to see to the proper prosecution of an action which he is to have brought and carried on in the name of his principal.

2. Same—A contract is not champertous unless it embraces some agreement to allow a part or parcel of the thing to be recovered as compensation for recovering it.

Ben Chapeze and C. P. Davis for appellant.

HARRIS v. COMMONWEALTH.

Filed October 4, 1893. Appeal from Allen Circuit Court. Opinion of the court by Judge Yost, affirming.

Criminal law—Degrees of offense—Under an indictment for willfully and maliciously shooting at and wounding another the defendant may be convicted of the offense of unlawfully shooting at another with intent to kill him without inflicting a wound.

Lewis McQuown for appellant; W. J. Hendrick and N. A. Porter for appellee.

FOWLER v. ARCHIBOLD.

Filed October 4, 1893. Appeal from Webster Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Separation of conclusions—As this was an ordinary action in which the law and facts were submitted to the court and the court did not state the conclusions of fact found separately from the conclusions of law, the sufficiency of the pleadings to support the judgment is the only question for decision.

2. Alteration of note—After a surety has obligated himself to pay one person, any alteration, without his consent, of the face of the writing, making it payable to another person, releases him.

John G. Bailey, John D. Hill and John L. Scott & Son for appellant; Waddill & Pratt and Edward W. Hines for appellee.

GREEN v. COMMONWEALTH.

KILPATRICK v. COMMONWEALTH.

WILLIAMS v. COMMONWEALTH.

Filed October 4, 1893. Appeals from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Local option—Repeal of statute—An act approved May 5, 1884, making it unlawful to sell liquor in Hardin county, which took effect upon its ratification by the voters of the county at an election held for that purpose, as provided by the act, was repealed by an act approved March 15, 1890, entitled "An act resubmitting to the voters of Hardin county the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county," it being provided by the latter act that if a majority of the votes cast in any magisterial district should be cast against prohibition, the county judge should grant license to retail liquor in said district, and if a majority of the votes cast in any magisterial district should be cast for prohibition, it should be unlawful for the county judge to grant any license in said district, and it being further provided that all laws, general or special, in conflict or inconsistent with that act should be repealed. The act of March, 1890, can not be regarded as an amendment to the act of May 5, 1884, and as submitting to the voters of each magisterial district the question as to whether that act should be repealed as to that district, but must be regarded as of itself repealing the act of May 5, 1884, as to the whole county.

2. Same—The fact that the act of March, 1890, prescribes no penalty for its violation does not evidence an intention that the act should have the effect merely of an amendment, as a repealing act does not become inoperative because it fails to prescribe offenses and punishments in lieu of those embraced in the old law. Besides, although the act prescribes no penalty a penalty can still be imposed, there being a general law imposing a penalty for selling liquors without license, under which any one violating the act in question by selling liquors without license can be punished.

3. Same—Where the language of the statute is plain the intent of the legislature can not be sought for outside of the statute. Therefore, the fact that the legislature, subsequent to the act of March, 1890, and at the same session, passed an act expressly amending the act of May 5, 1884, can not be regarded as evidence that the act of March, 1890, was not intended to repeal the act of May 5, 1884.

4. Same—Indictment—Even if the act of March, 1890, can be regarded as merely an amendment of the act of 1884, it was only illegal to sell in those districts which had, under the act of March, 1890, voted against the sale, and it being admitted that one district had voted for the sale, the indictment should have alleged that the sale was made in a district which had,

under the act, voted against the sale; it was not sufficient to allege that the sale was made "in Hardin county." This is not a case of an exception or proviso in a statute furnishing matter of excuse for the defendant.

W. R. Haynes for appellants; W. J. Hendrick for appellee.

FELAND v. STIRMAN & GATES.

Filed October 4, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Bills and notes—Discounting of note with notice of defenses—A note in the hands of one who, having received it with notice of the defenses against it, discounts it in bank and afterwards takes it up, is subject to any defense that might have been made to it before it was discounted. But where the payee has indorsed the note to an innocent indorsee, and the latter, after discounting it in bank upon its maturity, takes it up, he occupies, so far as defenses against it are concerned, as good a position as the bank did.

2. Findings of fact—If the defendant desired the court's finding of fact to be fuller upon a point essential to his defense he should, at the time, have requested the court to make it so. It was too late after the findings were made and filed to raise the question in the grounds for a new trial.

Reuben A. Miller and John Feland for appellant; Sweeney, Ellis & Sweeney for appellees.

GRIFFITH, &c. v. OWENSBORO & NASHVILLE R. R. CO.

Filed October 4, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Estates upon condition—Right to recover rents after condition broken—Nothing short of an actual entry will serve to defeat an estate upon a condition which has been broken. It can not be done by an action.

Where land was conveyed to a railroad company for use as a depot with the stipulation that if it should cease to be used for that purpose the grantors should have the right to resume possession, the company having ceased to use the land for depot purposes the grantors were entitled to recover rents only from the date they made actual entry upon the land and not from the date of the institution of this suit for a rescission.

C. S. Walker for appellants; Wilbur F. Browder for appellee.

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 15. NOVEMBER 1, 1893. No. 9

KENTUCKY COURT OF APPEALS.

BUTLER V. DAVIS, &C.

(*Filed September* 12, 1893—*Not to be reported.*)

Homestead—Improvements.—A debtor who has a right to a homestead in an old dilapidated house which he tore down has no homestead right against antecedent creditors in a new house erected for a residence on the site of the old one, although a part of the material of the old house was used in building the new one; creditors whose claims accrued before the erection of the new house may subject the property for their debts to the extent of the value of the improvement.

N. McC. Mercer and Knott & Edlen for appellant.

Thos. H. Hines and M. Eskridge for appellees.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant is a housekeeper, with a family, and is entitled to a homestead. There was an old and dilapidated residence house on the land that he owned as a homestead. He concluded that the old house was not worth being repaired, consequently he tore the same down and built a new residence house in its stead, working some of the materials of the old house into the new one.

The appellee sought to subject the homestead to the extent of the value of the new house for the appellant's indebtedness to him, which existed prior to the erection of the new house.

Chapter 38, article 13, section 16, of the General Statutes, is as follows: "The exemption provided for in this chapter shall apply to all persons, of any race or color, who are actual *bona fide* housekeepers, with a family, of this Commonwealth, but shall not apply to sales under execution, attachment or judgment at the suit of creditors if the debts or liability existed prior to the purchase of the land, or of the erection of the improvements thereon."

The policy of the statute is not to allow to the debtor a homestead

as against the claim on existing credit, nor to allow him to withdraw his money or means from such creditor by erecting improvements thereon.

It seems that the erection of the new building was the erection of an improvement in the sense of the statute. The fact that the old building was torn down and some of the material worked into the new building is in no sense an ordinary repair of a residence, but is the erection of an improvement.

The judgment is affirmed.

ELLIOTT V. ELLIOTT.

(*Filed September* 12, 1893—*Not to be reported.*)

1. *Limitation—Action by son against father for value of work done and improvements made on farm*—An action to recover the value of services rendered and improvements made upon a farm by a son for his father is barred by the lapse of five years unless the contract under which the right of action accrues is in writing.

2. *Same*—In an action to recover the value of such services and improvements, where the son alleges that it was agreed that he was to have the products of the farm, but that they were in fact appropriated by the father, the son is entitled to recover the fair value of the services rendered and improvements made unless he in fact received the products of the farm.

3. *Same—Counterclaim—Instructions*—Where the father, defendant to such action, asserts a counterclaim against the son for money paid out by him for the son, an instruction that the jury "may find for the defendant *on his counterclaim* such balance, if any, as may be shown to be due by the evidence, after deducting such amounts as may have been paid by plaintiff to defendant, or put upon the farm in improvements with the consent and agreement of defendant," was not prejudicial to plaintiff; the jury could not, under the evidence, have misunderstood the instruction to allow defendant on his counterclaim a sum exceeding the amount set up in his pleadings.

4. *Same—Liability for improvements*—Even if the son made the improvements under the written contract set up by him—which authorized the expenditure of a certain sum by the son for such improvements as would add to the value of the farm in the judgment of the father and the son—the father was liable for the value of no improvements made exceeding in cost the sum agreed upon unless they were made with his knowledge and consent.

John D. Wickliffe for appellant.

Fulton & McKay for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant sued his father, the appellee, on account for work, services, etc., done for him on his farm from the years 1884 to 1888, inclusive.

He contends that he was induced to quit his own farm on the Ohio river, and with his family move to Nelson county and take charge of his father's farm, of some 500 acres, under a written memorandum, which, though not signed, was in fact the contract between himself and father.

This paper was written in the spring of 1884, and was to the effect that the appellant and his wife were to come to the appellee's as his guests until September following to see whether they would like living there. In the meantime the son might put under cultivation such portion of the farm as was not already rented, so as to prepare it for pasturing, the rent of the land to be used in buying seed for that purpose.

If the contracting parties were satisfied to live together at the expiration of that time (September), then two or three reliable neighbors were to be selected to estimate the rental value of the whole farm per year. Appellee was to take one-half of this sum for the rent, and with the money have such improvements made on the place as would add to its value in the judgment of the father and son. The lease to last for three or five years, as the son wished. The latter was to board his father and Mrs. Barnett, and be paid board for any visiting children and grandchildren of the appellee.

The appellant says that after he moved to his father's he expended much money and labor on the farm during the years 1384 and 1885, all the time insisting on the selection of the neighbors to estimate the rental value of the place, but his father refused or delayed doing so until the latter part of the year 1885, when the arbitrators met and fixed the annual rental for three years, beginning December 25, 1885, at $300 per annum, in addition to the board of his father and Mrs. Barnett, the rent to be paid in such improvements as the father and son might agree upon; that he thereupon took charge of the place under the terms of the original proposition and the arbitration, but that the defendant called on him to make many improvements and do much work over and above the value of the rent, such as building a barn, crib, hauling manure for the farm, etc., the total charge against his father, after deducting the rent, being $4,287.91, for which he sues.

The defendant claims that, learning in 1884 that his son's farm on the river had been subjected to continuous overflow, and that his family were in reduced or straitened circumstances, he invited him to come and make what he could out of his farm, or so much as had not theretofore been rented to others for that year; that afterwards, if matters proved satisfactory to defendant and their joint occupancy was harmonious, he would let him have the farm on reasonable terms, but that he never had agreed to the terms in the paper known as "proposition"—this paper originated with plaintiff; that the plaintiff got the benefit of the products of the farm in 1884, and likewise in 1885, and that defendant furnished him large sums of money also, and that as to the plaintiff's claims set up for these two years, more than five years had elapsed since their alleged creation; that he did rent his farm to plaintiff for the years 1886-7-8, but that the plaintiff expended no money for him, or built any improvements or did any work for him on the farm in excess of the rent money, which was to be so expended, or if in excess it was without his consent; that on the contrary he paid out divers sums for the plaintiff, let him have large quantities of lumber, sold him stock to the amount of $385, for which he had his wife's note, etc.

The defendant's counterclaim amounted to several thousand dollars. Upon the trial of the case before a jury, and after the introduction of an unusually large number of witnesses for each side, a verdict for one cent was returned for the plaintiff. He has appealed, complaining very urgently that the finding is not sustained by the evidence; that the court erred in giving the instructions, etc.

The instructions offered by the plaintiff and refused by the court

were perhaps more likely to confuse than to aid the jury. The instructions given are general, but we think sufficiently plain to furnish the jury with a knowledge of the issues.

If there was no memorandum of the contract upon which to base the claims arising in 1884–5, the lapse of five years before suit barred them, and such was the purport of the first instruction.

If the memorandum or paper marked "proposition" was dictated or authorized by the defendant, or was afterwards ratified or approved by him, then the jury were told to find for plaintiff such amounts as would compensate him for work, etc., in 1884–5 furnished to the defendant, unless the evidence showed that the defendant did not receive the products or benefits of the farm. This was the second instruction, and was right.

The plaintiff was contending that under a contract he did the work, and that the defendant got the benefit of it. If so, says the court, find for the plaintiff the value of his services unless the plaintiff himself got the products of the farm.

To the third instruction the plaintiff enters his most earnest objection. It reads thus: "That they may find for the defendant on his counterclaim such balance, if any, as may be shown to be due by the evidence, after deducting such amounts as may have been paid by plaintiff to defendant, or put upon the farm in improvements with the consent and agreement of defendant.

It is thought that the expression "on his counterclaim" should have been followed by the words "not exceeding the sums claimed by defendant in his pleadings;" that there being no limit fixed, the jury may have allowed certain old debts paid by defendant for his son many years ago. But it will be observed that no such claim is set up by the defendant either in his pleadings or in his proof. On his cross-examination he speaks incidentally of having paid certain moneys for his son, but we can not believe that this could in any way have been taken into the account by the jury. The effort to show that it did, we think, failed, and afforded no sufficient ground for a new trial and will not be reviewed here.

The instructions charging the jury not to find for plaintiff for improvements in excess of $300, unless they were done with the knowledge or consent of the defendant, or were of value to him, were manifestly right, even if the terms of the memorandum are to prevail.

On the whole case we think the plaintiff had a full and fair chance to establish his claims before the jury, and we will not disturb their verdict.

Judgment affirmed.

LONG V. BOWEN.

(*Filed September* 14, 1893.)

The judicial finding that a county assessor is a lunatic, with an order for his confinement in a lunatic asylum, creates a vacancy in the office of assessor which the county court may fill until the next August election, when there must be an election to fill the vacancy, under chapter 33 of the General Statutes.

Kennedy & Son for appellant.

Ross & Owens and Hanson Kennedy for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee, in August, 1886, was elected assessor of Nicholas county, and qualified and entered upon the duties of the office and continued to discharge the duties of the office until April 27, 1889, when he was, by proper proceedings and by a court of competent jurisdiction, adjudged a lunatic and committed to the Eastern Kentucky Lunatic Asylum, where he remained a lunatic until August 27, 1889, when, as it is presumed, he was discharged as cured.

In the meantime, by proper proceedings, the office of assessor was by the county court declared to be vacant, and an election to fill the vacancy was ordered and held on the first Monday in August, 1889, which resulted in the election and qualification of the appellant, who entered upon the duties of the office.

After appellee returned from the asylum he demanded the books of the office from the appellant, but he refused to deliver them and made the assessment of the county for that year.

The appellee by this action charges that the appellant had usurped the office, and asked judgment against him for the fees of the office that he had received. The lower court sustained his contention and the appellant has appealed. The question to be decided is, was there a vacancy in the office at the time it was so declared by the county court in the sense of chapter 33, article 6, which is as follows: "The term vacancy in office, or equivalent phrase as used in this article, means such as exists when there is an unexpired part of a term of office without a lawful incumbent therein, or when the person elected or appointed to an office fails to qualify according to law, or when there has been no election to fill the office at the time appointed by law. It applies whether the vacancy is occasioned by death, resignation, removal from the State, county or district, or otherwise."

The 5th section provides that the county court shall have power, in case of a vacancy in the office of assessor, sheriff, etc., to fill it until the next August election, at which time there shall be an election to fill the vacancy.

The question is, did the judicial finding that the appellee was a lunatic, and his confinement in the insane asylum in accordance with such finding, and while the finding was in force, create a vacancy in the office of assessor and authorize an election to be held to fill the vacancy?

The judgment of the court that the appellant was a lunatic, and that he should be confined in the lunatic asylum, was in effect that the confinement should be that of physical restraint, and that he should be deprived of the right to transact any business or to take charge of and control his estate, but the management and control of the same should be confided to some prudent person to be appointed by the court; also that he should have no standing in court, except through a committee, etc; also that he should be deprived of the power to contract or be contracted with; also to deprive him of the power to control his own family, and to do other things that a sane person has a legal right to do.

The appellee's status was thus judicially determined, which was in force at the time of the election and qualification of the appellant. The appellee, so far as these things were concerned, or of discharging the duties of the office or of performing any other civil duties, was civilly dead, not in the sense of a punishment, but as a protection.

It seems from what has been said that the statute *supra* should be construed to mean not only resignation, removal from State, county

or district, whereby he abandoned his official duties, the county loses control over him, but death, natural or civil, the latter by the judgment of the court depriving him of the right and power to execute the duties of the office as well as the former, creates a vacancy in the office..

It seems that the expression "or otherwise" has reference to such other things as, by judicial determination at least, deprives the incumbent of the right and power to discharge the duties of the office. The confinement of the appellant in the insane asylum under the writ of lunacy certainly deprived him of the power to execute the duties of the office.

The judgment is reversed and remanded, with directions for proceedings consistent with this opinion.

PEAK, &C. v. GORE.

(*Filed September* 14, 1893.)

1. *Rescission of a contract of purchase of land can not be granted to a widow* merely because the vendor induced her to agree to pay double the value of the property, and the enforcement of the contract will be a great hardship upon her.

2. *Same—False representations concerning value of property sold*—When the vendee purchases after having time and opportunity to ascertain for himself the value of the property, and does in fact examine it, commendation concerning and false rapresentations of its value by the vendor afford no ground for a rescission of the contract; and this rule applies even when the vendee is without practical knowledge or experience as to the value or management of the particular property, and is induced to purchase by the vendor at an exhorbitant price by representations known by him to be false.

3. *Same—Covenant to convey "a good and legal title"*—A covenant by the vendor to convey "a good and legal title" at the time of the first cash payment obligated him to convey a title clear of all claims and liens of others.

4. *Same—Outstanding liens*—Where the vendee by false representation has been induced to purchase property at double its value, and has made one cash payment almost equal in amount to its real value, and the vendor, who is insolvent, agreed to convey "a good and legal title" at the time of the cash payment, and it appears that there are outstanding mortgage liens on the property, created by the vendee but concealed by him at the time of the sale, which amount to as much as the property is worth, and which the vendee did not satisfy with the cash payment, and which he has no means of paying, the vendee, who sues before either of two deferred notes for purchase money becomes due, is entitled to a rescission of the contract of sale and a cancellation of the deed and of the unpaid purchase money notes, because the vendor has not conveyed or tendered a conveyance of or shown ability to convey "a good and legal title;" and this is true, even though the mortgage lien is less in amount than the unpaid purchase money notes.

Robert Harding and Geo. Davison for appellants.

Breckinridge & McFerran for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Lewis.

November 18, 1887, James Gore sold to Amanda Peak and E. C. Montgomery a lot of land in Junction City, on which was the "Gore Hotel" and furniture, for $10,000, and as evidence of the sale a writ-

ten contract was entered into and signed by the parties. By its terms Gore agreed to make to them "a good and legal title" upon payment of one-third the purchase price, and execution of two notes, each for one-half the residue, bearing interest at the rate of 8 per cent. per annum, and payable in one and two years from the last of March, 1888, when the cash payment was to be paid and notes given. It was agreed they were to have possession of the property, and it was delivered in December, 1887, but to pay rent therefor at the rate of $60 per month until the cash payment was made and notes executed, and also to board Gore and his brother during the same period free of charge.

March 20, 1888, Mrs. Peak sold and conveyed to Gore a tract of fifty acres of land for about $3,700, of which $3,333.33 was used to make the cash payment for the hotel property, and for the residue Gore gave her his promissory note, that she sold, and proceeds of it were used to buy hotel supplies.

This action was brought September 8, 1888, by Mrs. Peak for rescission of the contracts of sale and purchase of the hotel property and the tract of land; for restoration to her of the tract of land and cancellation of the two notes given for balance of the $10,000. Montgomery was made defendant to the action, but in his answer made cross petition against Gore, the same relief was prayed for as asked in the petition. The lower court, however, dismissed both petition and cross petition without giving any relief at all.

The evidence makes it too plain for controversy that the hotel property, for which appellants agreed to pay $10,000, was not at the time nor is now worth half that sum. Indeed only one of nine witnesses who, having knowledge on the subject, testify as to its value say it was or is worth as much as $5,000, the value as fixed by the others being from $2,000 to $4,000. So that in view of the fact her son-in-law and copurchaser, E. C. Montgomery, is insolvent and unable to pay any part of the purchase price, the bargain is a very hard one for Mrs. Peak, who is a widow. But the relief prayed for could not be granted for that reason alone.

It is stated in the petition, and also sworn to by Mrs. Peak and Montgomery as witnesses, that pending negotiation about the trade, and also at the time the contract was reduced to writing, Gore, as an inducement for them to purchase the property, stated it was worth and he had been offered for it $10,000, and that its earning capacity was from $25 to $50 per day.

He practically admits making the statement as to its value, and, though not as distinctly confessing he made the other alleged statement, it is evident to us, from the manner in which his testimony is given, that he did do so; and as Mrs. Peak had at the time no experience or knowledge in regard to the value or earning capacity of hotel property, and Montgomery very little if any more, it is manifest the representations of Gore unduly influenced them to make the purchase, which they both testify neither had previously any intention to do. This, therefore, seems to us, from all the circumstances, to be the case of persons without practical knowledge or experience of the value or management of particular property being allowed to buy and pay an exorbitant price for it by representations of the owner, known by him to be untrue. But as they purchased after having time and opportunity to ascertain for themselves value of the property, and did in fact examine it, commendation or even false representation of its value by Gore can not, according to a settled rule, afford ground for rescission.

There, however, existed when the contract was made mortgage liens

upon the hotel property for near, if not quite, $3,000, which it is alleged in the petition and cross petition Gore fraudulently concealed from them, and of which they continued ignorant until June, 1888, when first informed in regard thereto. Gore denies he concealed existence of the liens or stated to them, as they allege, that the property was unencumbered; but it is evident they were misled and deceived on that subject by him. For how could he, as he covenanted in the contract of November, 1887, make them a good and legal title, which is equivalent to and means a title to property clear of claims and liens of others, if there were existing mortgages that he had made no provision to satisfy, and, as here appears, did not design to satisfy prior to or even when the deed was to be executed and delivered by him? For although he sold the tract of land shortly after Mrs. Peak conveyed it to him in payment of the first installment of purchase price of the hotel property, no part of the proceeds, except about $200, was applied to pay the mortgage debts; and so far as the record shows they had not been paid, even when the judgment appealed from was rendered; and in view of the alleged and undisputed fact that Gore was insolvent, it is not at all reasonable Mrs. Peak would have conveyed to him her own land, executed the two notes and accepted his deed without an assurance and belief the hotel property was free of encumbrance.

But waiving the question of fraud the case seems to us to stand thus: Gore had the right to insist upon complete performance of the contract on the part of Mrs. Peak and Montgomery, which consisted in paying deferred installments when they fell due, and they, consequently, are here without right to a rescission, provided there has been no breach or failure on his part whereby they were materially prejudiced.

Ordinarily a vendee could not be prejudiced by reason of prior liens on property purchased, if for less amount than unpaid purchase money past due by him, nor have a right to complain of the property being subjected and sold on account of his own default. But in this case Mrs. Peak and Montgomery had not defaulted in paying the unpaid installments of purchase money, none of which was due until March, 1889, nor failed to comply with their part of the contract in any respect; but Gore had failed to clear the property of encumbrance before the first installment of purchase money was paid and the deed was made and delivered, as he was bound to do. And as a consequence of such failure there existed, when this action was commenced, mortgage debts amounting, it is true, to not as much as the unpaid installments of purchase money, but to nearly, if not quite, as much as the evidence shows the hotel property was worth; and if added to the cash payment made by Mrs. Peak, in March, 1888, the aggregate amount would be double the value of the property. So that Gore being insolvent and his creditors having the right to enforce their mortgage liens on the hotel property at any time, Mrs. Peak, without fault of herself or Montgomery, but by reason of a breach of the contract by Gore, was put in danger of not only losing by enforced sale the hotel property, but also the tract of land conveyed by her in payment of the first installment of purchase money.

The question in this case is, therefore, not whether the unpaid installments of purchase money equalled in amount the mortgage debts that it was the duty of Gore to pay off before receiving any part of the purchase price or undertaking to convey the property, but it is whether he did, in March, 1888, make such conveyance of the property as he had covenanted to then make.

The deed made by him certainly did not convey a "good and legal title," nor has he since tendered such deed. Moreover, the evidence shows him to be, by reason of insolvency, unable to discharge the mortgage liens, which is indispensable in order to full compliance with his contract.

In our opinion the purchasers of the hotel property were clearly entitled to a rescission of the contract when this action was commenced, and the lower court erred in dismissing it. Instead a judgment ought to have been rendered rescinding the contract of sale and purchase of the hotel property, cancelling the unpaid purchase-money notes and restoring the parties in other respects to their original status, so far as can be done equitably and without prejudice to the rights of others.

And the judgment is reversed and cause remanded for proceedings consistent with this opinion.

JOHNSON V. COMMONWEALTH.

(*Filed September* 23, 1893.)

1. *Criminal law—The Commonwealth may assail the reputation for veracity of defendant's absent witnesses*, whose evidence, as stated in defendant's affidavit for a continuance, is read on the trial as their deposition.

2. *Same—Continuance*—Defendant was not prejudiced by the refusal to grant him a continuance, his trial not having occurred until four years after he was indicted.

3. *Same—Instructions—Self-defense*—The instruction on this trial for murder qualifying defendant's right of self-defense, in case he, "at the time of the killing of deceased, *brought on* the difficulty with him *and sought his life*," was not prejudicial or erroneous. The expression "brought on the difficulty and sought his life" could not have misled the jury, since the evidence did not disclose any act of accused by which he "brought on" the difficulty in any manner except feloniously, and the expression "and sought his life" sufficiently pointed out the *manner* and *intent* with which he must have provoked the difficulty in order to be deprived of his right of self-defense.

4. *Same*—Since the evidence shows clearly that the accused was on his back on the ground when he shot deceased, and had no other means of escape or opportunity to flee, if deceased was about to inflict any great bodily harm on him, he was not prejudiced by an instruction requiring him to use "any other safe or apparently safe means of protection or escape" before taking the life of deceased in self defense, even if such instruction was erroneous.

Stewart & Stewart for appellant.

W. J. Hendrick for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was indicted for the murder of Wm. King at the February term, 1889, of the Pike Circuit Court. At the March term, 1893, he was put upon trial, convicted and sentenced to the penitentiary for life. Assigning various errors, he has appealed to this court.

It appears the accused had a stillhouse where he made brandy. King was his neighbor, and appears to have frequented the place, at

times getting something to drink and at other times failing. Appellant was in dread, lest King would report him to the marshal, and the proof is abundant that he had, on several occasions, threatened to kill the deceased. On the day of the killing, when he saw King coming, he said, "There comes a d—d dangerous man," alluding, as we gather from the proof, to the danger of being reported to the marshal.

Several persons had gathered there on that occasion (Sunday morning) and were engaged in drinking brandy. Appellant said during the morning that "that day's work would ruin him." He was also heard to say that morning, "I'll be d—d if Bill King shall bother me any more." He got into a row with one Maynard, in which King acted as peacemaker. He said to King that "if he was a friend of Maynard he was no friend of his." King answered that he was a friend of both. He "gave King the God d—d lie" twice or more. This was down at a gate some distance from the stillhouse. Appellant then invited King to go and get a drink and they walked off arm in arm, both drunk or drinking, and so indeed were all the parties present. Johnson had a gun and a pistol. King was wholly unarmed. After getting, perhaps, a hundred yards from the gate, Johnson was seen to pat his cheek at King and was heard to say, by one witness nearer than the others, "Hit me if you dare." He did this two or three times, when King knocked him down with his fist and was standing over him quietly with his head hung down, but making no demonstration or effort to do anything further. He had nothing in his hands. Johnson, after falling and while on his back, fired with his pistol, striking King in front, who thereupon fell. He died the next morning.

The defendant proved that on several occasions previous to the killing King had threatened to kill him, and on one or two occasions had made some effort to do so, and on the day of the trouble called him a damned liar. He testified that King knocked him down and he knew nothing for a short time, and when he recovered consciousness he saw King stooping over him with a rock in his hand in a threatening attitude, and is corroborated by his daughter and perhaps another witness. This is not corroborated, however, by the other witnesses.

The appellant complains of all the instructions given, but most seriously of the qualification of his right of self-defense as given in the fourth. By the first, second and third instructions was given the law as to murder, manslaughter, and what the finding should be in case of doubt as to the degree of guilt.

By the fourth they were told that mere threats made by the deceased to take the defendant's life would not excuse or justify the defendant in taking the life of King, unless they should believe from the evidence that at the time Johnson killed King, if he did kill him, defendant believed and had reasonable grounds to believe that King was about to carry out said threats and take his life or inflict on him great bodily harm, and that there was no other safe means, or apparently safe means, of protection or escape but to kill King, and if the jury so believed and find, they should excuse him on the grounds of self-defense and apparent necessity and find him not guilty, "unless the jury should further believe from the evidence that at the time of the killing of King the defendant brought on the difficulty with him and sought his life, and if they should so believe they can not excuse or acquit him upon the grounds of self-defense or apparent necessity."

In a subsequent instruction the law as to reasonable doubt was given.

It is contended that this court, in Allen v. Commonwealth, 10 KY. LAW REP., 582, held that the jury should be required to believe beyond a reasonable doubt "that the accused *willfully* brought on the difficulty with the deceased for the *purpose* and with the *formed design* to kill him or inflict serious injury on his person before they were authorized to deprive the accused of his right of self-defense."

It is argued that the difficulty may have been "brought on" with no felonious or unlawful intent, or even innocently, and such indeed has been the criticism of this court in several recent cases on both the form and substance of instructions similar to this one. The expression "brought on" has been said to give the jury too much latitude—to leave out of view the intention upon the part of the accused and the manner of bringing on the difficulty.

In quite a recent case it was held to be probably prejudicial to the rights of the defendant, because he had gone to the house of the deceased, where an altercation occurred which finally resulted in the defendant killing his antagonist. (Wilcoxen v. Commonwealth, *ante*, 261.) It was thought the court indicated to the jury by his merely going there, innocent though he was of any intention to harm the deceased, that this was "bringing on" the difficulty in the broad meaning of the instruction. Therefore, it was said that the intention with which the difficulty was brought on must be submitted to the jury. That intention must be to kill or seriously injure, and must be confined to the immediate occasion of the killing.

In the present case the jury were required to believe that the accused brought on the difficulty at the time of the killing and was then and there seeking the life of the deceased before they could deprive him of the right of self-defense. There was no circumstance in proof prior to the killing in which the accused figured as an innocent factor, and yet which might have been thought by the jury to have brought on the difficulty, and by which the jury might have been misled. The felonious intent with which the difficulty must be believed by the jury to have been brought on sufficiently appears from the use of the terms "and sought his life." And, manifestly, these terms were not misunderstood. Though not strictly or legally so apt, they are suggestive to the ordinary mind of most nefarious design.

To seek a man's life is the embodiment of criminal intent, and suggestive of the foulest assassination; and that the accused thus "sought the life" of King at the time of killing him, the jury are told to believe before depriving him of right of self-defense. Moreover, when the Commonwealth established the fact that the accused had threatened to take the life of the deceased, it was not then a question merely of his necessary self-defense that was before the jury. His whole previous conduct towards the deceased and declarations concerning him were under scrutiny, and by these evidences of hostility and enmity the intention of the accused was properly gathered at the time of the fatal meeting.

Under the facts submitted to the jury in this case, we think it impossible for the jury to have been misled by this instruction. By a subsequent and independent instruction the defendant was given the usual law of self-defense without qualification.

It is further urged, on the authority of Bledsoe v. Commonwealth, 9 KY. LAW REP., 1002, that the instructions should not have qualified by the expression "other safe or apparently safe means of pro-

tection or escape;" that as the killing was on the premises of the accused, as in the Bledsoe case, he was not bound to flee but had the right to stand and defend himself. But the merest glance at the evidence will show that these words of qualification were not misleading. If ever applicable, it was when the defendant was on his back on the ground. If there ever was a time when he was in danger, or could have reasonably believed himself to be in danger, it was when he was knocked down, and there was then manifestly no possible avenue of escape from the danger. It is evident the jury thought that he was never in any danger from which he was required to escape, and so found him guilty of murder.

Instruction six, as to the jury judging of the character and credibility of the witnesses, was not prejudicial. The effort of the Commonwealth to impeach the character of some of the defendant's witnesses, while it affected their general moral character to some extent, resulted in establishing overwhelmingly their reputation for truth and veracity.

The motion for a continuance was properly overruled. The indictment was found in February, 1889, and the defendant was brought to trial some four years thereafter. The affidavit disclosing what the absent witnesses would testify was read as a deposition. Nor did the court err in allowing the Commonwealth to impeach, or attempt to impeach, the reputation of the absent witnesses. Their testimony was placed on the same footing as that of witnesses who were present, and their characters subject to the same tests.

We think that the defendant obtained a fair trial, and the judgment is affirmed.

COE, SR. V. COMMONWEALTH.

(*Filed September* 30, 1893.)

1. *An indictment for manslaughter*, alleging the offense to have been committed unlawfully, willfully, *maliciously*, feloniously, *in a sudden affray*, and not in self-defense, is sufficient; although the word "maliciously" is used it must be regarded as mere surplusage and in nowise affecting the indictment or the substantial rights of the defendant.

2. *The indictment in this case states with sufficient clearness and directness* the particular circumstances of the offense charged.

Allen & Allen for appellant.

W. J. Hendrick for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Lewis.

The offense charged in the indictment in this case is manslaughter, alleged to have been committed by the accused unlawfully, willfully, *maliciously*, feloniously, *in a sudden affray*, and not in his self-defense.

The defendant filed a demurrer to the indictment, and also after verdict of the jury, moved an arrest of judgment.

The only ground upon which a judgment may be arrested is, as prescribed in section 276, Criminal Code, that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

One of the grounds upon which, according to section 265, a demur-

rer to an indictment may be sustained is substantially the same as the one upon which a motion in arrest of judgment may be made, viz.: That the facts stated do not constitute a public offense.

But if the demurrer is proper in this case at all, it is because the indictment does not substantially conform to the requirements of article 2, chapter 2, title 6, of the Code.

Section 124 provides the indictment must be direct and certain as regards first, the party charged; second, the offense charged; third, the county in which the offense was committed and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense.

The only cause for demurrer to the indictment in question that counsel urges is that the particular circumstances of the offense are not stated with that directness and certainty required by the Code, for there can be no question but the offense of manslaughter is the one intended to be and which is in terms charged.

The circumstances of time, place and manner of the commission of the offense, and also the person slain, are all stated with sufficient directness and certainty to show the court had jurisdiction, to apprise the defendant of the particular homicide which he is called on to answer, and to constitute a bar, in case of conviction, to another prosecution for the same offense.

But although the offense charged is manslaughter, the word "maliciously," used in describing the particular circumstances of the offense, indicates a state of mind under which murder, not manslaughter, is committed. Nevertheless, as the words "in a sudden affray," descriptive of manslaughter, occur in the same sentence and connection, the word "maliciously" is to be regarded as surplusage and, therefore, in no wise affecting the indictment, otherwise sufficient, nor the substantial rights of the accused. For, while he might have been indicted for murder alone, and, upon failure of proof to sustain the charge, convicted of manslaughter, under the indictment complained of he could not have been possibly convicted of murder, as he was not. So that as the offense of manslaughter was charged and sufficiently described in the indictment, the word "maliciously" did not nor could either mislead or prejudice the accused, and consequently should not be held to vitiate or impair the indictment.

In our opinion there was no ground for either demurrer or motion in arrest of judgment, and as we perceive no other error in the record, the judgment is affirmed.

HAVERLY V. COMMONWEALTH.

(*Filed October* 17, 1893.)

1. *Criminal law—Instructions—Self-defense*—On the trial of one for murder, who makes the plea of self-defense, the instruction specially directing the attention of the jury to previous threats, menaces and assaults committed with felonious intent upon the accused by the deceased that was given in the cases of Oder v. Commonwealth, 80 Ky., 32, and Bohannon v. Commonwealth, 8 Bush, 481, is authorized only when all the conduct and declarations of the deceased prior to the homicide were of such a character that his very presence put into actual and imminent peril the life of the accused, and gave him reasonable grounds to believe that further murderous assaults with a deadly weapon were about to be made upon him.

In this case the conduct of the deceased toward the accused had been overbearing and irritating; threats and even an assault had been made, but no

felonious or deadly intent toward accused was manifest therefrom, and only the usual instructions concerning murder, manslaughter and self-defense were authorized or required by the evidence.

2. *Same—Absence of counsel of accused while proceedings were had*—The record does not show that the jury was permitted to retire in the absence of the attorney for defendant without taking with them certain papers, etc., or that the sheriff went into the jury room and remained there while the jury was considering of its verdict, and the mere allegation of these facts in a motion for a new trial is not sufficient to authorize a reversal on appeal.

3. *Same—Weight of verdict*—Although the evidence seems to show that appellant acted in self-defense only, the jury found otherwise and convicted him of manslaughter, and the weight and credibility of the testimony being matter for the jury to decide, the judgment must be affirmed.

A. H. Ward for appellant.

Wm. J. Hendrick for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hazelrigg.

Under an indictment for the murder of Lewis Long the appellant was convicted of the crime of manslaughter, and sentenced to confinement in the penitentiary for the term of two years. He complains of various errors, and his motion for a new trial having been overruled he has appealed to this court.

It is contended by his counsel that the facts leading up to the killing are of such a character as authorized or rather required the lower court to give to the jury instructions similar in character to those given in the Bohannon case, 8 Bush, 481, and in the Oder case, 80 Ky., 32.

In the first-named case it is recited that Bohannon's life had been repeatedly and openly threatened by a desperate and lawless enemy, and who had in fact made an actual attempt to assassinate him upon the public highway with a deadly weapon, and the accused had escaped death only by deserting his horse and concealing himself in the fields; after which the deceased pursued the friends of the accused riding with him, and who were members of his family, residing at his house, and mistreated them and declared to them that he intended to kill Bohannon on sight.

Under these circumstances it is said of Bohannon: "He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose, and if on such an occasion he casually meet his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man and the circumstances attending the meeting he has the right to believe that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed."

But it is said further "that the threats of even a desperate and lawless man do not and ought not to authorize the person threatened to take his life, nor does any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme."

In the second-named case Hall, having a grievous charge against Oder, connected with his daughter, threatened to kill him, waylaid him several times, assaulted him with a pistol, and sought to hire for money an ex-convict to kill him. The court said: "That when a person has been merely threatened by even the most lawless char-

acter it furnishes no legal excuse for taking his life. But when a person has been threatened, waylaid, menaced and assaulted with a deadly weapon, and he afterwards casually meets his foe, if from his character, antecedent conduct and the circumstances of the meeting and his presence he believes, and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict on him loss of life or great bodily harm, or will then and there carry into execution his design to kill him, or do him such harm, unless prevented, he is not bound to wait until actually assailed, but he may lawfully use such force as shall be necessary to avert such impending danger."

In these two cases, which are extreme instances of vindictive bloodthirstiness on the part of the persons killed, it will be seen that the very presence of their enemy put into actual and imminent peril the lives of the accused persons, and gave them reasonable grounds to believe that further murderous assaults with a deadly weapon were about to be made on them.

After a careful reading of the record before us we are of opinion that the facts of this case fall short of authorizing an instruction similar to those given in the cases relied on.

The appellant and the deceased had been fellow workmen in the same shop. The deceased was overbearing toward his comrades, and would put "bucks" or stitching horses in the way leading to appellant's bench. He took off his pistol in the presence of the workmen and placed it in his work drawer. He rendered himself unpopular with the workmen and was put to work at his residence by the proprietor.

Shortly before the killing he threatened to "do up" or "fix" the defendant, and on several occasions, when passing him on the streets of the town, he would crowd against him and shove him off the pavement. On one such occasion he put his hand in his pocket as if to draw a weapon and the accused got behind a tree.

These were assaults, contend counsel, and so they were, but we can not say that any deadly intent is apparent. No hostile demonstration, manifesting an attempt to commit a felony, is so clearly evidenced by these exasperating intimidations as to require their submission to a jury in an instruction.

These circumstances and threats, this display of the pistol, and—adopting the language of this court in Kennedy v. Commonwealth, 14 Bush, 352—"any other fact tending to show that the slayer was in peril at the time of the homicide, or that he had reasonable grounds upon which to believe he was in such peril, *may all be given in evidence* for the purpose of showing that there were grounds to believe he was *then* in danger; but if, notwithstanding all these things, he had no reasonable grounds for believing he was then in danger, they will not excuse him on the ground of self-defense, although they may have justified him in believing he would be in such danger at some future time. This is in consonance with the philosophy of the law of self-defense, which is based on necessity, real or apparent. When there is no necessity or apparent necessity to slay an adversary to save one's own life or person from great harm, there can not, in the nature of things, be a right to kill in self-defense."

The usual instructions on the subject of murder and manslaughter were given, and by the third the jury were told that "if they believed from the evidence that the accused, at the time of the shooting, in good faith believed, and had reasonable grounds to believe, that he was in immediate danger of loss of life or of suffering great

bodily harm at the hands of the said Lewis Long, then he, the accused, had the right to use such means as were necessary, or apparently necessary, to protect himself from such impending danger, and if in so doing he shot and killed Lewis Long, he, the accused, is excusable and should be acquitted."

This instruction is unobjectionable, and embraces the law of self-defense as applicable to this case.

To the complaints made that the court permitted the jury to retire to their room in the absence of the defendant's counsel, without taking with them certain papers and without the knife and pistol of the deceased, and that while consulting in their room the sheriff went in to them and shut himself up with them, it is sufficient to say that the circumstances indicated only appeared in the motion and grounds for a new trial. They are not shown to have in fact occured.

We have examined the objections taken with regard to the exclusion and admission of testimony, and perceive no error in anywise affecting the substantial rights of the accused.

We have not deemed it necessary to review the facts immediately attending the homicide. From the testimony of the accused and the declaration of the deceased, made just after the shooting, that he "rushed at" the accused before the latter fired a shot, from the range of the ball in the neck showing the deceased to have "ducked" his head as if rushing on the accused, and from the hostile intentions of the deceased, gathered from his previous conduct, it would seem that a case of self-defense had been made out, but of the truth of this testimony and of the weight to be given it the jury must be left to judge.

Perceiving no error of law, we must affirm the judgment.

MATTINGLY & CO. v. BERRY.

(*Filed September* 16, 1893.)

Homestead—Abandonment—A debtor, after abandoning his homestead, can not claim it against his creditors unless the abandonment was temporarily and with a fixed purpose at the time of returning to it to occupy it as a homestead.

In this case the evidence shows that at the time appellant moved with his family from his homestead he did not entertain a fixed purpose of returning to occupy it as his homestead; thererefore, it may be subjected for debts subsequently created, for which it was sold before appellant returned to it with his family.

R. S. Todd and Weir, Weir & Walker for appellants.

Birkhead & Clements for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Bennett.

In the spring of 1886 the appellee purchased and built upon a lot in the town of Yelvington, which he thereafter occupied with his family as a homestead until October of the same year. He then moved to Nottsville, in the same county, and there went to house-

keeping, and engaged while he lived at that place, which was six or seven months, in collecting taxes. He says he moved to said place and there lived because it was nearer the center of the taxing district. He then moved from that place with his family to the city of Owensboro and there engaged in the business of hotel keeping in partnership with Mr. Aull. He continued in said business several months, and during the continuance of said business he created the debt for the purchase of whiskies, for payment of which the house and lot in Yelvington was sold. When he quit the hotel business he engaged in the business of butchering in said town.

In July, 1888, and before the appellee had returned to said property, or indicated any intention to do so, the house and lot was sold under execution to satisfy said debt. The appellee then brought this suit to recover said property as a homestead, alleging that he only abandoned it temporarily, with a fixed purpose at the time to return and occupy it as a homestead. Did he have, at the time he left said property, a fixed and actual purpose and intention to return and reside on the property again? and did that intention continue to exist to the time of the sale of the property? That is the question.

It is well settled by this court that in order for a person to claim his homestead as against the rights of creditors, after abandoning the same, the abandonment must be temporary, with a fixed purpose, and at the time of abandonment to return to said property and occupy it as a homestead. (Carter, Fisher & Co. v. Goodman, &c., 11 Bush, 228; Burch v. Atchison, &c., 6 KY. LAW REP., 636; Turran v. Culf, 13 KY. LAW REP., 84; Nethercut v. Herron, &c., 10 KY. LAW REP., 247.)

It seems that the appellant's moving to Nottsville to collect taxes was entirely consistent with the idea of a removal for a temporary purpose, and would so indicate. But his thereafter moving to the city of Owensboro and engaging in the hotel business, after having failed in that business engaging in the butcher's business, would indicate that he had left his home at Yelvington with the fixed purpose of permanently abandoning it. His movements clearly indicated that purpose, and the persons with whom he dealt and contracted debts doubtless understood it that way, and that the property in Yelvington was subject to his liabilities.

Now it seems that after giving to the persons with whom he dealt the reasonable assurance that he had permanently abandoned his old homestead and made his home elsewhere and contracted debts on the faith thereof, it would be a deception and fraud upon them to allow him to claim a homestead in said property by making known, after incurring these obligations, his secret intention of returning to said property and occupying it as a homestead. (6 KY. LAW REP., *supra*.)

The judgment is reversed and remanded, with directions for proceedings consistent with this opinion.

MENGEL, JR., BRO. & CO. v. JACKSON.

(*Filed June* 15, 1893.)

1. *Constitutional law—Courts*—The Constitution does not either expressly or impliedly prohibit the enactment of a statute authorizing or requiring the judge of the criminal branch of circuit courts having four judges (Jefferson Circuit Court) to hear and determine any case pending in another

branch thereof, when from any cause the judge thereof may be unable to dispose of all cases before him without unreasonable and expensive delay. Therefore, the act of August 22, 1892, relating to such transfers of civil suits from one division to another of said circuit court, is not unconstitutional.

2. *The judge of the criminal branch of the Jefferson Circuit Court has jurisdiction to hear and determine a civil case* transferred to his branch at the request of a judge of one of the other branches of the court.

A. E. Willson and T. L. Burnett for plaintiffs.

Helm & Bruce for defendant.

Appeal from Jefferson Circuit Court.

Opinion of the court, on motion for a writ of prohibition, delivered by Judge Lewis.

It appears that September 19, 1892, the city of Louisville filed in the Jefferson Circuit Court, law and equity branch, a petition praying for judgment determining whether C. C. Mengel, Jr., Brother & Company, and others made defendants to the action will be damaged on account of the making by the plaintiff of a certain public improvement; if so, to what extent, and also that the right to erect and maintain that improvement is vested in plaintiff. But April 26, 1893, the following order was made: "The Hon. Sterling B. Toney, Judge of the Jefferson Circuit Court, law and equity division, having this day announced that he could not properly preside in the above-styled action; thereupon, pursuant to rule No. 19, 'transfers,' the clerk of this court determined by lot that this case be assigned to common pleas division."

April 29, 1893, the plaintiff entered a motion for the court, common pleas branch, to assign the action to an early day for trial, and in the event it can not be done to transfer the action to the criminal division (branch) of the court, to which motion defendants objected. But at a court held for the Jefferson Circuit Court, common pleas branch; May 1, 1893, the following order was made: "This day came parties by counsel and Hon. Wm. L. Jackson, jr., judge of the criminal division of the Jefferson Circuit Court, is requested to hear and determine this cause, to which defendants object and except."

The record shows this further order: "This action was set at rules in the clerk's office by plaintiff on May 1, 1893, in the criminal division of the Jefferson Circuit Court, and at a court held for the Jefferson Circuit Court, criminal division, May 8, 1893, defendants filed a demurrer to the jurisdiction herein."

On the same day defendants moved the court to remand the case to the rules of the common pleas branch; but both the demurrer and motion were overruled and the case assigned to June 10, 1893, for trial; and June 8, 1893, the defendants, C. C. Mengel, Jr., Brother & Company, filed in this court a petition praying for a writ directed to the Hon. Wm. L. Jackson, judge of the Jefferson Circuit Court, criminal division, prohibiting him further hearing or determining the issues arising in the action mentioned.

In considering this application the first question to be determined is, of course, whether Judge Jackson has authority to preside at trial of and render judgment in the action.

Section 11 of "an act concerning circuit courts having four judges," approved August 22, 1892, is as follows: "Any judge presiding over one branch of said court may, upon the request of a judge presiding

over any branch of said court, hear and determine any cause or question in such other branch pending. The request shall be entered on the order book of the branch in which such case or question is pending."

Although that section was clearly intended to authorize the judge of the criminal branch, as well as any other one of the four judges of the Jefferson Circuit Court, to preside in the condition thereby provided for, still it can not have that effect if contrary to the Constitution. The section of that instrument specifically applicable to the Jefferson Circuit Court is 137, as follows: "Each county having a population of 150,000 or over shall constitute a district, which shall be entitled to four judges * * Each of the judges in such district shall hold a separate court, except where a general term may be held for the purpose of making rules of court, or as may be required by law: *Provided*, No general term shall have power to revise any order, decision or proceeding of any branch of the court in said district made in seperate term. There shall be one clerk for such district, who shall be known as the clerk of the circuit court. Criminal cases shall be under the exclusive jurisdiction of some one branch of said court, and all other litigation in said district, of which the circuit court may have jurisdiction, shall be distributed as equally as may be between the other branches thereof, in accordance with the rules of the court made in general term, or as may be prescribed by law."

Manifestly that section is not self-operative, and, therefore, proper and necessary legislation to make it effective was contemplated by the framers of the Constitution. For though four branches of the court are thereby provided for, power was left to the General Assembly to designate by name and provide for election of a judge to preside over each distinct branch; to regulate the jurisdiction and procedure of each; to prescribe the manner of making equal distribution of litigation between the three branches having civil jurisdiction and of transferring cases from one to another; in a word, to enact all laws needed to secure administration of right and justice in each of the four branches without sale, denial or delay.

By section 13 power is expressly given to the General Assembly "to provide by law for holding circuit courts when, from any cause, the judge shall fail to attend, or if in attendance can not properly preside"

In what particular manner and by what person a circuit court shall be held in the cases mentioned in that section is left entirely in discretion of the General Assembly; and, consequently, plenary legislative power without doubt exists to authorize and require either of the four judges of the Louisville Circuit Court to hold the court of any one branch when, from any cause, the judge of that branch fails to attend, or, if in attendance, can not properly preside. There is, however, no express provision made in section 137 or elsewhere in the Constitution for the judge of the criminal branch of the Jefferson Circuit Court, or indeed for either of the judges, to hear and determine a case pending in another branch, when, by reason of the accumulation of cases, or for some other cause not mentioned in the Constitution, the judge of that particular court can not properly or promptly dispose of the litigation. But, on the other hand, the Constitution does not expressly or impliedly prohibit the enactment of a statute authorizing and requiring a judge of one of the four branches of the Louisville Circuit Court to hear and determine a case pending in another branch, when from any cause the judge thereof may be unable to dispose of all the cases before him without

unreasonable and expensive delay. So far from it, it would seem to be in harmony with section 137 and carrying out the purpose of it, for such division and equalizing of labor to be made when necessary for due and proper dispatch of litigation. Therefore, while a civil action can not be instituted in or transferred to the criminal branch of the Jefferson Circuit Court, the judge thereof may be empowered, as was done by the statutes mentioned, to hear and determine a case pending in any other branch, according to prescribed rules, and when the ends of justice require it. Whether this court has power under the Constitution to issue a writ of prohibition in such case as petitioners contend here exists is a question we need not now determine.

The writ of prohibition petitioned for is denied.

TOLER V. COMMONWEALTH.

(*Filed September* 14, 1893.)

1. *An indictment for the crime of willful and malicious shooting and wounding* with the intent to kill is sufficient where it alleges as to the mode of committing the offense that defendant "*unlawfully*, *willfully*, *maliciously* and *feloniously* shot and wounded," etc., although the accusatory part of the indictment omits the word *willful* and charges the defendant only with the offense of *malicious* shooting and wounding.

2. *The erroneous exclusion of evidence was not prejudicial to appellant* since the statutory offense was so clearly established by the evidence as to leave the jury nothing to do but consider the extent of the punishment.

3. *Special terms—What the call or order therefor must contain*—Under the act approved June 10, 1893, concerning the organization of circuit courts, the order for a special term, although made during a preceding regular term, *must* specify the day when the special term is to commence, and also give the style of each case to be tried, or in which motions, orders or judgments are to be made or entered. All these facts must also be stated in the notice signed by the judges, etc., when the special term is called by notice.

4. *The act of June* 10, 1893, *concerning the organization of circuit courts, was not intended to be retroactive* in its effect, and its provisions do not apply to special terms of the circuit courts that were called before the act went into effect.

Riddell & Riddell and H. C. Lilly for appellant.

Wm. J. Hendrick for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Pryor.

The cases of Flint v. Commonwealth, 81 Ky., 186, Barnard v. Commonwealth, *ante*, 51, and Johnson v. Commonwealth, determine the question made as to the indictment in this case.

Section 2 of articles 6, chapter 29, General Statutes, makes it a felony where one willfully and maliciously shoots at and wounds another with an intention to kill him.

The accusation in the indictment is that the defendant committed the crime of malicious shooting at and wounding Moses Roberts with intent to kill him, committed as follows: "That the said Toler did, on the—day of January, 1893, unlawfully, willfully, maliciously and feloniously shoot at and wound Moses Roberts with a pistol loaded, etc., with the intention to kill him," etc.

These averments, it seems to us, are sufficient to bring the case within the statute making it a felony where one willfully and maliciously shoots at and wounds another with the intention of killing him.

The word *willfully* is omitted in the accusatory part of the indictment, but as to the mode of committing the offense it is charged that the defendant willfully, maliciously and feloniously shot and wounded, with the intent to takeh is life, and to say that the offense is not stated with such certainty as to apprise the defendant of what he stands charged would be extremely technical and nullify a conviction warranted by both the indictment and the proof.

Some objection has been made as to the action of the court in refusing to permit certain testimony to go to the jury tending to show that the witnesses for the Commonwealth were under the influence and control of the prosecuting witnesses, and while no harm could have resulted to the Commonwealth by the admission of such testimony, it was at last immaterial, when the fact of the shooting was clearly established, and the statutory offense so completely made out, as to leave the jury with nothing to consider but the extent of the punishment to be inflicted.

There is one objection made by counsel that would necessitate a reversal if the present law in regard to calling special terms of circuit courts had been in force when the special term was called to try this case.

A part of the act in regard to the organization of circuit courts provides "that a special term may be held in any county, either by an order entered of record at the last preceding regular term in the county, or by notice signed by the judge and posted at the courthouse door of the county for ten days before the special term is held, *the order or notice shall specify the day when the special term is to commence*, and shall give the style of each case to be tried, or in which any motion, order or judgment may be made or entered at the special term, and no other case shall be tried, or motion, order or judgment entered therein unless by agreement of parties."

It is evident, therefore, that in counties where the circuit court has not a continuous session, the order for a special term, although made at the close of or during the regular term, must specify the day when the special term is to commence, and also give the style of each case to be tried, or in which motions, orders or judgments are to be made or entered. This also must be done where the special term is called by a notice posted as the statute requires. Such is the legislative will, and this court must enforce the law as we find it on the statute book, and however inconvenient it may be to call the attention of litigants to the cases to be heard or those in which motions are to be made, the act is imperative and must be followed.

When looking to this record, however, we find that the special term at which the accused was tried was called before the act reorganizing the circuit courts went into effect, and, therefore, the objections made by counsel can not avail. The order for a special term was made at the April term of the Lee Circuit Court, held in the year 1893, and the act reorganizing the circuit courts, and under which this objection was taken, was not approved by the Governor until the 10th of June, 1893, and by its provisions was to take effect when approved.

It was never intended that this statute should have a retroactive effect and nullify orders made in cases authorized by existing laws, and while the statute in question has no application to the present case, it is proper, by reason of its peculiar provisions, that the atten-

tion of circuit judges should be called to its provisions and the constructions placed upon it by this court, as it involves only a preliminary step in facilitating the administration of the laws.

The judgment below is affirmed.

TUTTLE, &C. V. BERRYMAN.

(*Filed September* 16, 1893.)

1. *Wills—Probate of paper referred to in will as part of it*—A paper referred to in a will and made a part of it need not be probated and recorded with the will in order to make it effectual. All that is necessary is that such paper be clearly and certainly identified by the will as a part of it.

2. *Same—Paper referred to in will—Parol evidence*—Where a testator in his will directs his land to be divided among his children according to the lines and corners of deeds, which the will recites he has made the children, parol evidence is not admissible to show that certain memoranda in writing made by the draughtsman of the will, but not signed by the testator, are the deeds referred to in the will.

I. N. Cardwell for appellants.

Haggard & Benton for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Pryor.

James Sheppard at his death left a last will and testament and three children surviving him.

This action below was instituted to have his will construed. The provision from which the litigation arises is as follows: "And at my death and the death of my wife, Susan, this 255 acres of land I have made deeds to my three children, giving corners and lines *as the deeds describe*, and at our death they are to have peaceable possession of their land *described in deeds*."

The widow of the testator died, and the plaintiff, one of the children, seeks by this petition a partition of the land in equal parts, alleging that no deeds were ever made. The appellants answer and say that the draftsman of the will made, at the time it was written, memeranda of the location, quantity and boundary of each child's portion, and these memoranda were what the devisor termed deeds, and further that the appellee had entered and cultivated her part as designated by the memoranda for one year. There was a demurrer to the answer and the demurrer sustained and a partition ordered.

It is contended in argument for the plaintiff that a writing referred to in the will, so as to be made part of it, must be recorded or probated with the will itself so as to make it affectual. We do not understand this to be the rule. A paper executed that is signed by the testator, or if unexecuted as in this case, must be so described by the will itself as to leave no doubts in the mind of the chancellor that it is the paper referred to. It must be clearly and certainly identified. The will being properly attested and admitted to probate establishes the paper as a part of that instrument. It refers to it and the probate incorporates it as part of the will. (Redfield on Wills, volume 1, page 264.)

We must, however, concur with the court below in his ruling sustaining the demurrer. The memoranda was made by the draftsman;

was never signed by the testator; no deeds were ever executed, and to admit testimony that a mere memoranda was intended as a deed would be to contradict the express language of the will itself. Parol testimony that changes the entire character of the instrument referred to in the will would be dangerous in its character and enable any paper to be substituted as the one referred to by the testator. It is immaterial what the intention of the devisor may have been, for it is often easy to show by parol, if such testimony was admissible, that the testator intended to do that which is directly the reverse of his intention, as expressed in the will itself; and while the testator may have designed to make a division of the land in his lifetime, and perfect the title in his children, still he failed to do so, and proof of the making of mere memoranda by the draftsman or surveyor as evidence of title in the children when the will says that deeds had been made would be identifying and making a part of testator's will a writing that in no manner corresponds with that referred to in that instrument.

It was no doubt the intention of the testator to make deeds and leave his children with a title to the land referred to in the memoranda. It was something to be executed in the future. He may have changed this purpose and concluded to let an equal division be made, as he no doubt attempted himself to do. The will is intelligently written. Both the draftsman and the testator must have known that this memoranda in a paper by one other than the testator and not signed by him was not a deed or a bond for title, and it is plain that the probate did not carry with it and make part of the will the memoranda made by the draftsman.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

OHIO VALLEY RY. CO. v. O'DANIEL.

(*Filed September* 27, 1893.)

Railroads—Contract as to fencing of track—Killing of stock on track—When a railroad company enters into a contract with the owner of lands adjoining its track by which the company undertakes to build and keep in repair a fence along one line of its right of way and the land owner along the other line, such a contract operates to relieve those in charge of trains from the duty of keeping a lookout for straying cattle while passing through the lands of the party with whom the contract was made, and the only duty the company owes to his cattle found upon its track within such inclosure is to use all proper means to avoid injuring them after they are discovered to be in a position of danger. But where, as in this case, both parties have seemingly abandoned the contract by neglecting the fences so that they no longer offer any obstruction to the passage of stock a rescission of the contract will be implied and the parties brought within the purview of the statute, which makes the company, whether negligent or not, liable for one-half the value of the stock killed where the owner has not received compensation for fencing his land along the road.

Adair & Morton and P. H. Darby for appellant.

S. B. & R. D. Vance for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Yost.

"If by the locomotives or cars of a railroad company cattle or other stock shall be killed on the track of the road adjoining the lands belonging to or in the occupation of the owner of such stock, who has not received compensation for fencing his land along the road, the loss shall be divided between the railroad company and the owner, unless the killing was caused by the willful act of the servants of the company, in which event the whole loss shall be paid by the company." (General Statutes, chapter 57, section 2.)

In this action, brought against it to recover damages for the killing of two jenny asses on the track of its road adjoining the lands belonging to and in the occupation of the plaintiff, the defendant pleaded that it had, several years before the killing, entered into a contract with the plaintiff, by the terms of which it was agreed that he would construct and maintain a good and lawful fence along the eastern line of the right of way, and that this defendant would construct such a fence along the western line thereof, both of which fences were to be so constructed and maintained as to prevent stock from going upon the track from the adjoining premises. After further alleging that it had, at all times, complied with the terms of this contract, it was charged that the plaintiff had suffered and permitted his part of the fence to be and remain in such bad repair as that it offered no obstruction to the passage of stock from his fields onto the company's roadbed, by reason of which defect in his fence the animals had gone from his field on the eastern side of the road to the track and were then and there killed.

Relying on this contract as a release of its statutory liability, it pleaded the plaintiff's contributory negligence in bar of the recovery sought.

The plaintiff in his reply admitted the contract, denied that he had failed in any way to comply with its terms, and alleged that by reason of the company's failure to keep its fence in good repair the animals had escaped from his field on the western side of the road through or over the defendant's fence to its track, where they were killed as alleged.

The jury returned a verdict for $200, and from the judgment rendered thereon the defendant prosecutes this appeal.

Three witnesses introduced by the defendant testified to the good condition of its fence, while that of the plaintiff was in bad repair and down in two places.

The evidence for the plaintiff, consisting of his own testimony and that of four other witnesses, conduced clearly to show that the defendant had suffered its fence to remain in bad repair for some time before the killing. It was at one place, on the day of the accident, not more than two feet high, and the animals killed and others had been seen to cross it at this point.

While the evidence was conflicting as to whether or not the animals went onto the track through the breach in the plaintiff's or defendant's fence, it was shown that they were in the fields on the western side of the road a few hours before they were killed. The court instructed the jury that, the fencing contract being admitted, if they should find "that each of said parties erected a lawful fence on his side, but when said stock was injured both had so neglected

their fence as that it offered no obstruction to the passage of stock as jennetts, they will find for plaintiff half the value of said stock."

While in this State the killing of any stock by cars of a railroad company is *prima facie* evidence of negligence, and the employes are required to keep a lookout, such a contract as this operates to relieve those in charge of the trains from the duty of keeping such a loookout for straying cattle while passing through the lands of the party, his grantee or tenant with whom it was made; and the only duty the company owes to his cattle found upon its track within such inclosure is to use all proper means to avoid injuring them after they are discovered to be in a position of danger.

The rescission of a contract may be implied where it has not been followed or acted upon for a length of time. That this contract could be so rescinded or abandoned, can not be questioned. If, through the negligence of the plaintiff in its performance, his stock had gone upon the track and been killed, the whole loss was his. If, upon the other hand, through the negligence of the defendant in keeping its fence in good repair, the animals had been killed upon the track through the carelessness of its employes, the whole loss would have fallen upon it. Where, as in this instance, both had failed to perform the contract, and had seemingly abandoned it, this brought the parties within the perview of the statute, and the defendant was liable for the whole value of the animals if they were killed through the negligence of its employes, but whether so killed or not for one-half of their value.

The testimony showed that the stock killed was worth from $400 to $475, and a judgment for $200, as one-half of their value, was not excessive.

The judgment is, therefore, affirmed.

GREEN V. COMMONWEALTH.
KIRKPATRICK V. COMMONWEALTH.
WILLIAMS V. COMMONWEALTH.

(*Filed October* 4, 1893.)

1. *Local option—Repeal of statute* -An act approved May 5, 1884, making it unlawful to sell liquor in Hardin county, which took effect upon its ratification by the voters of the county at an election held for that purpose, as provided by the act, was repealed by an act approved March 15, 1890, entitled "An act resubmitting to the voters of Hardin county the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county," it being provided by the latter act that if a majority of the votes cast in any magisterial district should be cast against prohibition, the county judge should grant license to retail liquor in said district, and if a majority of the votes cast in any magisterial district should be cast for prohibition, it should be unlawful for the county judge to grant any license in said district, and it being further provided that all laws, general or special, in conflict or inconsistent with that act should be repealed. The act of March, 1890, can not be regarded as an amendment to the act of May 5, 1884, and as submitting to the voters of each magisterial district the question as to whether that act should be repealed as to that district, but must be regarded as of itself repealing the act of May 5, 1884, as to the whole county.

2. *Same*—The fact that the act of March, 1890, precribes no penalty for its violation does not evidence an intention that the act should have the ef-

fect merely of an amendment, as a repealing act does not become inoperative because it fails to prescribe offenses and punishments in lieu of those embraced in the old law. Besides, although the act prescribes no penalty a penalty can still be imposed, there being a general law imposing a penalty for selling liquor without license, under which any one violating the act in question by selling liquor without license can be punished.

3. *Same*—Where the language of the statute is plain the intent of the Legislature can not be sought for outside of the statute. Therefore, the fact that the Legislature, subsequent to the act of March, 1890, and at the same session, passed an act expressly amending the act of May 5, 1884, can not be regarded as evidence that the act of March, 1890, was not intended to repeal the act of May 5, 1884.

4. *Same—Indictment*—Even if the act of March, 1890, can be regarded as merely an amendment of the act of 1884, it was only illegal to sell in those districts which had, under the act of March, 1890, voted against the sale, and it being admitted that one district had voted for the sale, the indictment should have alleged that the sale was made in a district which had, under the act, voted against the sale; it was not sufficient to allege that the sale was made "in Hardin county." This is not a case of an exception or proviso in a statute furnishing matter of excuse for the defendant.

W. R. Haynes for appellants.

W. J. Hendrick for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barbour.

By an act approved May 5, 1884, it was made unlawful for any person to sell spirituous, vinous or malt liquors in Hardin county, and any person selling in violation of the act was subject to a penalty of not less than $100 nor more than $500. The act was, however, not to take effect until ratified by a majority of the voters of the county, at an election to be held on the first Monday in August, 1884. An election was held at the time named and the act was adopted by the voters of the county. By an act approved March 15, 1890, entitled "An act resubmitting to the voters of Hardin county the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county," an election was ordered to be held in said county on May 10, 1890, "for the purpose of taking the sense of the legal voters of said county upon the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county, or in any magisterial district in said county," and it was provided that "if it shall be found that a majority of the votes cast in any magisterial district at said election were cast against prohibition, the county judge of Hardin county shall grant license to retail spirituous, vinous and malt liquors in said district, upon the applicant complying with the law as now prescribed by statute; and if a majority of the votes cast in any magisterial district at said election shall be cast for prohibition, it shall be unlawful for the county judge of said county to grant any license in said district."

By the terms of the act, all laws, general or special, in conflict or inconsistent with it were repealed.

At an election held in accordance with the provisions of the act, every magisterial district in the county voted for prohibition except one, Atcher's district. At the May term, 1892, of the Hardin Circuit Court the appellants in three cases, which are by agreement heard together, were indicted, each being charged with the offense of selling spirituous, vinous and malt liquors "*in Hardin county*" *within twelve*

months before the finding of the indictment, in violation of the act of May 5, 1884.

The penalty prescribed by the act of 1884 having been imposed upon each of the appellants, they have appealed to this court. Their contention is that the act of 1884 was repealed by that of 1890, while for the Commonwealth it is insisted that the latter act was but an amendment to the former; and that this was the legislative intent is argued from the language of the latter act, as well as from the fact that the same Legislature which passed the act of March 15, 1890, passed an act which was approved May 22, 1890, entitled "An act to amend an act to prohibit the sale of spirituous, vinous and malt liquors in Hardin county, approved May 5, 1884."

This last act creates new offenses and prescribes punishments therefor, but does not affect the appellants in these cases, as they are not charged with any of the offenses therein described.

In the last section of this act it is provided that this act "shall not be in force in any magisterial district that shall vote against prohibition under the act passed at this session of the General Assembly, entitled "An act resubmitting to the voters of Hardin county the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county."

Passing for the moment the act of May 22d, it seems to us that the act of March, 1890, necessarily repeals the act of 1884. If it were treated as an amendment it would render the law cumbersome and incongruous. Even if treated as an amendment, had the voters in each magisterial district voted against prohibition, it would unquestionably have operated as a repeal of the act of 1884. But it seems to us that it was not the legislative intent to make the repeal dependent upon the vote of the people, but to make the act of itself operate as a repeal, and, as suggested by its title, the question was resubmitted to the voters of the county.

By the construction contended for the people are not left to determine simply whether they will adopt the statute or not, but are vested with the power to determine whether the statute as a whole shall be repealed, or whether it shall be repealed as to one part of the county and not as to another.

In other words the people are left to determine the extent of the repeal—a most singular and remarkable delegation of legislative power. If such had been the legislative purpose, it could have been plainly expressed by an act properly entitled an amendment to the act of 1884, providing that an election should be held at a stated time in each magisterial district of the county, and that if any district voted for the sale of liquor that the act of 1884 should no longer be in force in such district. But the act goes further and provides that in each district where the vote is for prohibition it shall then be unlawful for the county judge to grant license to anyone to sell in such district, and that in each district where the vote is for the sale, then he shall grant license to any applicant complying with the law now prescribed by statute, thus making it manifest that the act was intended of itself as a repeal, leaving the county and each district in it in the condition it was in before the adoption of the act of 1884, and at the same time authorizing the people of each district to determine by vote whether liquor should or should not thereafter be sold therein.

As the act of March, 1890, prescribes no penalty for its violation, it is argued that this fact evidences the intention of the Legislature that the act should merely have the effect of an amendment. This omission, however, can not affect the question if, as we hold, the intent

to repeal is manifested by the terms of the act; for a repealing act does not become inoperative because it fails to prescribe offenses and punishments in lieu of those embraced in the old law. But it is not true that no penalty can be imposed for a violation of the act; for while the act itself prescribes none, there is a general law imposing a penalty for selling liquor without license, and under that law anyone violating the act in question by selling liquor without license can be punished.

It is true that the General Assembly seem by the act of May 22, 1890, to have labored under the impression that the act of 1884 had not been repealed. But the law alone can speak the legislative will, and when the language of the statute is plain we can not inquire into the legislative intent for the purpose of giving it a different meaning. The intent can not be sought for outside of the statute, unless the words are doubtful or uncertain. If considering the act of March, 1890, in connection with that of 1884, it should be held to operate as a repeal of the latter act. The latter act could only have been revived by another act expressing that purpose, or by the repeal of the act of March, 1890, by an act passed at the same session. It is not claimed that the act of May 22d had that effect. It can be regarded only as a piece of careless legislation.

But even if the appellee's contention that the act of March, 1890, is merely an amendment of the act of 1884, it then, together with the act of 1884, constitutes the law upon the subject in question. Under the admitted facts—that is, that the election was held under the amending act, and that one district had voted for the sale—it was not necessarily illegal to sell liquor in Hardin county. It was only illegal to sell in those districts which had, under the act of March, 1890, voted against the sale, and the indictment should have alleged that the sale was made in a district which had, under the act, voted against the sale.

The rule that where an offense is created by statute, and there is an exception in the enacting clause, an indictment for such an offense must negative the exception; but if there be a proviso therein which furnishes matter of excuse for the defendant the indictment need not negative it, but he must plead it has no application here. This is not a case of an exception or proviso in a statute furnishing matter of excuse for the defendant. It is simply a case where, under the statute, the selling, to constitute an offense, must be made in that part of the county in which the sale is prohibited.

Under the act of 1884, before it was amended, as is argued, it was unlawful to sell liquors anywhere in Hardin county, and an indictment charging a sale in the county would have been good. But now it is conceded that a sale in Hardin county is not necessarily a violation of the law—that it is only unlawful if made in certain magisterial districts; and, therefore, the indictment must charge that it was made in one of those districts. Suppose every district in the county except one had, at the election in May, 1890, voted for the sale of liquors; would an indictment have been good which merely charged a sale in Hardin county? We think not. There can be no distinction in the application of the rule in the supposed case and the one we are considering.

We are of opinion the indictment in each case fails to charge a public offense, and the judgments are reversed in each case and the cause remanded, with directions to dismiss each indictment.

SUPERIOR COURT ABSTRACTS.

L. & N. R. R. Co. v. Offutt.

Filed October 11, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *A discharged employe* who sues, or whose case is tried before the term fixed for his employment has expired, can only recover of the employer the damages he shows he has sustained up to the date of the trial.

2. *Contract to give permanent employment—Damages for breach of contract*—A contract by a railroad company with a former employe to "give him back his old place as conductor and retain him in its service as long as he did faithful and honest work," in consideration of his agreement to "help them out" in a strike, was valid, and the company is liable in damages for a breach of the contract.

3. *Statute of frauds*—Such a contract may be performed within a year, and is, therefore, not within the statute of frauds.

4. *Prejudicial error*—Although the damages awarded were not greater than the jury would have been authorized to find under an instruction restricting the recovery to the damages sustained up to the time of trial, still the court can not say that defendant was not prejudiced by an instruction telling the jury that the measure of damages was "the difference, if any, between what plaintiff could have earned under his contract at the contract price during the time the contract was by its terms to continue, and what he has earned and could earn during said time at any other employment which he could have obtained by a reasonable effort to do so."

James A. Mitchell for appellant; James C. Sims, W. T. Cox and Edward W. Hines for appellee.

Bamberger, Bloom & Co. v. Bank of Tupelo.

Filed October 11, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. *Bills of exchange—Negligence of bank in demanding payment and giving notice of dishonor*—Where a bill of exchange, payable on Dec. 15, 1888, "fixed" (the effect of which was to disallow grace), was indorsed to a bank for collection, a demand of payment by the bank on the 15th of December was sufficient to exonerate the bank from the charge of negligence in failing to present the bill for payment, although the officers of the bank when they made the demand supposed that the acceptors were entitled to three days of grace, there being no evidence that they agreed to wait three days or any other time.

2. *Same*—The bank's relation was that of a mere collecting agent, and the plaintiffs who drew the bill, and to whose order it was made payable, must, in order to recover of the bank, not only show negligence on its part, but must show loss as the result of that negligence.

3. *Same*—As the next day after the dishonor of the paper was Sunday, the bank had at least until Monday to mail notice to plaintiffs of the dishonor, and as a notice mailed on that day would not have reached them in time to have enabled them to sue out an attachment earlier than they in fact did, they were not damaged by the failure of the bank to give the notice, there being no intervening parties to whom they had the right to look upon the failure of the acceptors to pay the bill.

W. B. Dixon and Humphrey & Davie for appellants; George B. Eastin for appellee.

Henderson Hominy Mill Co. v. Watkins, &c.

Filed October 11, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Instructions to jury—The court properly refused an instruction to the jury which presented an issue not made by the pleadings.

Yeaman & Lockett and H. F. Turner for appellants; Montgomery Merritt for appellees.

FOOTE v. MILLER'S ADM'R.

Filed October 11, 1893. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Barbour, affirming.

Application of payments—A debtor has the right to direct to which of two or more demands payments made by him shall be applied; it is, however, not necessary that this direction should be expressed in terms—it may be inferred from all the circumstances.

Defendant owed plaintiff two notes, secured by mortgage, one for $1,010, due October 6, 1889, and one for $588.41, due November 6, 1889, and an open account for about $500. On October 6, 1889, the day the $1,010 note fell due, he sent plaintiff a check for $1,000 in a letter *Held*—That, considering the amount and the time it was sent, the fair inference is that it was to be applied to the note which fell due at that time.

Murray & Barnes for appellant.

THE D. B. BAYLESS STORE CO. v. MCCARTHY'S ASS'EE.

Filed October 18, 1893. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Evidence as to transaction with decedent*—A stockholder in a corporation can not testify for the corporation as to a transaction with one who is dead when the testimony is offered to be given. (From this Judge Yost dissents.)

2. *Same*—In this action by a corporation against an assignee for the benefit of creditors, the defendant having testified for himself as to acts done, and statements made by the assignor, who was dead when the testimony was given, it was competent for a stockholder in the plaintiff corporation, who was present on the occasion referred to by defendant, to testify in rebuttal as to all that was said and done on that occasion.

W. H. Mackoy for appellant; Tarvin & Hall for appellee.

JENKINS v. JENKINS.

Filed October 18, 1893. Appeal from Larue Circuit Court. Opinion of the court by Judge Yost, reversing.

Res adjudicata—In an action for divorce, brought by the husband in the Hardin Circuit Court, the wife having waived all benefits to her accruing from a former judgment of the Larue Circuit Court concerning the custody of their only child, and, of her own motion, entered anew into the question of the custody of the child in the Hardin Circuit Court, she is bound by the last judgment, although the judgment of the Larue Circuit Court would have been a complete bar to the action of the Hardin Circuit Court in the matter if it had been relied on as such.

J. P. Hobson and I. W. Twyman for appellant; W. H. Marriott for appellee.

PHŒNIX INSURANCE CO. v. HEAVERIN.

Filed October 18, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Fire insurance—Pleading*—In this action upon a policy of fire insurance, by the terms of which the plaintiff's property was insured from the 2d day of May, 1891, to the 2d day of May, 1892, as the only averment in the petition as to the time the property was burned is that it was "on the — day of —, 1892, and while the said policy was in full force and effect," the petition

fails to state a cause of action, as the loss may have occurred after the 2d day of May, 1892, the averment that 'the policy was in full force and effect" being but a conclusion of the pleader. Therefore, a default judgment for plaintiff must be reversed.

2. *Motion for new trial*—The provision of the Civil Code requiring motion for new trial to be made within three days after judgment applies as well to default judgments as to judgments rendered upon the trial of the issues. And as the motion for a new trial in this case was not made until after the expiration of three days, the only question to be considered is whether the petition states a cause of action.

C. S. Walker for appellant; Sweeney, Ellis & Sweeney for appellee.

BLACKBURN, &c. v. KENTUCKY CENTRAL R. R. CO.

Filed October 18, 1893. Appeal from Clark Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

Mistake in transmission of telegram—Measure of damages—Where a telegram offered and accepted for transmission expresses the object of the sender, and by negligence in transmitting it its tenor is so changed that it fails to be the communication intended, then independent of any contract or valid regulation affecting the measure of damages the company is liable for such injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the delivery of the correct message, and where the message relates to a proposed trade, if the general purpose appears on the face of the message it is not necessary in order to render the company liable for the loss of a bargain caused by its negligence in transmitting the message that the company should be apprised of the details of the proposed trade or its extent.

The terms of the sale of an omnibus and horses had been ageed upon, but the consummation of the trade was deferred until plaintiff, the seller, could be released of any obligation to another person with whom he had been negotiating. R., the proposed purchaser, becoming impatient, wrote to D. to see plaintiff and let him know what plaintiff would do. Plaintiff had D. to write out a telegram to R., which he delivered to defendant's agent for transmission. This was the telegram: "Blackburn (plaintiff) says he is in position to close with you." In the telegram as delivered to R. the word "impossible" appeared in place of the words "in position." R., concluding it was intended to end negotiations, made other arrangements, and the trade with plaintiff was never consummated. *Held*—In this action against the telegraph company that the measure of damages is the difference between the sum plaintiff was to receive from R. for the omnibus and horses and the sum for which he afterward sold them, that being shown to have been their market value.

I. N. Cardwell for appellants; Breckinridge and Shelby for appellee.

PUSEY v. N. N. & M. V. CO.

Filed October 18, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *Railroads—Agreement as to fencing—Killing of stock on track*—The plaintiff having entered into a contract with defendant railroad company concerning the fencing of the company's right of way through his land, by the terms of which the company agreed to furnish a certain part of the material for the fence, and plaintiff agreed to construct the fence as soon as the materials were furnished him, in consideration of which plaintiff released the company "from any and all liability it may incur by reason of the killing or injuring of any stock by the trains of the company," this contract relieved the employes of the railroad company in charge of its trains from the duty of keeping a lookout for stray cattle while passing plaintiff's lands, but the company was still bound to use all proper means to avoid injuring such cattle after they were discovered to be in a perilous position.

2. *Same*—It was the duty of the plaintiff to build the fence within a reasonable time after he had notice that the materials which the company agreed to furnish had been delivered, and if he failed to do so within such reasonable time, and his stock was killed after such reasonable time had passed, the company owed him only such duty as it would have owed him if the fence had been constructed, but that duty it was bound to perform, and it was error to instruct the jury that in such a state of case the law was for defendant without regard to the question of negligence.

Hobson & O'Meara for appellant; P. H. Darby, Weed S. Chelf and John C. Gates for appellee.

DAVIS' ADM'R v. MITCHELL, &C.

Filed October 18, 1893. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

Instruction to jury—The court erred in giving to the jury an instruction based upon a hypothesis which there was no evidence to sustain.

Wood & Day for appellant; Z. T. Young for appellees.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. NOVEMBER 15, 1893. No. 10

KENTUCKY COURT OF APPEALS.

MORRISON, &c. v. GARROTT, &c.

(Filed May 4, 1893—Not to be reported.)

1. Sales of infants' real estate—Summons—In an action by their statutory guardian against infants under the age of fourteen years for a sale of their real estate, service of summon on the infants and their guardian by one who is not in fact a deputy sheriff, although he signs the return of the summon as such, and who was interested in the suit and a party plaintiff thereto, is of no effect and does not bring the infants before the court.

2. Same—Where the action for the sale of the land, in which the infants under fourteen years of age are interested, was brought in 1876 by one who was their statutory guardian, and it appears that summons was served on the infants and that they had neither father nor monther, and that the court appointed a guardian ad litem for them, who filed an answer in the usual form. Section 81 of the Civil Code of 1851 applies and the infants are before the court, although a copy of the summons was not served on their statutory guardian as well as upon them.

3. Same—Purchase of land of infants at judicial sale by their guardian—An administrator of a decedent, who was the statutory guardian of decedent's infant children, instituted suit for a settlement of the estate and a sale of decedent's land. At the sale he induced one of the children, who was an adult, to purchase it, agreeing to take it off his hands in case the purchaser could not sell it at a profit. The adult child could not sell the land and the guardian paid the purchase money bonds, and took a conveyance from the purchaser who had obtained a commissioner's deed therefor. The guardian kept the land for about six years and sold it at a profit. Held—

First. The indirect purchase at the judicial sale by the guardian was constructively fraudulent as to his infant wards, and he is liable to them for the difference between what he paid for the land and its actual value at the time of the sale.

Second. The vendees for value of the guardian had no notice from the record of the constructively fraudulent action of their vendee, and are entitled to be protected as innocent purchasers for value against the claim of the wards.

J. I. Landes, A. H. Clark and W. W. Clark or appellants.

Petree & Downer for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hazelrigg.

In February, 1891, appellant, V. H. Morrison, brought suit against the appellees, alleging that appellee Garrott had been appointed administrator of her mother's estate in 1876, and also guardian for her infant children, and that in these capacities he had filed a petition in the Christian Circuit Court, and by proceedings had therein had procured a judgment for the sale of all the real estate of her mother.

She alleges that the land was sold for greatly less than its value; that the guardian had become the purchaser, and had since sold the land to the appellees; that she was never legally summoned in that action or brought before the court, and that the sale was, therefore, void. She asked that the old action be reinstated on the docket; that the sale had therein be set aside as fraudulen and void, and that a sale be made only of so much of the land as might be necessary to pay the debts of the estate.

The judgment in the old case, which was rendered in March, 1877, recites that it was "heard upon the petition, answer of the guardian ad litem and attorneys for the infant defendants, answer of the defendant, Alvin Morrison, commissioner's report, proof, exhibits, etc., and it appearing that in order to pay the debts of the estate of Mrs. M. E. Morrison, a sale of a portion of the real estate belonging to the estate of M. E. Morrison is necessary, and that the balance, or even the estate as it now is, is not susceptible of division between the children and heirs of said M. E. Morrison without greatly impairing the value of said real estate, and it further appearing from the proof that a sale of the whole of the real estate mentioned and described in the title papers filed herein will benefit said infant defendants, Mattie B. Leavell, Lizzie P. Morrison and V. H. Morrison, etc., it is, therefore, adjudged," etc.

We quote this to show that the action of the court was deliberate and after full consideration.

The irregularities depended on to vacate the former judgment are, first, that the court had no jurisdiction of the person of the infant defendant, V. H. Morrison.

It appears from the record that the suit was instituted by Garrott, as administrator of Mrs. Morrison, and also as statutory guardian for the infants.

C. W. Morrison, husband of the oldest daughter of the intestate, and S. A. Leavel, the adult brother of the infants, united with him as plaintiffs. All the heirs, and some if not all the creditors, were made defendants and served with process. The petition disclosed the ages of the infants. The summons is returned: "Executed 14th of August, 1876, on Lizzie P. Morrison, V. H. Morrison, Mattie B. Leavell, * * * by delivering to the first three named a copy of this summons.

"Singed: POLK CANSLER, S. C. C.
"By D. A. MEANS, D. S."

Section 81 of the Civil Code of 1851, in force when this action was brought, provided as follows: "Where the defendant is an infant under the age of fourteen years, the service must be upon him and upon his father or guardian; or, if neither of these can be found, then upon his mother, or any white person having the

care or control of the infant, or with whom he lives. Where the infant is over fourteen years of age, service on him shall be sufficient."

The appellant was an infant under fourteen and had neither father nor mother. The process was served on her, though not on her guardian. He, however, was the plaintiff in the action, and sought a sale, alleged to be for the advantage of his ward. At the term of court following this service the court appointed a guardian ad litem for the infants, who filed an answer in the usual form. In February, 1877, the present Code having gone into effect, another summons issued against "Lizzie P. and V. H. Morrison, infants under fourteen years," and this was executed "by giving to each a copy thereof, and also by giving W. W. Garrott, their guardian, a copy, the said children having no mother or father living, and also by giving a copy to Wm. Payne and Wm. Harrison, having charge of said T. P. and V. H. Harrison.

"Signed: B. F. ROGERS, S. C. C.
"By C. W. MORRISON, D. S."

The service is assailed on the ground that Morrison was a party plaintiff, and, moreover, that he was not, in fact, an authorized deputy.

It being a fact that Morrison was one of the plaintiffs and was not, in fact, a deputy under Rogers, we are disposed to think that the service is of no effect. But we think otherwise of the first service. As was said of a somewhat similar case (Cheatham, &c. v. Whitman, 86 Ky., 614), "undoubtedly the object of this provision was to bring notice to one who would naturally feel enough interest in the infant to see that his rights were protected. The purpose of a summons is to give notice."

In this case the infants had no father or mother. Their statutory guardian was a party plaintiff and had notice. Even the present Code, section 52 (see amendment of January 16, 1882), which was enacted for the still better protection of infants, provides that if the infant's father, guardian or mother, or person having him in charge, is a plaintiff, or all of them are plaintiffs, the summons shall be served on a guardian ad litem to be appointed by the clerk. Here the infants were served with process and were represented by a guardian ad litem. Their statutory guardian also had notice and we think they were properly before the court.

Secondly, it is contended that W. W. Garrott, the administrator and guardian, and who was also the special commissioner to sell the lands, was, in fact, the purchaser, and that on that account he got no title and could convey none to his subsequent vendees, the other appellees herein.

It appears that on the day of sale, it being the second effort of Garrott to sell the lands, and perhaps while it was being cried at about $23 per acre, Garrott went to one Elliott and told him to buy the land if he wanted it, and said something to him about protecting the estate and not letting the land go too low. Elliott didn't want it, but at Garrott's instance and request ran it up to $25 per acre, when it was knocked off. Garrott then got Leavel, one of the heirs and a plaintiff in the action, and the adult brother of the infants, to take the land and execute bond for it, with the agreement that he was to sell it privately for any sum he could over the bid, and give the estate the benefit of the sale, and if no advance could be obtained Garrott agreed to take it off his hands and pay his bonds. Efforts in good faith were made by Leavel and Garrott to sell but without success. Leavel, not being able to pay off the bonds, conveyed the lands to Gar-

rott, he having first obtained a deed from the court through Garrott as comimssioner.

The latter kept the lands some six years or more, having materially improved them by the erection of a new dwelling house, barn, fencing, etc., when he sold and conveyed them to the appellees.

It is evident that there is nothing appearing of record to put the vendees of Garrott on inquiry affecting the title to this land, even if it be conceded that Garrott's conduct can not be legally approved. The judgment and all the proceedings were regular, and these vendees must be held to be protected as innocent purchasers.

The learned chancellor below, however, was of opinion that Garrott's purchase or arrangement by which he secured the title was constructively fraudulent and held him liable to the appellant, V. H. Morrison, for the difference—or her share of it—between the amount of the Elliott bid, and at which he (Garrott) finally got the land and the actual value of it at the time of the sale as ascertained by the proof. This finding, we think, was correct. As to the other appellants it was properly held by the chancellor that by their acts and acquiescence they had ratified the title and conduct of Garrott and were not entitled to any judgment against him.

The judgment of the lower court is affirmed.

DAVIS, &c. v. MEAUX, &c.

(Filed May 6, 1892—Not to be reported.)

Marriage of slaves—Evidence—The preponderance of the evidence shows that the appellant's parents, who were slaves, were married in accordance with the customary matrimonial rites among slaves; that they lived together as man and wife, and that appellant was a child of the marriage and was always recognized and helped by her father as his child; therefore, she is entitled to inherit his estate as his legitimate child.

E. H. Gaither for appellants.

Nat Gaither & Cardwell, P. B. Thompson, sr., and C. A. Hardin, sr., for appellees.

Appeal form Mercer Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant, America Davis, claims the property in controversy as the legitimate child of Austin Rowan. Her legitimacy is denied, and that issue is to be tried. Did Austin Rowan marry Sophia Bledsoe, and was America Davis born within that wedlock?

Austin Rowan and Sophia were both slaves. Were they married according to the customary marriage among slaves? If so, the appellant having been born within that wedlock is legitimate, and is entitled to the property.

The evidence by eye witnesses is that Austin and Sophia were married in accordance with the customary marriages among slaves, and lived together as man and wife, and that the appellant was the fruit of that marriage, and some time ater her birth Austin abandoned her mother, but always recognized and helped the appellant as his child.

The foregoing facts are estalbished without contradiction by A. Davis, Eliza Bledsoe, Lewis King, Lot Fry and George Davis.

Thomas Kyle, the son of the master of Austin, says that Austin always recognized the appellant as his child, but he never heard that Austin was married to Sophia. His testimony does not contradict the witnesses just mentioned, nor does the evidence of the other witnesses for the appellees contradict them as to the fact of marriage cohabitation and the birth of appellant within wedlock. The fact that one of the witnesses for the appellant testifies that he is 117 years old and does not affect his credibility as to the facts that he details. Nor does the discrepancy of the other witnesses as to dates affect their credibility; for it is to be remembered that they are old slaves, who knew but little about dates, time or numbers, but who can remember events with accuracy.

The judgment is reversed, with directions to render judgment for the appellant.

HOWARD, &c. v. SINGLETON, &c.

(Filed May 9, 1893.)

1. Sales of infants' real estate—Summons—A guardian may institute an action against his infant wards, who are under the age of fourteen years, for the sale of their real estate, where the share of each is worth less than $100, and obtain a valid judgment and order of sale without the service of summons on the infants, a guardian ad litem being appointed for them and answering for them, and a bond being executed by the guardian to protect their rights. (Civil Code, section 490.)

2. Same—Amended petition—Although a summons on an original petition for the sale of a farm of infants under the age of fourteen years is properly served on the infants and their guardian, it is necessary that summon be also served on the infants and their guardian upon the filing of an amended petition asking for the sale of a town lot of the infants, the sale of the lot not having been prayed for in the original petition. The proper service of the summons on the original petition without the service of summon on the amended petition, does not bring the infants before the court as to the amendment so as to authorize an order of sale of the town lot.

3. Ejectment—Burden of proof—Where plaintiffs allege in 1892 that H. owned and was in possession of a certain lot at his death in 1869, and that they are his heirs at law, and the owners and entitled to the immediate possession of said lot, recovery of which is prayed for, the burden of proof is upon them to establish their right, although the defendants in their answer admit the ownership and possession of H. in 1869, and that plaintiffs are his heirs.

John T. Hays, J. Smith Hays and Knott & Edelin for appellant.

Wm. Lindsay and James D. Black for appellees.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellants, as the only heirs at law of John Higgins, who died in 1869, the owner of a lot of ground in Barbourville, Ky., brought this suit against the appellees for its recovery.

In the first paragarph of their petition they set up their heirship, the seizin and ownership of their ancestor and the description of the premises.

In the second they allege ownership and right of immediate

possession, and aver that the defendants are in the wrongful possession, to their damage, etc.

The answer of each of the defendants denies every allegation of the petition, save that of the ownership of John Higgins in 1869 and the heirship of the plaintiffs, and sets up the particular part claimed by each defendant.

For this reason it is contended by the appellants that the burden of proof was thrown on the defendants; that having admitted the facts from which the law infers ownership, they could not then merely deny the ownership.

If the only issue in an action of ejectment were one of abstract title, there might be something in this contention, but even then the legal seizin of Higgins in 1869 and the consequent lawful entry and possession of the heirs at that time are not conclusive evidences of ownership and right of possession in the heirs in April, 1892, when the suit was brought. Suppose Higgins—still living in 1892—had sued, merely setting up his title and rightful possession in 1869, would the admission by the defendants of such facts conclude the question of ownership and right of possession some thirty years later.

The plaintiffs must show a right of entry in themselves and a legal estate in the premises existing in them at the time the suit was commenced. The legal right to the possession was between the parties at the time of the institution of the action was the issue in the case. We do not think that the pleas of the defendants changed the general and well-established rule that the burden was on the plaintiffs. In discharging that burden it was developed that the appellants had been divested of the title in question by a commissioner's deed in an action in the Knox Circuit Court, brought in March, 1877, by one Letitia Cain, guardian of the appellants, for the sale of the property and reinvestment of the proceeds.

It is contended by the appellants that the record of this old suit, as exhibited by them in proof, shows the judgment of sale to be void as to the appellants, who were then infants under fourteen years of age, for the reason that while they were summoned on the original petition and a guardian ad litem was appointed, yet on the amended petition, which for the first time sought a sale of the lot now in contest, they were not summoned and no guardian ad litem was appointed for them, nor was any answer filed for them.

The appellees insist that the service of process on the original petition and the appearance of the infants by their guardian ad litem were sufficient to properly bring them before the court, but it will be observed that the petition only sought a sale of a farm in the county and not the lot in the town, and it is clear that they were not before the court as defendants, and if the action was such a one as required them to be made defendants, and so brought before the court, the judgment of sale was void.

But this old suit was brought under section 490 of the Code by the statutory guardian of the infants in a case where the share of each owner was less than $100.

This section provides "that a vested interest in real property, jointly owned by two or more persons, may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant, if the share of each owner be worth less than $100."

The proper allegations were set up in the amended petition as to the ownership and value of the lot in contest. The report of

the commissioner was made, showing the necessary facts, and a bond executed fully protecting the right of the infants, the appellants here.

The judgment of the court directing a sale recites these facts, and we perceive no irregularity in the proceedings, certainly nothing rendering the judgment void.

Construing section 490, it was held, in Shelby, &c. v. Harrison, jr., &c., "that the guardian may unquestionably bring an action for his ward, and upon the conditions therein prescribed obtain an order of court for a sale of the joint property without making the ward a defendant." And, although the appellants were named as defendants in the old suit, and not served with process on the amended petition, yet they were fully represented in the action by their guardian who brought the action, and who was also their mother.

The evidence introduced showed a complete divestiture of title so far as the appellants were concerned, and established the ownership and right of possession in the appellees.

The peremptory instruction to the jury to find for the defendants was proper, and the judgment is affirmed.

KELLY v. SHELBY RAILROAD CO., &c.

(Filed May 13, 1893—Not to be reported.)

Master and servant—Concealment of danger from servant—Peremptory instruction—Appellant alleged that appellee employed him and others to lay its track across a certain street, concealing from him the fact that one L. had men employed to make a hostile attack upon appellee's hands should they attempt to lay said track; that he was so assailed while laying said track by the hands of L. and was seriously injured, etc. The evidence, without contradiction, shows that the appellee did not know and had no reason to believe that the hands of L. would make any such assault; therefore, a peremptory instruction for the defendant was proper.

S. B. Kirby and Gardner & Moxley for appellant.

T. L. Burnett, B. F. Buckner and O'Neal, Phelps & Pryor for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

The appellant alleges as cause of action that the appellee employed him as a hand to help lay a railroad track across Preston street, Louisville, Ky.; that the appelllee knew or had reason to believe that the work was unusually hazardous, consisting in the fact that Dennis Long & Co. had hands employed to make a hostile attack on the appellee's hands in case they attempted to do said work, and that appellant did not know the threatened attack; nor did the appellee inform him of it; that said attack was made by said hands and appellant was wounded by them. The appellee, among other defenses, denied that it knew of or had any reason to believe that Dennis Long & Co. proposed an attack upon its hands. The court, upon the conclusion of appellant's evidence, nonsuitd him. He has appealed.

Mr. Krieger, witness for the appellant, who was appellee's president and ordered the said work done, testifies that he had no knowledge or reason whatever to believe that the hands of

Denis Long & Co. contemplated an attack upon the appellee's hands. This is all the evidence upon the subject of knowledge or belief, except the inference, if unexplained, that might be drawn that appellee had knowledge or belief that injury was intended, from the fact that appellee employed two policemen to accompany the hands. But Mr. Kreiger explains why they were thus employed. He says that he apprehended that the Louisville & Nashv lle Railroad Co. might attempt to get possession of their right of way first, and he sent the policemen with the hands in order to protect its rights and its hands.

But the Louisville & Nashville Railroad Co. made no effort in that direction, and he did not know of any contemplated attack upon the hands by Dennis Long & Co. or their hands. There is no evidence that contradicts this evidence. On the contrary it is corroborated; for the written order under which the work was ordered tells Mr. Doyle, the foreman, to lay the track "across Preston street." The appellee had a right of way across said street. Now the hands of Dennis Long & Co. did not molest nor attempt to molest appellee's hands while they were laying the track across Preston street; it was only when they commenced laying the track on the land of Dennis Long & Co., or when such seemed to be their purpose, that the hands of Dennis Long & Co. made the attack, thus showing that had the work been confined to laying a track on Preston street, no attack would have been made, or was any contemplated.

The judgment is affirmed.

McFATRIDGE, &c. v. HOLTZCLAW, &c.

(Filed May 16, 1893.)

Construction of will—Distribution per capita—A devise of an estate to several persons or the children of several persons, "to be equally divided among them," requires a per capita division and not a division per stirpes.

A devise of the remainder of an estate to be equally divided between the heirs of testator's brothers and sisters, share and share alike, as though the brothers and sisters were living, means that the remainder must be divided per capita between the children of the brothers and sisters.

Poston & Jacobs and Gaither & Vanarsdall for appellants.

Phil. B. Thompson, sr., for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Bennett.

By the last will of S. S. McFatridge he willed his estate to his wife for life. He willed the remainder interest in his estate as follows: "After the death of my wife I wish my property disposed of and equally divided between the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living."

The testator had no children, and at the time of his death and the publication of his will his two brothers, William and Harvey McFatridge, and his sister, Mrs. Holtzclaw, were living. One brother had four children, one had two and the sister had one. The widow of the testator having died, the question is, how do the children of the brothers and sister take, per capita or per stirpes?

In the case of Purnell v. Culbertson, 12 Bush, —; Jarman on Wills and other authorities are quoted as establishing the following propositions: "Where the gift is to the children of two or more persons, the division must be per capita and not per stirpes; as the devise is to testator's brother A. and the children of his brother B., then B.'s children each get as much as A.; and where the testator gave two shares of his estate to the children of his sons A. and B., to be equally divided between them, it was held that each of said family of children took per capita and not per stirpes. The words 'to be equally divided' in a will means a division per capita and not per stirpes, whether the devisees be children and grandchildren, brothers or sisters, nephew or nieces, or strangers in blood to the testator."

According to said case there can be no doubt that the words "equally divided between the heirs of my brothers and sisters, share and share alike," taken alone mean that the devisees take per capita and not per stirpes. But the words "as though my brothers and sisters were living" are added. So the question is, do said words change the meaning of the preceding words so as to make the children take per stirpes and not per capita? As said, the preceding words, considered without reference to the latter words, clearly and unequivocally mean that the children of the brothers and sisters take per capita and not per stirpes because they take equally from the testator and not as the representatives of their parents. They are named as children (heirs) of the testator's brothers and sisters as descriptive only of the class of persons that are to take. And he clause "as though my brothers and sisters were living," if it has any significance whatever, it is certainly not that of limiting the right of the children to take per stirpes as the representatives of their parents. They were not only living at the date of the will but at the date of its publication; and the reference to the devisees as the children (heirs) was descriptive only of the persons that were to take the estate; and if any meaning is to be given to the clause last quoted, it seems it was intended to emphasize the fact that the children were to take per capita; for if the testator's brothers and sisters had been made the objects of his bounty, nothing in the will to the contrary, they would have taken per capita and share and share alike. And their children were to "share and share alike" the same as their parents would if living and taking equal portions. This construction gives effect to both clauses of the provision quoted, but the construction placed upon the provision by the lower court destroys the first clause, giving the devisees equal portions of the estate and makes them take per stirpes as the representative of their parents.

The judgment is reversed and case is remanded, with directions to enter judgment in accordance with this opinion.

BOARD OF TRUSTEES OF ELIZABETHTOWN v. CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD CO., &c.

(Filed May 23, 1898.)

1. Subscription to capital stock of railroad upon condition—Sale of railroad—The town of E., in 1867, subscribed $75,000 to the capital stock of the E. & P. Railroad Co., upon condition of the road being constructed, and also that the company build machine shops in E., and if it failed to do so, the subscription to be void. The subscription was made and the conditions

complied with. In 1874 the E. & P. road was sold by order of court for debt, and the purchasers were incorporated as the P. & E. R. R. Co. The latter company sold the road to the C., O. & S. W. R. R. Co., which had been duly incorporated and authorized to make the purchase. The latter company having removed the machine shops from E. to another town, the town of E. seeks to recover damges for the alleged violation of the contract contained in the terms of its subscription. Held—

First. The town of E. did not become a creditor of the E. & P. R. R. Co. by making the subscripton; it was only a stockholder and did not, by contract or otherwise, acquire or hold any lien on the property of the E. & P. road to secure the performance of the conditions upon which the subscription was made.

Second. Even if E. held any lien on the property of the railroad to secure performance of the conditions of its subscription, it waived its right thereto by failing to assert it in the suit brought for the sale of the road for debt in 1874.

Third. The construction of the road and the building of the machine shops in E. was a literal compliance with the conditions upon which the subscription was made. Nothing in the contract required the company to forever maintain shops at E., regardless of the public convenience and necessity.

Fourth. The appellee was a bona fide purchaser of the road for value, and holds it as such free from the claims of all creditors of the E. & P. road.

2. Same—Failure to operate road—Although one section of the act enacted in 1882, authorizing the appellee to acquire the P. & E. road, prohibited it from discontinuing the operation of trains between E. & P., the town of E. did not, by virtue of its subscription, acquire a right to maintain an action against appellee for a violation of this section of said act. Such action can be maintained only by the Commonwealth.

H. T. Kendall, S. H. Bush, J. H. Vanmeter and W. P. D. Bush for appellant.

P. H. Darby and Holmes Cummins for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

In 1867 the Elizabethtown & Paducah Railroad Company was incorporated, with power to construct and operate a railroad between those places; and the board of trustees of Elizabethtown, having first submitted the proposition to voters thereof, made on behalf of the town, a subscription of $75,000 to capital stock of the company upon conditions of the road being constructed, and also that the company build machine shops in Elizabethtown, and if it failed to do so the subscription to be void.

Subsequently the subscription of stock was paid, the road constructed and machine shops built with n limits of Elizabethtown upon thirty acres of land purchased by the company.

In 1874 the Elizabethtown & Paducah Railroad and all its property, real and personal, used in operating it, together with franchises of the company, was sold under judgment of court, Smithers and Marcus becoming purchasers and receiving a deed therefor. And afterwards, they being principal stockholders, a company was incorporated to own and operate the road under name of the Paducah & Elizabethtown Railroad Company. But in 1882 appellee, the Chesapeake, Ohio & Southwestern Railroad Company, was, by act of the general assembly, incorporated, and, under authority given to it, purchased of the Paducah & Elizabethtown Railroad Company, having authority to sell, said

road and all property, real and personal, connected with and used in operating it, as well as franchises of the vendor.

The Chesapeake, Ohio & Southwestern Railroad Company continued after its purchase to operate and maintain the machine shops in Elizabethtown, being the only shops owned and used on that road, until the — day of ——, 188–, when they were dismantled, and shops instead of them were, for consideration of $50,000, paid by the city of Paducah, erected at that place, where the machinery was taken and all needed work of the company, for which machine shops are adapted and used, has since been done; and on account of that abandonment and disuse of the shops at Elizabethtown, alleged to be a breach of the contract of subscription of the $75,000, appellants, trustees of Elizabethtown, brought this action for damages.

In an amended petition the failure of appellee to run through daily trains between Elizabethtown and Paducah is made also a cause of action.

Though appellee's motion to strike out that part of the amended petition containing the additional cause of action was overruled, a general demurrer was sustained to it as well as the original petition and the action was dismissed.

The principles by which the question of appellee's liability for abandoning and disusing the workshops at Elizabethtown is to be mainly determined are stated and settled in Chesapeake, Ohio & Southwestern Railroad Company v. Guist, 85 Ky., 619.

In that case the appellee sought to recover of the appellant, Chesapeaek, Ohio & Southwestern Railroad Company, for a personal injury inflicted in 1881, before its purchase of the road, and while owned and operated by the Paducah & Elizabethtown Railroad Company. The latter company was also made a defendant, but not served with process.

It is true the cause of action there was a tort, for which the Paducah & Elizabethtown Railroad Company was directly and alone liable, while here the alleged cause of action is a breach of contract, made with the original company, though not alleged to have been broken by either it or the Paducah & Elizabethtown Company, but by the Chesapeake, Ohio & Southwestern Company. Nevertheless, it was in that case held, as the record in this requires us now to hold, that the last-named company was a bona fide purchaser, paying full value for the road, and in virtue of the deed of conveyance became distinct and sole owner of all the property and rights of its vendor, yet free of all claims of creditors.

It was fur her held in that case to be a settled principle that when the power to sell is by terms of its charter given to one corporation, a purchaser for value, though also a corporation, holds the propeity as if it had been an individual transaction.

The attitude of the plaintiff in this case is, however, not that of a creditor of the original corporation, but Elizabethtown became, upon performance of the conditions of its subscription of the $75,000, invested with all the rights and bound by all obligations attaching to the position of stockholder of that company.

It may be that Elizabethtown, though a stockholder, would have had a right to reparation for violation by the original company of the conditions upon which the subscription of stock was made, but neither by law nor the contract of subscription was a lien acquired on the corporate property to secure performance of those conditions to the prejudice of creditors or bona fide purchasers. And even if such lien had existed the failure to assert it when the action was brought by creditors of the original com-

pany for sale of its property, would amount to a waiver of it; for it is a reasonable presumption that neither the purchasers at the judicial sale nor the Chesapeake, Ohio & Southwestern Company would have paid as much for the property if it had been then adjudged a lien existed in favor of Elizabethtown for enforcement of the condition of its subscription of stock.

But it seems to us very clear that no obligation was ever imposed upon appellee by either the act authorizing it to purchase the property or by its contract of purchase to continue indefinitely or for any length of time use of machine shops at Elizabethtown. According to the terms prescribed there was a literal performance of the conditions upon which the subscription of stock was made in behalf of Elizabethtown when the machine shops were built there; and in the absence of language showing, or from which it can be fairly implied, it was intended for the machine shops to permanently remain and be operated there without regard to public convenience and necessity, certainly an action brought more than fifteen years after the transaction should not be maintained against a bona fide purchaser of the property, either for damages or other relief, upon the ground the machine shops have been disused at that place.

In 1867, when the subscription of stock was made, Elizabethtown and Paducah were intended to be terminal points of the railroad, to construct which the stock was subscribed.

In 1882, fifteen years thereafter, that road became part of a line owned by appellee, extending from Memphis by way of Paducah to Louisville, and with which Elizabethtown was connected by only a branch road; so that the transfer of machine shops to Paducah, not necessary in 1867, became subsequently a matter of convenience and necessity to the public as well as appellee; and as we are unable to see wherein any legal right of Elizabethtown has been violated by such transfer, or upon what principle of equity appellee's property can be now taken or subjected to a lien of that town that never in fact existed, or if it existed has been waived and lost, the demurrer to the original petition was properly sustained.

Section 6 of "An act to incorporate the Chesapeake, Ohio & Southwestern Railroad Company," approved January 19, 1892, contains this provision: "Provided, That if the said corporation shall, by consolidation or otherwise, acquire the Elizabethtown & Paducah railroad, it shall not, by reason of any branch that may be built or otherwise, discontinue the operation of said line from Memphis to Paducah or from Paducah to Elizabethtown, but through cars shall be kept on the road from Memphis to Paducah and from Paducah to Elizabethtown."

Appellant did not acquire, by terms of its subscription of $75,000, the right to maintain against appellee an action for failure to comply with requirement of that section. For a disregard or violation of that statute, it seems to us, the Commonwea th only can maintain a proceeding or action. The demurrer to the amended petition was likewise properly sustained.

Judgment affirmd.

OWENSBORO, &c., RAILROAD CO. v. HARRISON.

(Filed May. 25, 1893.)

1. Pleading—Filing of amended answer—Where plaintiff alleges that he conveyed a right of way to a railroad company, which had been previously

surveyed and staked off, but that the railroad, without his consent and against his protest, constructed its road on another strip of his land which he seeks to recover, and defendant in its answer does not deny that the right of way had been staked off before the conveyance was made, and that the road was built upon other land against plaintiff's protest, it is too late to file an amendment denying these facts after the trial has begun.

2. Same—Confession and avoidance—An amendment alleging that the road was constructed with plaintiff's knowledge and acquiescence was properly rejected as a plea of confession and avoidance, defendant having admitted in its original answer that the road was constructed against plaintiff's protest.

3. The railroad may institute proceedings to condemn the right of way taken, and the court may order a writ of possession not to issue until it has had a reasonable time to institute such proceedings.

J. A. Dean for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee conveyed to the appellant a right of way across his land for its railroad bed. The right of way was described by a specific boundary that had been previously surveyed and staked off. The appellee seeks to recover the possession of the strip of ground upon which the appellant constructed its railroad bed, because, as is alleged, the appellant, without appellee's consent and against his protest, constructed said track upon other ground than that conveyed to him. The appellee contends that it constructed its bed and track on the ground conveyed to it. The jury found that the appellant had not constructed its roadbed upon the ground conveyed to it. The court's instruction upon the subject of the construction of the roadbed is correct. The appellant did not attempt to deny that the right of way had been staked off before the conveyance was made, and that the appellant built its bed upon other land against the appellee's protest, until after the trial had begun. The court then refused to allow it to file the denial. We can not say that the court, under the circumstances, abused its discretion. The appellant also objects to the court's action in sustaining a demurrer to its amendment that set up the plea of estoppel consisting, as is alleged, in the fact that the appellee knew and acquiesced in the appellant's building its roadbed on its line of road.

If the plea was intended as a confession and avoidance, the appellant is confronted with the fact that it had already admitted, which stood as true, that the appellant had built its roadbed against the protest of the appellee. But the plea, as we understand it, is not a plea of confession and avoidance; for the answer asserted that the roadbed was constructed on the ground conveyed and the proposed amendment says that the roadbed was constructed on its line of way by appellee's consent, etc. Now, taking the answer and amended answer together, they repeat the fact that the roadbed was built on the land conveyed by the appellee. The bill of exceptions is not copied in the record.

The appellant can yet have its roadbed condemned as a right of way, and the court has the right to suspend the writ of possession for a reasonable time in order for it to take that proceeding if it applies for it.

The judgment is affirmed.

KILGUS, &c. v TRUSTEES OF THE ORPHANAGE OF THE GOOD SHEPHERD, &C.

SAME v. TRUSTEES OF THE CHURCH HOME, &c.

(Filed June 1, 1893.)

1. Taxation—Lien for street improvement—Exemption of orphans' home—Home for orphans, created and maintained only for purposes of public charity, are by section 9, article 1, chapter 92, General Statutes, exempted from taxation for governmental purposes as well of the city of Louisville as of the Commonwealth, but they are liable for their proportionate part of local assessment for improvements of streets upon which they about.

2. Same—A special act exempting an orphans' home of the city of Louisville from "assessment and taxation under the revenue laws of the Commonwealth, or under any ordinance, resolution or other act of the city of Louisville," and providing that its property "is hereby freed from future charge and payment of taxes to the State and to the city," exempts the property of the home from the ordinary taxation levied for the support of the State and the municipal government; but it must pay its proportionate part of assessments made for local imporvements, such as the improvement of streets upon which it abuts.

3. Same—A statute should never be so construed as to exempt a particular person or corporation from taxation for any purpose, unless the language used clearly and expressly requires it to be done.

H. S. Barker and Lane & Burrett for appellants.

Strother & Gordon for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

These two actions, brought by appellant against appellees, respectively, were tried and determined by the lower court together, as will be done on this appeal.

The object of each is enforcement of lien on a lot of land for proportinate cost of improving an adjacent street by appellant in pursuance of an ordinance of the general council and under contract with the city of Louisville.

There is no question made in either action about his compliance with terms of that contract, nor as to correctness of the amounts assessed and fixed. But the ground relied on as defense in each case is exemption from such assessment existing in virtue of special acts of the general assembly.

It appears that in 1858 H. P. Johnson conveyed to W. Cornwall and others in trust a lot upon which to establish an orphan asylum, to be used as a free home for educating and instructing indigent orphan boys in useful arts and trades. And in 1872 "An act to incorporate the trustees of the Orphanage of the Good Shepherd in the city of Louisville'" was passed, whereby W. Cornwell and others, then trustees undedr the deed mentioned, were declared a body corporate, to whom the several county courts of the Commonwealth were authorized to bind orphans upon terms agreed to.

Section 6 of that act is as follows: "That all property now held for the benefit of said orphanage, and all which hereafter may be so held, shall be, and the same is hereby, exempted from assessment and taxation under the revenue laws of the Commonwealth, or under any ordinance, resolution or other act of the

city of Louisville, and all such property is hereby freed from future charge and payment of taxes to the State and to the city."

In 1872 John P. Morton conveyed to James Craik and others a lot upon which were to be erected buildings suitable for a church home for females, an infirmary for females, an infirmary for males and a chapel. And, subsequently, "An act to incorporate the Church Home for Females and Infirmary for the Sick," was passed, whereby James Craik and others were created a body corporate.

Section 3 of that act is in the same language as section 6 of the first-mentioned act just quoted, differing from it only in application. The two institutions thus created, being manifestly intended for purposes of purely public charities, were, by section 9, article 1, chapter 92, General Statutes, independent of the special acts, exempted from taxation for governmental purposes as well of the cityof Louisville as of the Commonwealth. But taxation for ordinary purposes of government does not properly comprise local assessment for construction of a street, and as a consequence, exemption by statute from the first does necessarily and properly involve exemption from the latter.

Accordingly, in Broadway Baptist Church v. McAtee, 8 Bush, 508, it was held that exemptions made in the General Statutes in favor of church property apply only to taxation for general purposes of government—State, county and municipal—and that, therefore, property of that church was liable for payment of its proper proportion of cost of constructing the particular street there in question.

In Zable v. Louisville Baptist Orphan Home, 13 Ky. Law Rep., 385, the appellant, a contractor, sued to enforce a lien on property of appellee for its proportion of the cost of constructing an adjacent alley, from which the latter claimed exemption in virtue of a special act of the legislature.

In that case the following extract from Burroughs on Taxation was quoted and approved: "The word tax or taxes does not include local assessments, unless there be something in the statute in which it is found to indicate such an intention. The question frequently arises in the construction of statutes exempting persons or corporatons from payment of taxes, and the almost unbroken current of authority is that such expression does not include local assessment."

The question, therefore, in this case is whether the two acts relied on by appellees respectively were intended by the legislature to exempt their property from local assessment.

In Zable v. Louisville Baptist Orphan Home the provision of the special act is as follows: "The property, money, estate and rights of said corporation shall be exempt from all taxation whatever." But it was there held the word tax did not embrace local assessment, and that something more was needed to show such was the legislative intention.

The language of the two acts we are considering is, however, somewhat different from that of the act first mentioned; for it is in both of them provided the property shall be exempt from assessment and taxation under revenue laws of the Commonwealth and also under ordinances of the city of Louisville. But the word "assessment," which means levying a tax or determining the share of tax to be paid by each individual, relates as well to taxes for support of government as to taxes, or rather enforced contributions, for construction of streets or other local improvements; for the act of assessing must precede collection in either case.

It does not, therefore, seem to us that the word assessment, used as it is in the two special statutes without qualificaiton or

explanation, necessarily or fairly indicates legislative intention to exempt the property of appellees from any other than ordinary taxation for support of the State and municiapl governments. And not being clearly and expressly exempted from due proportion of the cose of constructing adjacent streets, it can not be held so exempt without violating a well-estabished rule of construction; for, as said in Sedgewick on Stat. and Common Law, 344, statutes under which exemptions from common burdens are claimed, "are regarded with a jealous eye and strictly construed."

In support of the construction we have given the two statutes in question, we cite the case of the State, &c. v. the Mayor and Common Council of Newark, 35 N. J., 157. There the Protestant Foster Society claimed exemption from the cost of constructing or improving streets under its charter, by which it was enacted that the property of the society "shall not be subject to taxes or assessments," which is nearly the same language used in the two statutes we are considering. But the court in that case held that the word "taxes" must, in the absence of any clear indication to the contrary, be understood to refer exclusively to the ordinary public taxes, and that the word "assessment" has reference to burdens of the same general character as those expressed in the word "taxes" and was not intended to include local assessments for muncipal purposes.

In our opinion a statute should never be so construed as to exempt a particular person or corporation from taxation for any purpose, whereby the burden falls so much heavier on others having no greater interest at stake or duty to perform, unless the language used clearly and expressly requires it to be done. In these cases it may be fairly presumed that if the legislature had intended to exempt the property of appellees from the cost of local improvements, it would have been plainly and fully indicated by additional or other words than the single and insufficient term, "assessment."

Whether the two statutes would be valid, if susceptible of the construction contended for by appellees, is a question we need not determine, because we think the exemption claimed was not granted.

Therefore, the judgment in each case is reversed and cause remanded for proceedings consistent with this opinion.

COVINGTON & CINCINNATI BRIDGE CO. v. COMMONWEALTH.

(Filed June 15, 1893—Not to be reported.)

J. W. Bryan, W. M. Ramsey and Fisk & Fisk for appellant.

W. J. Hendrick for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The opinion delivered in this case at a former hearing determined the constitutionality of the act of the legislature reducing the tolls on appellant's bridge. (14 Ky. Law Rep., 836.)

This is the only question invovled on the present appeal, and having heretofore adjudged the act constitutional, we perceive no reason for disturbing the judgment below, and the same is now affirmed.

BENNYFIELD v. COMMONWEALTH.

(Filed June 15, 1893—Not to be reported.)

The verdict finding defendant guilty of manslaughter is authorized by the evidence.

Samuel Avritt and S. A. Russell for appellant.

Wm. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was charged with the crime of murdering Josiah White. He was found guilty of the crime of manslaughter. He appeals. The verdict of the jury was authorized by the evidence. The instructions given to the jury, were full, fair and correct. There was no error in refusing instructions.

The attorney acting for the Commonwealth was guilty of no impropriety.

The judgment is affirmed.

FERREL v. COMMONWEALTH.

(Filed September 14, 1893—Not to be reported.)

1. Criminal law—Evidence—Where the plea of self defense is relied on by the accused charged with murder, and it appears that the homicide occurred during a game of cards, in which several were engaged and in which all were quarrelling, what was done and said by all present is competent evidence, since it tends to show the attitude of the parties to each other and the nature of the quarrel.

2. Same—Even if such evidence was incompetent, the admission of the statement made by the son of the deceased during the quarrel, that his father had no pistol and had possessed none for fourteen years, was not prejudicial to accused, since a pistol was found under the deceased as the evidence before the jury clearly showed.

3. Same—Evidence concerning what occurred at another game of cards, which had no connection with the homicide, was properly rejected.

4. Same—Impeachment of reputation of witness—The evidence to uphold the reputation of the witness, Wickenham, in this case, did not relate to too remote a period and was competent.

W. G. Welch, Hill & McRoberts and W. H. Miller for apepllant.

W. J. Hendrick, John S. Owsley, Joseph B. Paxton and R. C. Warren for appellee.

eal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted for the murder of Samuel Eagleman and sentenced to the State prison for life.

It is sufficient to say that the parties were engaged in a game of c ds, all but the accused; were under the influence of liquor and ·· med with pistols ready to take human life for the most trivia offense.

It is needless to recite the facts with a view of determining whether any provocation or cause existed excusing this appellant for taking the life of the deceased. The plea was self-defense, but the testimony of such a character as to authorize the conclusion that the facts relied on as sustaining this view was an afterthought by the deceased.

There are but few if any pallating circumstances in the case, and the verdict of the jury is fully sustained by the testimony. As one of the principal questions of fact was as to whether or not the deceased was attempting to draw a pistol on the accused when he fired the fatal shot, it is contended that that Cris Gentry and one Bright said while the quarrel was progressing and pistols drawn was incompetent.

Bright, a friend of the deceased, it seems, was engaged in the game, and he drew a pistol and was told by the deceased to sit down; "I need no pistol; I have no pistol;" and the son of deceased remarked, "Papa has no pistol and has had none for fourteen years." All this took place when the quarrel was going on, and was competent to show the nature of the difficulty and the attitude of the parties towards each other.

They were all engaged in the quarrel except, perhaps, the son, who was endeavoring, doubtless, to convince the accused that he was in no danger. All that took place at the time was competent, but, if not, the fact of the pistol being on the floor under the body of the deceased was before the jury and must have been considered by them, and the statement of the son, even if regarded in the light of substanital testimony, did not prejudice the accused; nor did the fact that Bright was a partner with the deceased in the take out or game throw any light on the case.

The court acted properly in excluding from the jury, or in refusing to hear testimony with reference to another and different game of cards played with Hardin on the same day. Neither the conduct of Bright nor the deceased when playing cards with Hardin had any connection with this case. That Bright was drunk, a violent man and ready to shoot in behalf of his friend, the deceased, this proof clearly shows. His conduct and actions on that day in every way reprehensible was before the jury, and the greatest latitude given the defense in the presentation of the case.

As to the testimony of Wickenham and the attack upon his character, we are not disposed to say that the time he lived in Harrodsburg was too remote to enable the witnesses who then knew him well to speak of his character for veracity at the date of the trial, or that the court should have told the jury the object of impeaching a witness. This was not necessary, and, besides, the jury had before them witnesses who had known Wickenham in the last two years pending his tiral. They spoke well of him and lived nearer the place of trial than those who knew him at Harrodsburg.

This man has been tried in a county where all the parties and witnesses were known, and doubtless by an intelligent jury, presided over by an able and imparital judge, and to say that the objections raised in this case are sufficient to justify a reversal, when guilt is so manifest, would be trifling with the administration of justice.

The judgment is affirmed.

McHARGESS v. COMMONWEALTH.

(Filed September 16, 1893—Not to be reported.)

1. Criminal law—Change of venue—Presumption—Where it appears that the homicide was committed and the indictment found in one county and that the trial occurred in a different county, the reasonable presumption is that all the steps required by statute for a change of venue were taken and that when the trial took place the original papers, together with a transcript of the record pertaining to the prosecution, were all before the trial court.

But the record shows these acts with sufficient clearness in this case.

2. Same—Dying declarations—A dying declaration may be competent, although the deceased did not expressly state that he was bound to die and had no hope of recovery. Consciousness of impending death may be proven by circumstances.

James D. Black, J. Smith Hays and D. K. Rawlings for appellant.

W. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Lewis.

The main point attempted to be made by counsel in this case is that because the indictment was found against appellant in Whitley county, and the offense of murder with which he is charged appears from the indictment to have been committed there, we are bound to assume the Knox Circuit Court, in which he was tried and found guilty, was without jurisdiction.

The reasonable presumption is that all the steps required by statute in order for appellant to obtain a change of venue were taken, and that when the trial took place the original papers, together with a transcript of the record pertaining to the prosecution, had been transmitted by the clerk of Whitley Circuit Court, as was his duty, to clerk of Knox Circuit Court, and were before the latter court as indisputable evidence of the change of venue. Otherwise we have to assume that the Knox Circuit Court, utterly without right or authority, undertook to try appellant for an offense involving his life and to finally adjudge his punishment by confinement in the penitentiary. Appellant, having in the Knox Circuit Court, pleaded to the issue and submitted without objection to trial, can not require the Commonwealth to make proof in this court the change of venue was actually made. But there is, however, enough in the record to thoroughly satisfy us the original papers and transcript of orders made in the Whitley Circuit Court, including the proceeding and order for change of venue, were in possession of the clerk of the Knox Circuit Court and before that court when the case was called and tried.

But two witnesses seem to have been present when the homicide took place, and their statements do not agree. But the jury, under proper instruction by the court, found from the evidence appellant guilty of manslaughter, and as there is evidence to support the verdict, it can not be disturbed.

It is not indispensable, in order to render proof of dying declarations competent for deceased to have stated he was bound to die and had no hope of recovery. The fact of impending death, and consciousness of it on the part of a wounded person, may be proven by circumstances.

The deceased was shot about the lower part of the stomach, and the wound was so large that the attending physician stated he could put all his hand in it, and besides the bowels were protruding. It is, therefore, plain the deceased believed he would die very soon, as he did in less than one hour, and that he was utterly without hope of recovery. Besides, what he said showed he believed his death inevitable and near at hand. His expression was that "it was an awful fix for one to be in without warning."

But it seems to us the question of competency is immaterial; for, besides the words just quoted, his only remark was, "Sam shot me;" so that nothing he said really bears upon the cause or manner of his being shot.

We perceive no error of the court in admitting or rejecting evidence, or in any other respect prejudicial to substantial rights of appellant.

Judgment affirmed.

TRIBBLE'S EX'ORS v. BROADDUS, &c.

(Filed September 19, 1893—Not to be reported.)

1. The marriage of an executrix eo instanti terminates her authority as a personal representative.
2. Same—The duties and powers of the female executrix under her decedent's will in this case were purely executorial and not those of a trustee merely, and her marriage avoided the trust she held as executrix.

J. A. Sullivan for appellants.

Smith & Moberly for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Chief Justice Bennett.

Alexander Tribble died testate. He devised a large part of his estate to his wife; also a considerable part of his two nephews.

He also made some specific devises.

He appointed his wife and two nephews executors of the will, who qualified and entered upon their executorial duties. Afterwards the wife married. Mr. Broaddus and the other executors deny her right to continue longer as executor. She contends that the duties that she was required to perform under the will at the time of her marriage were those of trustee merely.

The General Statutes, chapter 39, article 1, section 16, provide in substance "that a married woman shall not be appointed executor or administrator, and that the marriage of a female executor or administrator shall 'avoid the trust.'"

It seems that a marriage of the appellee eo instanti avoided the trust. Now the only question is, was she executor or trustee merely at the time of the marriage?

It seems that her duites and powers under the will were all purely executorial and not those of trustee merely.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

PFINGST, &c. v. SENN, &c.

(Filed September 19, 1893.)

1. Beer garden not a nuisance per se—A garden in a city used as a beer garden and pleasure resort is not in itself a nuisance, although it may make the adjoining property less eligible as a place of residence for some people, and may subject the neighbors to inconvenience and annoyance.

2. Same—Injunction against threatened nuisance—Equity will enjoin a threatened nuisance only when the thing about to be done is per se a nuisance; but where the nuisance is eventual or contingent, or the thing about to be done may or may not result in a nuisance, equity will not interfere.

An injunction will not be granted to prevent the owner of property from using it as a beer garden and pleasuree resort merely because, when formerly so used, it was so managed as to become a nuisance.

O'Neal, Phelps & Pryor and O. A. Wehle for appellants.

Rogers & Duncan for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

The plaintiffs, some twenty-five in number, filed their action in the Louisville Law and Equity Court, setting up that they were in the possession, as owners and tenants, of certain premises in proximity to a lot and the improvements thereon owned by the defendants, and situated on Main and Rowan streets, between 22d and 24th streets, in the City of Louisville; that the last-named property had originally been owned by one Nomberger, who resided on it until about 1872, when it became the property of Bloom & Ulman, who had it occupied by tenants for residences until in March, 1879, when they leased it to one Brohm for the term of ten years, to be used by him as a pleasure resort and beer garden; that Brohm erected certain frame structures on the premises, consisting of a dancing hall, a ten pin alley, bar-rooms, open air orchestra stand and other improvements at a cost of some $6,000, but failing, in 1880, to comply with his contract, Brohm surrendered the premises to the former owners, Bloom & Ulman, who thereupon and continuously up to July, 1890, rented them to various persons for the purpose of conducting therein a pleasure resort and beer garden; that "during the ten years since the lot has been used as a place of entertainment it has, from the nature of the business conducted therein, become and been a nuisance to the citizens who owned and rented residences in the neighborhood;" that crowds gathered there during these years, and "the guests would dance in the dancing hall to the music of string and brass bands stationed in the hall and in the open orchestra stand in the garden until the hours of morning, while others would amuse themselves by rolling tenpins in the ten-pin alley, and the noise made by the stamping of feet of the dancers, by the directions to the dancers given in a loud stentorian voice, by the instruments of the orchestra and by the balls of the ten-pin alley, would keep the neighbors and their families awake or disturb their sleep for several nights in the week, so as to endanger and impair the health of the more nervous members of the families and destroy the comfort and peace and render impossible the quiet enjoyment of domestic life;" that crowds of idle and disorderly spectators were drawn by the music, and their habitual presence in the streets became to the neighbors a source of annoyance and a nuisance, all of which occurred, not by reason of any careless or disorderly

management of the place by those in charge, but necessarily out of the character of the business conducted there; that from July, 1890, until June, 1891, the premises were not put to this use; that in June, 1891, the plaintiffs and others in the vicinity, learning that Bloom & Ullman had rented the garden to a certain society for June 24th for a picnic, filed a remonstrance with the common council of the city against the issual of a license to hold such picnic, in consequence of which no license was granted; that thereupon Ullman and the other owners promised that if the remonstrance were withdrawn they would not in the future use the place as a pleasure resort; that the objection was thus withdrawn and the picnic held, since which time the premises have not been so used; that recently learning that the defendants, who are brewers, were negotiating for the property, they informed them of the agreement as to the use of the property and warned them not to buy it for the use of a beer garden; that notwithstanding this, the defendants have bought the lot and improvements and have given out in speeches and threatening that they would reopen the garden as a pleasure resort and beer garden; that if permitted to do so the reopening of the place "as a beer garden and pleasure resort will again disturb the peace, comfort and happiness of the plaintiffs and their families and endanger and impair the health of themsleves and th ir families, and will render their lives during the spring, summer and autumn months miserable;" that as long as "the garden and the improvements now standing on the same are used for the purpose of a pleasure resort, for which they are adapted, or if similar structures are erected and used in similar manner, the said garden is bound to be a continuous annoyance and cause of discomfort to the people residing in the neighborhood within the distance of two squares from the defendants' lot, no matter with how much regard for the comfort of the neighbors the defendants may conduct the place; that irreparable injury will happen to them unless an injunction be granted against the threatened nuisance.

We have thus given in some detail the substantial averments of the petition, because a demurrer thereto, filed by the defendants, was sustained by the court and the petition dismissed. The sufficiency of this pleading is, therefore, the only question involved.

We observe, first, that it is not an actual, existing nuisance of which complaint is made, nor are the things about to be done in themselves nuisances.

There can be beer gardens and pleasure resorts, music and dancing, and yet no nuisance set up.

Admittedly the conduct of such exercises or the running of such a business may result in inconvenience and annoyance to neighbors not participating. It may render the location less legible as a place of residence for people who pay high rents or are of "dainty modes and habits of living." (Wood's Law of Nuisances, section 800), but, nevertheless, these places and modes of amusement are not to be condemned or denounced as nuisances in themselves.

"Injunctions against threatened nuisances," says Mr. Wood, section 797, "will seldom be granted except in extreme cases where the threatened use of property is clearly shown to be such as leaves no doubt of its injurious results."

The learned author, in support of this view, refers to the case of Dumesnil v. Dupont, 18 B. M., 804, where this court quotes with approval this language of Lord Broughman, in the case of the Earl of Rippon v. Hobart, 1 Cooper's selected cases: "If the thing sought to be prohibited is in itself a nuisance, the

court will interfere to stay irreparable mischief without waiting for the result of a trial; but where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere. * * * It is also very material to observe that no instance can be produced of the interposition by injunction in the case, of what we have been regarding as an eventual or contingent nuisance," and the court declind to interfere with the erection of a powder-house within a few hundred yards only of the dwelling of complainants, notwithstanding the plaintiff's case was strongly fortified by the argument that as "the electric fluid, the irresistible effects of which are disclosed in every thunder storm, may, in defiance of every precaution, at any moment cause it to explode, it can not be doubted that if five hundred kegs were stored in a magazine in the heart of the city every thunder storm would awaken an universal alarm and consternation in the minds of the inhabitants." (Cheatham v. Shearon, Swanns' Rep., 213.)

A much stronger appeal was thus presented to the court than we have in this case. It is at last but the fear or apprehension of danger or injury that is being urged.

"When the injury complained of is not, per se, a nuisance, but may or may not become so, according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere. Thus the erection of a wharf, a railroad bridge, a plaining mill, a stable, a cotton gin, a blacksmith shop, a toll-gate, a livery stable or a turpentine distillery, will not be enjoined when the injury is only a possible and contingent one." (High on Injunctions, section 743.)

A bowling-alley, billiard-room, a like place of amusement kept for gain or hire, may or may not be a nuisance, according to the nature of the amusement, the manner in which the place is conducted and its location. (Wood, section 43.)

A ten-pin alley, kept for public use in a village, in connection with a lager beer saloon, was not a nuisance, per se. (State v. Hall, 32 N. J. L., 158.)

A slaughter-house, tallow factories and melting houses, soap factories, fat boiling and bone boiling establishments, have been held to be prima facie nuisances. It would seem from the authorities, therefore, that the opening of the grounds under consideration as a pleasure resort and beer garden is not of itself a nuisance. Whether the management may make it such is problematical. The nuisance sought to be restrained is eventual and contingent; that when opened before it became a nuisance is not determinate and satisfactory evidence that it will so become in the future. It is not even alleged that it will be conducted like it was before.

In Hahn & Harris v. Thornberry, &c., 7 Bush, 403, it is held that the chancellor will not interfere by injunction where the nuisance sought to be abated or restrained is eventual or contingent, nor where the evidence is conflicting and the injury to the public, or to the individual complaining, doubtful.

In Louisville Coffin Company v. Warren, &c., 78 Ky., 400, the maintenance of a smokestack, which caused "much annoyance and discomfort by the smoke and soot" issuing therefrom, was held not to be a nuisance.

"One living in a city," it was said, "must necessarily submit to the annoyances which are incidental to city life."

In Rhodes v. Dunbar, 57 Penn. Statutes, 274, it was well said

by the learned chief justice: "It is a difficult matter at all times to strike the true medium bewteen the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher and laborer, as well as the wealthy, employed or unemployed citizen to constitute a city. They all have rights, and the only requirements of the law are, that each shall so exercise and enjoy them as to do no injury in that enjoyment to others or rights of others.'"

Among the rights to be enjoyed, indeed we might say necessarily to be enjoyed by a large class of persons in a crowded city, is the right or privilege of attending places of open air amusement, such as are sought to be condemned in the petition.

Undoubtedly, if the operation of these grounds becomes a nuisance, the chancellor will, if there be no remedy at law obtainable by complainants, interfere in their behalf. We can not say now that the objectionable floors may not be so deadened as to prevent the noise complained of, or that the voices of the dancing director may not be "toned down" or the music made less harsh. There is nothing in the state of case set up in the petition rendering this improbable. Of course the idle and disorderly crowd of "hangers on" may easily and summarily be disposed of on complaint to the municipal authorities.

Judgment affirmed.

COCKERILL v. COMMONWEALTH.

(Filed October 12, 1893.)

1. An instruction on the trial of one for murder, directing the jury to acquit him on the plea of self-defense, "if they believe that at the time of the shooting defendant was in danger of death or great bodily harm, then about to be inflicted on him, or which reasonably appeared to him about to be inflicted upon him," is highly prejudicial to the substantive rights of the accused, because it allowed him the right of self defense only in the event the impending danger seemed real to the jury, whereas he was entitled to act for his own defense if the impending danger was to him apparent and not necessarily real.

2. Same—Right of officer to kill in self-defense rather than retreat—One summoned to aid a peace officer in arresting an offender, who, with the aid of his friends is resisting the officer, need not seek safety from impending bodily harm at the hands of the resisting friends in flight; he may stand his ground and aid the officer, and if in so doing to protect himself apparently impending great bodily harm he kills one of those resisting, he may rely upon the plea of self defense.

3. Same—The fact that the party summoned to aid the peace officer, and who had been driven away from the officer's side by one who attacked him with a deadly knife, returned with a gun to the place where his assailant and the officer with his prisoner were, should not form the basis of an instruction limiting his right to rely on the plea of self defense for killing such assailant.

4. Same—An instruction telling the jury that if they believe beyond a reasonable doubt that defendant, after engaging in a difficulty with deceased, left the place of the difficulty and afterwards, when in no danger, voluntarily returned to deceased and renewed the difficulty with him, then he could not rely on the plea of self-defense, unless after such return he abandoned said difficulty in good faith before killing deceased, was prejudicial and erroneous in requiring defendant to establish beyond a reasonable doubt that he abandoned the difficulty on his return before killing deceased.

George Denny, jr., Robert Riddell and John Bennett for appellant.

W. J. Hendrick for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Hazelrigg.

Upon his fourth trial under an indictment for the murder of James Amerine, in Estill county, in November, 1887, the appellant was found guilty of manslaughter and sentenced to confinement in the penitentiary for the term of four years.

He insists that his conviction was at last secured by reason of the misinstruction of the jury by the trial court, the misconduct of the prosecuting attorney in his speech to the jury, and the misconduct of certain members of the jury during the trial.

Stated briefly, the Commonwealth's proof established that after a hasty controversy with the deceased in the court-house yard, in the town of Irvine, the appellant rapidly left the yard, and, porcuring a gun from a neighboring house, came back hurriedly, approached his antagonist, and after deliberate aim fired the fatal shot.

The facts and circumstances attending the killing and relied on by the appellants as showing the homicde to have been excusable, and as establishing a case of self-defense on his part, are about these: It was county court day, and late in the evening a row was in progress in a saloon. The deputy sheriff was sent for to quell the disturbance. He succeeded in arresting one Puckett, who was drunk and disorderly, and while attepmting to take him to jail was resisted and assailed by a large number of the excited and drunken friends of the prisoner. Among these latter the deceased, Amerine, was one of the most active and unruly. He swore that Puckett should not be taken. He cut at the deputy with a knife which he flourished in his hand from the inception of the trouble until he was killed. The deputy was sorely pressed and summoned as his aid in suppressing the mob and in landing the prisoner in jail the appellant, Cockrill, Butterworth, and perhaps others. The officers with the prisoners and the crowd had surged across the street and into the court-house yard. The deputy was thrown to the ground and his nephew, young Park, a lad of some sixteen years, was pushing through the mass of yelling men toward his uncle, when he was roughly accosted by the deceased, knife in hand, and while the boy was crying, the appellant seeing his danger, said to Amerine, "Don't hurt him," or "Jim, don't hurt him; he is nothing but a boy."

The deceased turned upon the appellant, saying, "What in the hell have you got to do with it?" And when assured that no offense was intended, he adavnced on the appellant, who backed away, protesting all the time that he had nothing against him, until reaching the yard gate he sprang through it, followed by the angry and insulting words of his assailant. Amerine then proceeded toward the front of the court-house and flourishing his knife, "said he would sink that in him." Cockrill procured a gun, walked up the pavement toward the still struggling, resisting crowd and Amerine. He stops, levels his gun at Amerine, taking deliberate aim. There is nothing in the way of the expected shot. Suddenly he voluntarily takes down his gun; lowering the breach and extending the muzzle upward, the expected report is not heard and the trouble between them is supposed to be over. But Richardson and Wilson, having seen the appellant's hurried return with the gun and his approach toward

Amerine, rush on him, and when they reach him seize him and hold him and his gun "as in a vice." Amerine, who was only a few steps away, seeing the situation of the appellant, stepped forward, and with his left hand extended as if to grab the muzzle of the gun, right hand grasping the open knife, made at the appellant. The latter, seeing his danger, with an extraordinary effort pressed down the gun and fired from his hip, calling on the persons holding him not to let the deceased cut him.

This is the defendants' side of the case, and there is much proof to sustain this account of it. On the important point that the appellant was summoned as an aid to the deputy sheriff there is no contradiction. Thereupon the court gave the usual instructions on the subject of murder and manslaughter.

By a third instruction the jury were told that they might acquit the defendant "if they believed from the evidence that at the time he did the shooting (if he did do it) he, defendant, was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to him about to be inflicted upon him by said Amerine, and from which he had no other safe or to him apparently safe means of escape."

Here the right of the defendant to strike in defense of his life or person is made to depend not on his own reasonable belief that he was in immediate danger of death or great bodily harm, but on the belief of the jury that such danger actually existed.

It is true that the immediate infliction of the danger need only to have been reasonably apparent to the defendant, nevertheless the jury, under this instruction, must believe the danger to have been real before they could acquit. This instruction has often been condemned as highly prejudicial to the substantial rights of persons charged with homicide and who seek to excuse the act, and the law does excuse it upon the ground that the danger was apparent and not necessarily real. Moreover, notwithstanding that the danger must be so established to the satisfaction of the jury as in fact existing and as being about to be inflicted on him, yet he may not still act if perchance he may seek some other safe or to him apparently safe means of escape.

Does this mean that the defendant must seek to escape by means not absolutely safe, but merely apparently so? The language is easily susceptible of this construction. But upon broader grounds the requirement of the instruction that the defendant must seek safety by flight or means other than by defending himself from the impending danger, and that, too, by such active and aggressive resistance as may appear sufficient to safely protect himself from the attack made on him, must be condemned.

Assuming the case as made out for the defendant by the proof, and we must so assume in fitting or applying the law of self-defense to the particular facts shown in support of his proffered excuse for the homicide, he was upon the ground as an appointed aid to the deputy sheriff. When driven off the grounds at the point of the knife by the unruly assistant of the resisting prisoner, to arrest or imprison whom he was summoned by the officer, shall the defendant fail or refuse to return? Or, returning, shall he be required to escape impending danger by flight?

Not even the rigid requirements of the common law would demand this of him.

The fourth instruction was as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, after engaging in the difficulty in which Amerine was killed, left the place of said difficulty, and that afterwards at a time when

he was in no danger and away from said Amerine, he voluntarily returned to the place where Amerine was and of his own volition and choice renewed said difficulty with deceased, then, and in that event, he can not rely upon the law of self-defense and apparent necessity, unless, after such return, he abandoned said difficulty in good faith before the shooting of Amerine."

For the reasons already indicated, explanatory of the right of the defendant to return to the grounds from which he had been driven, it is obvious that that leaving and returning should not form the basis of an instruction depriving him of the right of self-defense. But if the defendant had not been summoned to aid the deputy, the instruction is erroneous.

There are three things charged, the doing of which by the defendant is made the basis of a denial to him of the right to defend himself, and one upon which that right is regained: First, that he left the difficulty; second, that he returned to it; third, that he renewed it; and fourth, that he abandoned it. Now all four of these propositions are preceded by the requirement of a belief on the part of the jury beyond a reasonable doubt. The first three are facts material and necessary to constitute the guilt of the defendant, the last one is a condition upon which he may establish his innocence, and to require the jury to believe it as indicated in the instruction is to require the defendant to establish his innocence beyond a reasonable doubt.

Upon the whole we do not know of a case in which the usual instructions as to murder, manslaughter and unrestricted self-defense could more appropriately be applied as the whole law of the case, with perhaps an additional instruction on the duty of the defendant to aid the deputy in arresting and imprisoning disorderly persons and remain on the ground for that purpose.

This, however, if given, should be qualified so as not to afford the defendant a cloak to shield any wrongdoing of his own. It is improbable that the minor errors complained of can occur again, and are, therefore, not noticed.

Let the judgment be reversed and a new trial be had according to the principles of this opinion.

SUPERIOR COURT ABSTRACTS.

CITIZENS' SAVINGS BANK v. HOWARD.

Filed October 25, 1898. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Assignment of note after payment—In this action upon assigned notes, in which the only issue was whether the notes sued on had been paid off or purchased by plaintiff's assignor, the evidence shows that they were paid off, and, therefore, nothing passed by the assignment.

J. A. Dean for appellant; Sweeney, Ellis & Sweeney for appellee.

MILLIKEN v. DEMING, &c.

Filed October 25, 1893. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

The mother is not by the natural relation authorized to bind her infant children either personally or as to their estate; therefore, an agreement by a mother, that if plaintiff would maintain her infant child he should be paid out of the child's estate, can not be enforced.

W. Buckler for appellant; O. S. Deming for appellees.

TRUSTEES OF DOVER CHRISTIAN CHURCH v. MAYSVILLE & BIG SANDY ROAD CO.

Filed October 25, 1893. Appeal from Mason Circuit Court. Opinion of the court by Judge Yost, reversing.

Trustees of church—Title to church property—In this action by five trustees of a church to recover damages for injury to the church property, it is immaterial whether the statute limiting the number of trustees of such societies to three prevented the title from vesting in a greater number, as the plaintiffs are, if not in fact the title holders, to be regarded as a committee suing by the appointment and on behalf of the congregation; and, besides, as there were originally only three trustees, and two of the plaintiffs are the survivors of those three, the title must be regarded as remaining in them if it did not vest in the five trustees.

E. L. Worthington, G. S. Wall and T. C. Campbell for appellants; Wadsworth & Son for appellee.

COMMONWEALTH v. KEARNS.

Filed October 25, 1893. Appeal from Rockcastle Circuit Court. Opinion of the court by Judge Yost, reversing.

Shipment of liquor "C. O. D."—Place of sale—When whisky ordered by letter is shipped from one county to another by express C. O. D., the sale takes place in the county in which the whisky is delivered to the carrier, and is not a violation of a prohibitory liquor law in force in the county to which it is shipped.

W. J. Hendrick for appellant.

HURD v. COMMONWEALTH.

Filed October 25, 1893. Appeal from Breathitt Circuit Court. Opinion of the court by Judge Yost, reversing.

A warrant of arrest charging that the defendant "has been guilty of the offense of selling liquor to Mason Cope, committed in town of Jackson on or about the 1st day of December, 1892, in violation of town law," does not describe the offense charged or state the county in which it was committed, and, therefore, a demurrer should have been sustained.

J. P. Gillum, J. J. C. Bach and J. B. Marcum for appellant; W. J. Hendrick for appellee.

SNOWDEN, &c. v. DARNABY, &c.

Filed October 25, 1893. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Guardian and ward—Venue of action—An action by a ward against his guardian for a settlement of his accounts must be brought in the county in which the guardian was qualified.

2. Power to vacate judgment—The motion to vacate a judgment because of its rendition before the action regularly stood for trial, can not be made after the expiration of the first three days of the succeeding term.

3. Same—No defense being offered, it was error to set aside a default judgment on motion of defendants.

4. Same—Whether a judgment against a guardian and his sureties was erroneous in awarding "compound interest," or whether it was merely a misprision, the court should not have set it aside at a subsequent term. If it was erroneous as distinguished from a misprision, the court had no power at a subsequent term to correct it; and if it was a mere misprision, it should have been corrected only in so far as it was a misprision, which could have been done without setting aside the whole judgment.

L. J. Moore for appellants.

MT. VERNON BANKING CO. v. HENDERSON HOMINY MILLS.

Filed October 25, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, reversing.

A writ of fieri facias binds the estate of the defendant from the time it is delivered to the officer to execute, and when the defendant at the time the writ is placed in the officer's hands is still in possession of personal property which another claims to have purchased from him, the execution creates a lien upon the property if the prior sale was fraudulent; and one who purchases the property from the fraudulent purchaser between the date at which the writ goes into the officer's hands and the date of the levy takes subject to the execution lien, which is perfected by the levy; and it is immaterial whether the last purchaser had notice of the fraud.

J. L. Dorsey for appellant; Yeaman & Lockett for appellee.

RHODES v. COMMONWEALTH.

Filed November 1, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Judge Yost, reversing.

1. A bawdy house is a house of ill fame, kept for the resort and unlawful commerce of lewd people of both sexes.

2. Letting house to be kept as bawdy house—Not only is the person keeping a bawdy house liable to indictment, but the person letting the house, knowing the purpose for which it is to be kept, is liable to the same punishment as the keeper.

3. A disorderly house is a house the inmates of which behave so badly as to become a nuisance to the neighborhood; and while a bawdy house is a disorderly house, a house may be disorderly without being a bawdy house, therefore, upon the trial of appellant under an indictment against him and another jointly for keeping a bawdy house, it was error to instruct the jury that they should find appellant guilty if they believed he was the owner of the house and let it to his codefendant for the purpose of keeping a "disorderly house."

Montgomery Merritt for appellant; W. J. Hendrick for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. STORMS.

Filed November 1, 1893. Appeal from Garrard Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Railroads—Refusal to accept passenger's ticket—Exemplary damages—Where a passenger on a railroad train asked the conductor before the train started if his ticket was good, and the conductor said to him, "it is worth nothing; you must either pay some money, get off and get another ticket, or I will put you off," whereupon he left the train and purchased another ticket, which was accepted by the conductor. Every element necessary to sustain an action in tort against the company is lacking, as the passenger sustained neither personal inconvenience, sickness, loss of time, loss of capacity to earn money, or physical or mental suffering as a result of the acts

complained of. Therefore, in this action by the passenger against the company to recover damages, he was only entitled to recover the actual damages sustained by him, and the court erred in allowing the jury to give exemplary damages.

2. Same—Where by the default of a carrier a passenger is not carried, or is compelled to pay the passage money or fare a second time in order to be carried, the passenger's remedy is either in assumpsit or tort at his election. The form of the action is unimportant save upon the question of damages, as in actions of assumpsit the damages are generally limited to compensation, while in actions of tort the jury are allowed greater latitude, and in proper cases may give exemplary damages.

Breckinridge & Shelby for appellant; William Herndon for appellee.

WESTERN UNION TELGRAPH CO. v. SMITH.

Filed November 1, 1893. Appeal from Spencer Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Delay in delivering telegram—Damages for mental suffering alone—One to whom a telegraph message has been sent notifying him of the death of his father and the time of burial, which the telegraph company has failed through the negligence of its agent to deliver in due time, may recover damages for injury to his feelings, although unaccompanied by any pecuniary loss or physical suffering.

In this case a verdict in favor of plaintiff against defendant telegraph company for $1,000 on account of mental suffering caused by delay of defendant in delivering to plaintiff a message announcing the death of his father and time of burial is sustained.

2. Same—The fact that the agent made inquiry of several citizens of the town concerning the plaintiff's whereabouts, none of whom knew him, is not sufficient to authorize the court to say that the verdict is not supported by the evidence, there being testimony to show that the agent had, a short time before, been introduced to plaintiff and afterward admitted that he had met him, but had forgotten it.

Richardson, Weissinger & Baskin for appellant; Strother & Gordon for appellee.

KEUBLER v. TAYLOR.

Filed November 1, 1893. Appeal from Livingston Circuit Court. Opinion of the court by Judge Barbour, affirming on original and cross appeal.

1. Guardian and ward—Action to surcharge settlements—As this action to surcharge various settlements made by plaintiff's guardians with the county court is against the guardian alone, the sureties not being joined, the objection that the petition does not allege that the bond was approved by the county court is unavailing.

2. Same—Limitation of actions for fraud—As the action which is in the nature of an action for relief for fraud was brought within five years after the discovery of the fraud, it is not barred by limitation. The plaintiff being young and inexperienced, it was but natural that he should rely upon what his guardian, who was also his stepfather, told him, and he could not reasonably have been expected to at once discover the fraud.

3. Same—Pleading—Objection waived—The allegations of plaintiff in his petition that he did not discover the fraud "until shortly before the institution of the action" was vague and indefinite, but the objection should have been made in the form of a motion requiring plaintiff to make his allegation more specific. But as defendant joined issue upon this allegation, and evidence was taken thereunder, the defect was cured by the judgment.

4. Liability of guardian for interest—As defendant did not use his ward's money he was not chargeable with interest on each amount from the time

he received it; but as he did not try to invest the money, as he should have done, he should have been charged with interest on the balance in his hands at the end of each year, counting from the time of his appointment. But the error in charging him with interest on each amount from the time he received it is more than compensated for in improper allowances.

5. Stepfather not entitled to compensation for stepchild's support—As plaintiff lived with defendant, his stepfather, as one of the members of his family, the relation of parent and child was established, and the defendant could not demand compensation for the child's maintenance and education, there being nothing in the case to take it out of the general rule. Neither can the plaintiff claim pay for his services.

6. The court did not err in rejecting an amended petition which was not tendered until near two years after the institution of the action and after the cause had been submitted for judgment.

J. W. Bush and J. C. Hodge for appellant; John K. Hendrick, W. D. Greer and W. S. Bishop for appellee.

MITCHELL, ASS'EE v. PORTER, &c.

Filed November 1, 1893. Appeal from Carlisle Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Banks—Authority of cashier to accept renewal of note—The cashier of a bank has not, in law, authority by virtue of his position as cashier merely to receive in payment of debts due the bank other notes or things other than money without consulting the president and other officers of the corporation. But he may be intrusted by the corporation with the business of renewing notes and debts of the bank, or the management of the business of the bank. And if this power is given him his agreement to accept one note in payment of another will bind the bank.

2. Same—Such authority need not be expressly conferred, but may be shown by the manner in which the business of the bank was conducted, and by the cashier's repeated dealings with the party who claims that he had such authority. And it is for the jury, under all the evidence, to say whether the cashier was intrusted with such authority or not.

J. C. Flournoy for appellant; J. D. White & Son for appellees.

BELL v. LOUISVILLE, &c., RAILROAD CO.

Filed November 1, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Grounds for new trial—The assignment as ground for new trial "that the court erred to plaintiff's prejudice in its instructions to the jury, in refusing to instruct the jury as asked by him, to all of which he excepted at the time," makes both the giving and refusing of instructions grounds for new trial, it being manifest that such was the intention, and that the word "and" was omitted by mistake.

2. Railroads—Statutory presumption of negligence overcome—In this action against a railroad company to recover damages for the killing of stock on the track by one of its trains the statutory presumption of negligence was overcome by the uncontradicted testimony of the employes in charge of the train, showing that they exercised proper care.

3. Prejudicial errors—As plaintiff had no case the instructions, though erroneous as abstract propositions, were not prejudicial.

Sweeney, Ellis & Sweeney and R. S. Todd for appellant; Helm & Bruce for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. DECEMBER 1, 1893. No. 11

KENTUCKY COURT OF APPEALS.

HOOK, &c. v. JOYCE.

(Filed June 6, 1893.)

Adverse possession of lot in cemetery—When the legal title to a lot is in A. at the time B. buries his dead and erects tombstones therein, nothing more than an easement, giving the right of burial therein, can exist in B. in said lot; but a right to such easement may be acquired and perfected by prescription, so that it will pass by descent to B.'s heirs at law.

The right to such easement, as well as title to the lot itself, may be acquired by fifteen years' continuous actual, adverse possession.

Burial of the dead in a lot in a cemetery, openly and under a claim of right and the erection of tombstones, whether the lot is enclosed or not, is, in legal contemplation, an adverse holding of such easement—actual, adverse and notorious so long as the gravestones stand. No other acts of possession are necessary, nor can there be an ouster of possession by an intruder so long as the gravestones stand, indicating by inscription previous burial of another.

Gilbert & Kahn and R. L. Reeves for appellants.

Sam Houston for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is in the nature of an action of ejectment brought by appellee to recover of appellant a cemetery lot, and upon the trial the court gave the following instructions:

"1. The court instructs the jury that the parcel of land in contest is a cemetery lot for burial purposes within the cemetery ground of the city of Paducah, which was purchased by it and laid out into cemetery lots in 1847, and the lot in contest was con-

veyed by the city to the defendant, W. H. Hook, in 1881, by the deed from it to him exhibited in evidence, and under this deed the defendant became the owner of same and plaintiff can not recover; and they will find for defendant unless they should believe from the evidence that the plaintiff, M. W. Joyce, is the son of Lucinda Joyce, and that plaintiff and Lucinda Joyce, under whom he claims, at any time prior to possession of the defendant, Hook, had held the actual, adverse possession of the lot in contest continuously, claiming to own same adversely to all the world, against all persons for fifteen years. In which event he is the owner of the land or lot and entitled to recover it, and they will find for him unless the jury should further believe from the evidence that defendant Hook thereafter had held the actual, adverse possession of the lot continuously, claiming it as his own, adversely to all the world and against all persons for fifteen years before this action was brought. In which latter event also they will find for defendant; and if they find for plaintiff Joyce, they will find for him the lot in contest, and assess the damages at whatever sum they may believe from the evidence he has sustained, by reason of the removal of the tombstones and the desecration of the graves of his ancestors, not exceeding $100.

"2. The court instructs the jury that the deposit of the dead in the grave in burial gives the heir no interest in the soil; and to constitute adverse possession of a cemetery lot the possession must have been with acts of ownership by the claimant in the preservation and use of the grounds for burial purposes, and under a claim of right as owner, openly and notoriously against all the world and all persons."

The legal title of the tract of land, within boundary of which the lot in dispute is situated, having been in Clark when appellee's father was buried there, and conveyed to the city of Paducah at the time his brother was buried and the gravestones were put there by his mother, no more than an easement in the lot could at any time exist; but such easement, as well as title to the soil, may be acquired and perfected by prescription, the right to which can not be defeated even by the owner of the soil, but will by descent pass to heirs at law.

In this case it appears appellee is the only living child and heir at law of Lucinda Joyce, who, after death of her husband, followed by that of a son, caused tombstones to be placed at their graves, the lot to be enclosed and otherwise cared for, and was afterwards herself buried there.

The court, therefore, correctly instructed the jury that actual, adverse possession of the lot by Lucinda Joyce and plaintiff for fifteen years before entry of appellant gave to them indisputable right to the easement; and the rights of appellant were at the same time described and protected by the further instruction to the jury to find for him in case he had acquired and held adversely the lot continuously fifteen years next before the commencement of the action. For, like the fee simple title to land, an easement, whether acquired by deed or by possession, may be lost by entry and continuous adverse possession for the statutory period of fifteen years by even a tort feasor.

It seems to us, therefore, the first of the two instructions is unobjectionable; but the question arises, what is the nature and extent of the adverse possession required in order to ultimately ripen into a title to an easement of a burial lot?

It seems to us burial of the dead body is the only possession, when claimed and known, necessary to ultimately create com-

plete ownership of the easement so as to render it inheritable; and as long as it is enclosed as a burial place, or, even without enclosure, as long as gravestones stand, marking the place as burial ground, the possession is, from the nature of the case, necessarily, and, therefore, in legal contemplation, actual, adverse and notorious.

Moreover, there can not be an actual ouster of possession by an intruder nor running of the statute of limitation in his favor while such gravestones stand there, indicating by inscription the previous burial of another.

It appears that appellee does not now nor has resided in Paducah for many years; but nonresidence does not divest an heir at law of such easement, the gravestones of his parents being, as long as they stand, conclusive of his claim of ownership as well as right of entry.

The last instruction seems to require, as evidence of adverse possession, some visible acts of ownership by the claimant in the preservation and use of the ground for burial purposes; and in that respect it was rather prejudicial to appellee.

As no error of law occurred prejudicial to appellant, and there is evidence to support the verdict, the judgment is affirmed.

SOUTH'S ADM'R, &c. v. MARCUM, &c.

(Filed June 8, 1893—Not to be reported.)

1. Landlord and tenant—Title—In an action by a landlord against his tenant to recover possession of land, it is immaterial whether or not the landlord had any title to the land at the time the contract of lease was made. And after the tenant has been in actual, adverse possession of such land for fifteen years, it is immaterial whether or not the landlord had any title in contest with even a stranger concerning the right of possession.

2. Same—Vendor and vendee—Estoppel—One who was in possession of land, claiming in his own right under a void patent, in 1846 made a written contract with the holders of the title thereto, by which he became their tenant and continued to hold as tenant until 1860, when he purchased the undivided half interest of one of his lessors, from whom he received a deed in 1867. Held—That the tenant thereafter is estopped by his conduct from pleading against either of such landlords that they in fact had no title in 1846, and that they induced him to become their tenant by fraud.

3. Same—The evidence shows that defendant held as tenant of two joint owners from 1846 to 1860, and thereafter as purchaser and claimant of one-half the land, and either as tenant or joint owner of one of his original lessors as to the other half for such a length of time that his possession, by the lapse of fifteen years from 1846, had ripened into a perfect title to himself to one-half, and his joint owner as to the other half. Held—A deed executed by him alone for a small part of the land, by which he alone undertook to convey it, is not a disclaimer of allegiance to or joint ownership with his co-tenant, and he can not defeat the right of the other joint owner to an undivided half of the land.

Isaac N. Cardwell and Wm. H. Holt for appellants.

J. B. Marcum for appellees.

Appeal from Breathitt Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellants, heirs at law of J. W. South, brought this action in

equity, December 20, 1881, to recover one-half the value of 150 sawlogs, cut on a tract of land of which they claim to own an undivided half, defendant, Edward Marcum, since dead, owning the other half, and for an injunction restraining him from further cutting timber thereon.

Upon motion of the heirs at law of Edward Marcum, who had in the meantime become defendants in his stead, the action was transferred to the ordinary docket for the trial of the issues of title to the undivided half of the land which appellants alleged they own. It appears that about the year 1788 a tract of 116,000 acres of land was patented by the Commonwealth of Virginia to Thomas Franklin, within boundary of which is the tract in question; but, nevertheless, Edward Marcum, prior to 1846, entered, had surveyed and caused a patent to issue in his favor, and was at that date in possession of the tract, one half of which appellants claim; but it appears that Daniel Breck and J. W. South, claiming to be owners, made a written contract at that time, 1846, with Edward Marcum by which he leased the land from them and continued in possession under that lease until 1860, when Breck sold to him his undivided half, and subsequently made to him a deed therefor. But the whole purchase price was not paid until 1872, when, after litigation, Breck, or rather his father and heir at law, recovered a judgment for the balance unpaid of the purchase money.

The defense made by Marcum to the suit of Breck was that he was induced to enter into the contract of lease with Breck and South by their fraudulent representation they had a title to the land. That defense is made in this action by his heirs at law, and as an additional defense they plead adverse possession for more than fifteen years before the action was commenced.

It seems to us that having held the land under that lease as tenant of Breck and South until 1860, when he purchased an undivided half and received a deed therefor in 1867, he is precluded from pleading and relying upon the alleged fraud; besides, that issue was made and tried in the suit brought by Breck for the purchase money in 1867, and determined against him by judgment rendered in 1872.

In order to determine validity of the other ground of defense, which involves a question of law as well as fact, it is necessary to ascertain the relation of the parties and effect of the transactions between Breck and South, as joint owners, and Edward Marcum, their tenant until 1860, when he purchased Breck's undivided half of the land.

On the trial of this case appellants did not undertake to show any title of record to the land, nor did the lower court seem to have regarded it essential for recovery they should do so, although their failure to offer paper evidence of title was improperly referred to in an instruction.

Whether they had or did not have a title in 1846 would have been immaterial in any action they might have instituted for recovery of the land against Edward Marcum, their tenant, and after the expiration of fifteen years from 1846 would have been immaterial in a contest for possession with any other person; for he, as their tenant, had the actual possession of the land, claiming for them to a well-defined boundary until 1860, and thereafter continued in possession until his death, and his heirs at law have done so since. So that as to Breck the possession had, one year after 1860, ripened into a title, good against all claimants, and Marcum did not nor could resist payment of the purchase price of the undivided half upon the ground Breck had no title.

As to South, Marcum held possession as his tenant also until 1860, fourteen years, and whether he thereafter sustained the relation of tenant to him as to an undivided half of the land or that of joint owner, his continued possession enured to the benefit of South, who, at the end of fifteen years, likewise had a perfect title; for there is no evidence whatever that Marcum disavowed allegiance and claimed adversely to South before expiration of fifteen years from 1846, which was in 1861, or that he held and claimed the entire tract adversely to South at all for fifteen years before institution of this action in 1881.

It appears he sold and undertook to convey a small parcel of the tract in 1867, or 1868, but that circumstance, even if it had occurred in such manner as to apprise South that Marcum then held and claimed the entire tract adverse to his title to one-half, was not effectual to divest South or his heirs at law of their entire title and interest, because it took place within fifteen years before institution of this action.

The case, as it appears to us, stands thus: Marcum was, in 1846, in actual possession of the land in controversy, claiming to the extent of a well-defined boundary, but had no title whatever, for his patent was void because the land had been already appropriated and patented to Franklin. He, by a contract of lease then made, became tenant of South and Breck, and as such continued in possession until 1860, and thereafter as purchaser and claimant of one-half, and as either tenant of or joint owner with South of the other half, it is immaterial which, he continued in possession for the full period of fifteen years, and until that possession had ripened into a perfect title of himself to one-half and of South of the other half of the land; and so far from his disclaiming either allegiance to South in respect to the one-half in controversy or joint ownership with him, there is evidence that as late as 1867 he recognized South's title and proposed to purchase his undivided interest, and his sale of a small parcel of the land, which was the first act that could, in any case, be construed as notice to South of the adverse character of his possession, did not occur till 1867, less than fifteen years before commencement of this action.

We think as the record stands appellants were clearly entitled to the peremptory instruction in their favor which was asked, but refused by the lower court.

The judgment is, therefore, reversed for a new trial of the issue consistent with this opinion.

ROBERTS v. COMMONWEALTH.

(Filed June 10, 1898—Not to be reported.)

1. Criminal law—The refusal to grant defendant a continuance was not erroneous or prejudicial since witnesses at the trial testified to the facts expected to be proven by the absent witnesses, and the affidavit for a continuance, which alleged what the absent witnesses would state if present, was read on the trial as evidence so far as it was competent.

2. Same—Decisions concerning challenge to the panel are not subject to exception and can not be considered on appeal.

Irregularities in the selection or formation or summoning of the jury can not be shown by only the affidavit of the accused; the record must be appealed to.

8. Same—Summoning of jury from an adjoining county—An affidavit of an accused that his prosecutors are people of influence and are using money to secure his conviction is not sufficient to authorize the court to order the jury summoned from an adjoining county. The court must be governed by section 194, Criminal Code, in such case.

4. Same—Jury—Under section 193, Criminal Code, the court may appoint persons to summon petit jurors after the regular panel is exhausted in a case.

5. Same—An attorney may state to the jury the nature of the case against defendant, who is not the regular attorney for the Commonwealth.

6. Same—Evidence—Where a witness for accused is asked by the Commonwealth if he is not under indictment for perjury, and he answers affirmatively, a further statement from him that the prosecutors of defendant procured the indictment against him is competent.

But, under all the circumstances of this case, the exclusion of such statement of the witness for defendant was not prejudicial.

7. Same—Evidence of a witness that a relative of defendant, not in defendant's presence, endeavored to induce him to testify in favor of defendant, is incompetent, but its admission did not prejudice accused.

8. Same—View of premises by jury—The trial court did not abuse its discretion in refusing to send the jury to view the ground where the homicide, for which appellant was indicted, occurred.

J. J. C. Bach, R. A. Hurst, J. B. Marcum and W. W. Vaughn for appellant.

Wm. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

On a former trial of this case a demurrer to the indictment was filed and overruled. On an appeal to this court the ruling of the lower court in this respect was approved, and the sufficiency of the indictment will not again be considered.

The appellant, for the second time convicted of murder and sentenced to confinement in the penitentiary for life, complains on this appeal, first, that he was not granted a continuance.

No absent witnesses could throw any light on the killing with which he was charged, but would testify, it is said in the affidavit, to the unsoundness of defendant's mind. There were other witnesses present who did so testify, and the affidavit for the continuance, so far as competent, was read to the jury as evidence. Secondly, it is urged that the court erred in overruling his challenge to the panel of the jury summoned for that term of court. No record evidence of how the panel was obtained was offered, but the affidavit of the defendant contained the statement that it was not selected by the jury commissioners, but by the sheriff and his deputies, all of whom are alleged to be taking an active part in the prosecution of the defendant.

This was not the proper way to show irregularity in the formation of the jury or in the mode of summoning it. There was a record easy of access disclosing the facts. It does not appear when the panel was summoned. It is to be presumed that the sheriff performed this service under the order of court, as provided by section 11 of article 4, chapter 62 of the General Statutes. Moreover, it is distinctly provided by section 281, Criminal Code, and oftentimes so announced by this court, that decisions of the court upon challenges to the panel and for cause shall not be subject to exception.

In this connection we may notice the motion of the defendant to have the jury summoned from an adjoining county. His affidavit discloses that the prosecutors are people of influence, and are using money to secure his conviction. Section 194, Criminal Code, provides that "if the judge of the court be satisfied, after having made a fair effort in good faith for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified persons from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed."

The manner of satisfying himself of this impracticability is by making a fair effort to obtain the jury in the county wherein the case is pending, and certainly the court is not to ignore the plain provisions of the Code and be controlled and guided by the unsupported affidavit of the defendant.

After the regular panel was exhausted the court, under section 198, Criminal Code, designated two other persons to summon petit jurors, who were duly sworn. This was objected to by the defendant, but we perceive no error in thus following the provision of the law cited.

An attorney other than the regular attorney for the Commonwealth stated to the jury the nature of the charge against the defendant. We see no error in this, nor in the fact that one of the witnesses for the Commonwealth is shown to have heard the statement. The court no doubt would promptly have required his retirement had his attention been called to the fact of his presence.

We have examined the rulings of the court carefully in admitting and rejecting testimony, and find no error prejudicial to the substantial rights of the defendant.

The nearest approach to it, perhaps, was in not allowing the defendant to prove by Ransom Roberts that the friends of the deceased had procured an indictment for perjury against the witness, in order to discredit his testimony. The Commonwealth had been allowed, but without objection by defendant, to ask the witness if he was not under indictment for perjury; he answered affirmatively. Whereupon the defendant asked him who procured the indictment, an objection to which was sustained, and it was then avowed that the witness would prove that Sherman Cope and other relatives and friends of the deceased, who were prosecuting the defendant, had procured the indictment against the witness. This evidence was competent as tending to explain away the discrediting circumstances of the indictment; but it appeared that the indictment was found for perjury in the very case then on trial, and growing out of the testimony of the witness on a former trial. The testimony, therefore, involving the alleged perjury, and upon which the indictment was found, was all before the jury in the case on trial.

The statements of the witnesses for the Commonwealth establishing the alleged false swearing on the part of the witness, together with the testimony of the witness alleged to have sworn falsely, were all before the jury. The testimony theretofore pro and con on the subject-matter of the alleged perjury was heard by the jury. They understood all the circumstances and were in an attitude to judge of the effect and weight to be given the testimony of the witness in defendant's behalf as affected, if at all, by the pendency of the indictment against him.

John Frazier was allowed to prove that Abe Roberts, a witness

for the defendant and a relative, had said to him after the killing, and not in the presence of the defendant, that if he (witness) would swear for defendant, that he (Roberts) would help him out of a certain indictment against him. This was irrelevant and incompetent testimony, but not prejudicial.

It abundantly appears from the proof that Frazier was not present at the killing and could have known, therefore, nothing touching it which he could have sworn for the defendant material to his defense. An intelligent jury would not hold the defendant responsible for the supposed imprudences of his friends, especially when they appear incredible and absurd on their face.

The facts testified to for the defendant by Ransom Roberts, and allowed to be contradicted by Centers and others for the Commonwealth, were not collateral, but substantive facts. They involved the manner of killing, and the attitude of the parties at the time of the homicide.

It was not error to permit the contradictory testimony, nor was it improper to allow Robt. Frazier to testify to the statements of Ransom Roberts respecting his intentions on the day of the killing. These intentions involved in no way the action or conduct of the accused, were not made with reference to him and were competent only so far as they might affect the credibility of the witness.

We think that the lower court allowed defendants' counsel every opportunity that was reasonable to present their testimony, and Hopson's proposed testimony came too late.

Whether the jury should be sent to view the ground was a matter within the sound discretion of the court. There appeared to be no complication in the testimony regarding the topography of the country where the killing occurred.

Upon the whole case, as it appears of record, we are of opinion that the defendant had a fair and impartial trial, and the judgment is, therefore, affirmed.

ARMSTRONG v. COMMONWEALTH.

(Filed June 17, 1893—Not to be reported.)

1. Criminal law—Evidence—The evidence conclusively shows that appellant was guilty of murder and discloses no palliating circumstance. Therefore, the judgment of conviction will not be disturbed.

2. Same—Jury—There is nothing in the evidence offered by the accused to sustain his charge that the sheriff who summoned the jury was influenced against him by some interest in a reward offered for the conviction of the murderer of the deceased.

3. Same—Malice aforethought—Instructions—An instruction that malice aforethought means a premeditation to do the act without lawful excuse, and that it is immaterial how suddenly or recently this premeditation is formed, is not erroneous.

4. Same—Instruction—While an instruction defining the phrase "considerable provocation" as meaning an assault and battery of some force, etc., has been condemned as unsound, yet such a definition did not prejudice accused, since the only "considerable provocation" of deceased asserted by him was the violent striking of him on the head with a rock, which was an assault, accompanied by actual battery.

Fairleigh & Straus and J. Alexander Chiles for appellant.

Wm. J. Hendrick and R. F. Peak for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was tried and convicted of the crime of murdering Kate Downs.

The evidence is conclusive that the appellant, a married man, had had unlawful commerce with Kate Downs, and he supposed that she was with child by him, and in order to hide his guilt, and prompted by no other motive, he beat her to death with a sledge hammer.

The evidence discloses no palliating circumstance. His own evidence convicts him of murder. For cool and unmitigated fiendishness, he stands at the head of the list, whose right to the bad eminence there are none to dispute, yet he asks this court to give him a new trial upon the ground that he thinks the sheriff of the county, who had something to do with summoning the jury, might have been influenced against him on account of some supposed interest in a reward that had been offered by some persons, the most of whom were impecunious, himself among the number, for the arrest and conviction of the murderer, notwithstanding the fact that each juror swore that he had no prejudice against the accused and was otherwise competent to serve, and to whom there was no objection.

It is true that one person says that the sheriff claimed a part of the reward. But the evidence, on the other hand, is that the appellant was arrested by the order of a police judge; that the deputy sheriff summoned nearly all the jury and had them in charge during the trial; that the sheriff understood that the subscription, called a reward, was for the purpose of employing a detective to discover the murderer; that he had no agreement or understanding with anyone that he was to get a part of the reward.

The circuit court passed upon the question upon motion for a new trial, and held that the evidence was not sufficient to establish the charge and its judgment must stand.

The judgment is affirmed.

Judge Hazelrigg delivered the following response to a petition for rehearing:

It is true that in Bohannon v. Commonwealth, 8 Bush, 81, it is said that where self-defense is relied on it is error to instruct that "malice aforethought means a predetermination to kill, however suddenly or recently formed in the mind of the person killing." This was said because a lawful killing—a killing in self-defense—might, by this definition, be made a legal murder. "A killing," says the court, "to constitute murder, must be done unlawfully, and unless it be unlawful it can not have been done with malice aforethought, although it may have been predetermined." In this case under consideration malice aforethought is said to mean a predetermination to do the act without lawful excuse, and it is immaterial how suddenly or recently this predetermination is formed.

Thus it will be seen that the precise objection to the definition criticised in the Bohannon case is met and cured by the one given in this case. If the predetermination to do the act is with a lawful excuse, as to defend one's self, it is not malice aforethought in the meaning of the instruction.

Complaint is also made that the phrase "considerable provocation" is defined to mean an assault and battery of some force, etc., and that this definition is condemned as unsound in

Slaughter v. Commonwealth, ante, 230. This is true, but in this case the only provocation asserted by the appellant is that the deceased, upon his refusal to marry her, violently struck him on the head with a rock.

Manifestly, therefore, the definition as given could do no harm. The only provocation to which he testifies was not merely an assault but an assault, accompanied with an actual battery.

Petition for rehearing overruled.

WEHLE, EX'OR v. UMPFENBACK.

(Filed September 21, 1893—Not to be reported.)

1. Will of married woman—Separate estate—A married woman has no power to make a will, except as authorized by statute. In this State a married woman can dispose of her separate estate by will only where the separate estate was secured to her by deed or by devise; but the deed may be a deed of trust assigning personalty as well as a deed of conveyance of real estate.

A married woman, who was the custodian of her husband's earnings, loaned out money and took therefor notes payable to herself for her sole and separate use, without her husband's knowledge or consent. Without his consent she made a will disposing of such choses in action as her separate estate. Held—That the wife had no right to dispose of this estate by will since it was created neither by deed nor devise.

Even if the notes represented property accumulated by the wife alone during her coverture, she had no right to convert it into a separate estate without the consent of her husband, so as to enable her to deprive him of his marital rights by bequeathing it to another.

2. Probate of will of married woman—As a married woman has no power to make a will, except as provided by statute, the burden is on the propounders of her will to show a state of case that would authorize her to execute it and the court to probate it.

Pirtle & Speed for appellant.

Humphrey Marshall and Lieber & Lincoln for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

Johanna Umpfenback, when a married woman, attempted to make a last will, by which she disposed of what she claimed to be her estate, to her collateral kindred, excluding her husband. When offered for probate the husband appeared and objected, because his wife had no power to execute it.

It seems that the husband and wife had no children; were frugal and industrious people, and by close economy had accumulated a considerable estate, the most of it, as the proof conducing to show, the result of the husband's labor. Notes were held by the wife for considerable sums of money, and made payable to her alone, that were afterwards re-executed so as to make them payable to her own sole and separate use. The wife also held by assignment a bond for her separate use for the payment of money secured by mortgage, and her devisees claim that because these choses in action were held in the manner indicated, and made payable as she directed, that she could dispose of them by will without her husband's consent, and divest him of his marital rights.

It is plain from the proof in this case that the wife was the

custodian of the earnings of the husband, and that an estate of the value of many thousand dollars, created by his daily labor, had been disposed of by her without his knowledge.

It by no means follows that because the wife holds personalty to her separate use she may dispose of it, or that at her death it passes to her kindred to the exclusion of the husband.

A separate estate in a married woman may be created in this State by gift, by deed, devise or even by parol of personal property, but it was never contemplated by any legislature to vest in the wife the power to dispose of any personal estate thus held, whether by writing or by parol, by will to the exclusion of her husband. The statute in regard to wills alone confers upon a married woman the right to make a will, and provides: "A married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will." There must be a deed or a devise creating this separate estate before the wife can dispose of it. This right is not restricted to a deed for real estate, as the ordinary meaning would imply, but there may be a deed of trust securing realty or personalty to the wife, made by a third person during or prior to the marriage, or made by the husband and wife during the marriage or by antenuptial contract. The wife assumed in this case to create a separate estate out of what belonged to her husband without his knowledge, and that had been acquired by him during the marriage, or if, as counsel assumes, the wife had accumulated this property during the existence of the marital relation she had no right to convert it into separate estate without the consent of the husband, so as to enable her to deprive him of his marital rights. Such was never contemplated by the framers of the statute empowering a married woman to make a will, and the facts of this record indicate very plainly the necessity for such a construction, and affords ample reason for restricting the exercise of such a power by a feme covert within the legislative intent.

As a married woman has no power to make a will except as provided by this statute, it was incumbent on the propounders to show a state of case that would authorize its probate. The case of Hickman v. Brown, 88 Ky., 377, settles the question in this case.

The judgment below is affirmed.

STEARNS v. CHENAULT, &c.

(Filed September 21, 1893—Not to be reported.)

Deeds—Evidence—Seal to certificate of notary—The deed to plaintiff, which was executed and acknowledged before a notary public in the State of Ohio, was competent and ought to have been admitted as evidence, although the seal of the notary attached to his certificate contains only the letter "O." (indicating the State of Ohio) following the words "Hamilton county," when the statute of Ohio concerning such seals requires a notarial seal to contain the word "Ohio."

Wood & Day for appellant.

J. B. White for appellees.

Appeal from Powell Court of Common Pleas.

Opinion of the court by Judge Pryor.

This was an action of ejectment, and the court below on the hearing excluded from the jury a deed for the land in controversy, leaving the plaintiff without title. That instrument connected his title with that of the patent under which the plaintiff claimed, and the excluding of it as evidence entitled the defendant to a verdict.

The only question arising necessary to be decided springs from the seal of the notary public, annexed to his certificate to the deed made the plaintiff by one Mitchell. The acknowledgment purports to have been made in the State of Ohio, before a notary of that State. It is objected that the notarial seal does not show upon it the devices required by the statute of Ohio, and that without such a seal the certificate, although proper in other respects, is defective.

The seal is required to be one inch and one-fourth in diameter, surrounded by the words notarial seal, ——— county, Ohio, and shall contain as much of the coat of arms as exhibits the mountain range, the rising sun, the bundle of arrows and the sheaf of wheat.

The original deed, with the seal and certificate, is before us for inspection. It was recorded in the proper county in 1882, and the impression made upon the paper in affixing the seal is dim, and scarcely perceptible with the naked eye. With a magnifying glass the mountain range, the rising sun and the arrows may be seen, and the words "notarial seal, Hamilton county, O.," surrounding the seal. Instead of the word Ohio we find the letter O., and this seems to be the only departure.

Some of the letters, in giving the name of the county, are scarcely visible, but at the same time it is evident that the seal was affixed, and in compliance with the law of Ohio. There is nothing in the record showing the certificate or seal to be a forgery, and upon its face it bears the evidence of a genuine certificate.

The name of the notary is given, and if fraudulent it will be easy for the defense to make it appear. Deeds executed out of the State, and within the United States, when certified under his seal of office by a notary to have been acknowledged as required by the statute, may be admitted to record. The deed offered in evidence having been so certified, a certified copy should have gone to the jury as evidence of title.

The judgment is reversed and remanded for a new trial, and for proceedings consistent with this opinion.

RICHARDSON'S ADM'R, &c. v. BANTA.

(Filed September 21, 1893—Not to be reported.)

1. This appeal was taken and the transcript filed as required by law.
2. An appeal will not be dismissed for want of an assignment of errors, the provisions of the Civil Code concerning assignment of errors having been repealed.
3. Settlement of decedent's estate—Demand—Interest—Where an administrator within one year after his appointment files his petition in equity for a settlement of the estate of his intestate, and the case is referred to a commissioner to audit claims against the estate, a demand by a creditor, as required by section 53, article 2, chapter 39, General Statutes, is not necessary in order to entitle him to interest.

Geo. W. Jolly for appellants.

G. G. Gilbert for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hazelrigg.

The provisions of the Civil Code as to assignments of error having been repealed, even in cases respecting the settlement of trust estates and estates of deceased persons, and the appeal in this case, granted by the lower court, having been abandoned, and the one granted by the clerk of this court being within two years from the rendition of the judgment, and the transcript having been filed at least twenty days before the first day of second term of this court next after this latter appeal, the motion to dismiss the appeal for want of an assignment of errors, and because the transcript was not filed as provided by law, must be overruled.

If the dismissal had been asked because the appellant had failed to appear in person or by brief in this court, it might have been sustained.

This was an action to settle the estate of E. T. Richardson, brought by his administratrix, the present appellant. The judgment of the lower court allowing the claims of the appellee, with interest accruing thereon after the death of Richardson, is the matter complained of.

The appellant qualified as administratrix on March 21, 1888, and instituted this action on January 12, 1889. On March 18, 1889, an order was entered, referring the case to the master commissioner for proof of claims, and directing creditors to appear before him before the 25th of March, 1889, and prove their claims. The appellee did so, and his three notes, amounting to some $6,400, were allowed. No demand was necessary. (Grey's Adm'r v. Lewis, 79 Ky., 456.)

The interest was properly allowed. "Where an administrator, within one year after his appointment, files his petition in equity for a settlement of the estate of his intestate, and the case is referred to a commissioner to audit claims against the estate, a demand by a creditor, as required by section 58, article 2, chapter 89, General Statutes, is not necessary in order to entitle him to interest." (Hamilton's Adm'r v. Tarlton, Receiver, 8 Ky. Law Rep., 471.) That case is conclusive of this.

Judgment affirmed.

CARTER v. McDANIEL.

(Filed September 21, 1898.)

1. Dower—Seisin of husband—A widow is not entitled to dower in land in which her husband, when living, owned an interest in reversion or in remainder, unless there was seisin, in fact or in law, by the husband at some time during the coverture.

Where a son, while married, and after his father's death, held possession of land of his father that was assigned to the father's widow as her dower, possession of which he was compelled to surrender to the widow by order of court, died before his father's widow, the son's widow is entitled to no dower interest in such land because, although her husband held an interest in remainder therein, he never had any seisin, in fact or in law, of such land.

2. Same—Mortgage—A mortgage by a son of his undivided interest in his deceased father's estate embraces all interest the son holds in such estate, whether in possession, reversion or remainder; such a mortgage sufficiently describes land of the father assigned to his widow as dower so as to embrace the son's interest in reversion in the lien thereby created.

Lieber & Lincoln for appellant.

James P. Gregory and R. Reid Rogers for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

Harrison McDaniel died intestate in 1875, leaving Ashbrine McDaniel, his widow, and James T., Ida May and Wesley McDaniel, children.

Harrison McDaniel's administrator filed a suit for the settlement of his estate as insolvent. Ashbrine McDaniel, the widow, intervened by cross petition, asking the allotment of dower in her deceased husband's land. About forty-eight acres were allotted to her, and the balance of the land was sold to pay the debts of the deceased. After the allotment of dower the widow sold the same to the appellant, Carter, who held the possession of it until her death, which was in 1890, and also held the possession of it after her death.

In 1876 James T. McDaniel mortgaged his undivided interest in said land to the appellant to secure the payment of $100, and interest at the rate of 10 per cent. At the time of the allotment of dower said James was in the possession of said tract of land, and was forced to surrender the possession of the dower right by order of the court.

His death occurred before that of Mrs. Ashbrine McDaniel, the appellant being in the possession of the dower land at the time. To the appellant's suit to foreclose said mortgage the widow and heirs of James T. McDaniel resisted his right to recover, the widow claiming dower and the heirs their inheritance, and that the appellant was liable to them for rents. A trial of the case resulted in the dismissal of the appellant's petition and judgment over against him for rents.

The objection to the mortgage that the dower interest is not sufficiently described is not well taken, for the mortgage does mortgage James T. McDaniel's undivided interest in his father's land, which includes any and all interests that he owned therein, whether in possession, reversion or remainder.

Was the widow of James McDaniel entitled to dower in the said reversionary interest of her husband? It is well settled by this court that where there is no seizin in fact or in law by the husband at any time during the marriage in a remainder or reversionary interest, his widow is not entitled to dower therein. (Butler v. Cheatham, 8 Bush, 594, and the cases there cited.)

But the widow contends that inasmuch as her husband held the possession of the land before dower was allotted, that fact entitles her to dower. We do not think so, because he held the possession subject to the superior and paramount right of the widow to the possession of any part of the land that might be assigned to her as dower, and when she obtained the possession of the same by virtue of this paramount right the inchoate right to the dower ceased. He stood in the same attitude that he would have done if he had lost the right of possession by a superior title.

The appellant having held the possession of the dower after the death of Mrs. Ashbrine McDaniel, he is responsible to the heirs of Harrison McDaniel for the rent of the same as long as he held it after her death.

The case is reversed, with directions to subject one-third of the dower interest to the appellant's mortgage debt, and if he has

lost the right to interest on the debt to disallow the same, and to disallow the widow's claim to dower and to offset the appellant's debt with the amount of rent that may be due the heirs, and for further proceedings consistent with this opinion.

CURTIS v. LOUISVILLE CITY RY. CO.

(Filed September 23, 1898.)

1. A street railway company may make reasonable rules for the regulations for its drivers and its passengers. Rules forbidding drivers to receive fares of passengers and requiring the passenger to place his fare in the box of the car within one block, and authorizing the driver to call policemen to his assistance when it is necessary to preserve order or enforce the rules of the company, are reasonable and must be observed by passengers

2. Street railways—Retention of fare by driver by mistake in making change—Where the driver of such railway company, while making change for a passenger, retains by mistake five cents (the fare for one passage) the passenger can not be compelled to put another five cents in the box to pay his fare. The driver has retained the fare and may deposit it in the box if he so desires. And if, upon refusal of the passenger to pay another fare, the driver calls to his aid a policeman and ejects the passenger, the company is liable in damages therefor.

3. Same—Evidence—The request of the driver to such passenger to put a fare in the box, and his statement that the company would correct the mistake at its office, only a short distance away, are admissible in mitigation of damages in an action by the ejected passenger against the company.

W. O. Harris and Thomas Lawson for appellant.

Humphrey & Davie for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

The appellant took passage on the defendant's street car, to be conveyed from his home to his law office in the city of Louisville. The fare was five cents. The appellant not having the exact change, handed the driver a fifty-cent piece in lieu, and requested the change for it. The driver gave him a package of nickels, marked fifty cents. The appellant immediately, and in the presence of the driver, though his attention at the time may have been directed to the front, counted the nickels, and they were short five cents; and while still in the driver's presence, and with the nickels in his hand, he called his attention to the shortage, and demanded the correct change. The driver, not denying the shortage, refused to give the appellant the correct change, saying that he had received it at the appellee's office, just as it was, as fifty cents, and that if there was a shortage the company must correct it, not he.

He then requested the appellant to put five cents fare in the box, and when the car reached the next station, which was but a few minutes run, the office would correct the mistake, and that he (the driver) would go with him to the office and make a statement in reference to the mistake. The appellant declined to put the five cents in the box, or to pay in any way an additional sum, saying that the driver, having refused to give him back the correct change, had retained the fare, and that he would not

pay it again. Thereupon the driver called a policeman and caused him to eject the appellant from the car.

The appellant brought this suit to recover damages. The first trial resulted in a verdict for $1,000 in damages, which was set aside by the court, and on second trial the court instructed the jury peremptorily to find for the appellee. The appellant appeals.

By the rules of the appellee a passenger that gets on a street car must deposit his fare in the box within one block. The driver must not receive the fare, etc. When it is necessary to enforce the rules or to preserve order the driver may call to his assistance a policeman. These rules are reasonable, and the appellant was aware of them.

The question is, was he, under the circumstances, excusable for not putting the nickel in the box as required, and was the driver excusable for ejecting him on account of his refusal?

The appellee furnishes its drivers with change, fixed up in small sums in packages, for the accommodation of passengers in the payment of their fare. The drivers are charged with the change, and any shortage in the sum with which they are charged falls upon them unless corrected by the company.

It seems that the fear of the driver that the company would not make good to him the shortage, and that the loss would fall upon him if he made up the shortage, caused him to prefer that the company should make the correction.

It admits of no doubt from the evidence that the package contained a shortage of five cents. Now, as said, the appellee's rules were reasonable, and a passenger refused to comply with them, the appellee would have the right to expel him for noncompliance; but the question is, could the driver, who was authorized to make change on behalf of the appellee, and for its benefit as well as that of the appellant, retain a nickel by mistake belonging to him, and then compel him to put the fare, another nickel, in the box because the rule of the company required the appellant to put his fare in the box?

Now, the appellant had placed the nickel in the hands of the driver, and he was authorized under the rules to put it in the box. He received the half-dollar, and retained five cents too much, the amount of the fare, and he would not give it to the appellant, but required him to pay his fare in addition.

The retention of the five cents was, under the circumstances, a payment of the fare which the driver could have put in the box had he desired; but whether he put it in the box or not did not concern the appellant because he had paid his fare, and was entitled to his ride.

The mistake as to the amount that was in the package was that of the appellee and not that of the appellant, and this court adheres to the rule intimated in L. & N. R. R. Co. v. Wilsey, 83 Ky., 511, which is sustained by other cases, that if a passenger has paid his fare, and the company fails to furnish him with proper evidence of the fact, he is, nevertheless, entitled to his ride because the mistake is that of the company, and the passenger ought not to be prejudiced by it; and that the company is responsible for any damages that the passenger sustains in consequence of being ejected by the company.

The request of the driver to adjust the matter is competent to go to the jury in mitigation of damages, and what occurred after the appellant got off the car should not go to the jury unless it was done by the appellee's authority.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SIMPSON v. SIMPSON'S EX'ORS.

(Filed September 28, 1893.)

1. Antenuptial contract—When enforced against the wife—An antenuptial contract, when entered into in good faith, and free from fraud or imposition, will be upheld in equity, however inadequate the pecuniary consideration. But in such contracts the parties do not deal at arm's length, they stand in a confidential relation, and each must exercise the greatest good faith toward the other. And if the provision made for the support of the wife in such a contract is inequitable, unjust and unreasonably disproportional to the means of the husband, equity will require strong proof of fairness and good faith in its execution before it will be enforced against her.

In this case the husband was worth $15,000 or $20,000, and a good business man; the wife had no property, no business experience and very little education. Two days before the wedding, and in the absence of and without consultation with her friends, the husband induced her to agree to an antenuptial contract which deprived her of nearly all her marital rights in his estate. The nature and value of his estate was not explained to her, nor was the effect of the contract explained. She was under complete control of him, both before and after marriage. Held—That equity will not enforce the contract against her. It should be set aside and her marital rights in his estate enforced.

2. A father has a right to make a reasonable provision for his children by advancement, and this is no fraud on the marital rights of his wife.

G. G. Gilbert for appellant.

Fairleigh & Straus and L. A. Weakley for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Pryor.

This action in equity was instituted in the Spencer Circuit Court by Mattie S. Simpson, the appellant, against the executors and devisees of the last will of her husband, John R. Simpson, for the purpose of cancelling an antenuptial contract, made between the appellant, whose maiden name was Mattie Swope, and John R. Simpson, the testator, on the evening preceding their marriage. The provisions of the will were renounced by the appellant, and she now claims she is entitled to dower and her distributable share of the personalty of her husband's estate upon the ground that the marriage contract is a nullity.

The marriage contract was entered into the 16th of July, 1888, was signed and acknowledged by both parties and recorded. The marriage took place the day after the contract was entered into, and the parties lived together as man and wife until his death in September, 1891, and this action instituted in October of that year.

The husband, at the date of the marriage, was possessed of an estate of $15,000 or $20,000, and the wife's estate not exceeding in value $100.

He was about 68 years of age and was a shrewd business man, and from the proof in this case economical to an extent that deprived his wife at least of the comforts and necessaries of life; converted his wife into a cook soon after the marriage; clothed and controlled her as one would the most abject menial in his service. The wife, at the date of the marriage, had passed the age of 50; was uneducated and without any business experience. The testator (her husband) at the date of the marriage, had two

children, both sons, and each with a family and in comfortable pecuniary circumstances. The agreement to marry having been entered into, the day fixed for its consummation was Thursday, the 17th day of July, 1888. The friends of the appellant, who lived in Louisville, were invited to the wedding, and were having such clothing made for the appellant as suited the occasion. On the Tuesday preceding the day the marriage was to take place in the evening, the testator called on the appellant and suggested the making of a marriage contract, to which the appellant, it seems, assented. He left the house and in a short time returned with his lawyer, who had prepared the contract in his office as directed by the testator, and had it read over once to the appellant, and being asked if she understood it and her response being "yes," the parties both signed it, and the clerk being present took the acknowledgment and recorded the instrument.

As soon as the contract was signed and the witnesses to it had returned, the testator insisted on their marriage taking place at 5 o'clock the next morning (Wednesday) the day preceding the day to which the friends had been invited. Her wedding outfit had not been sent from Louisville, but still the testator was persistent and the woman compelled to marry, as the testimony shows, with such scanty clothing as would doubtless have proved distasteful to those of less mature years than the parties to the alleged agreement. At the time this contract was signed, or before, there was no explanation made to the appellant as to the nature of the marital rights she was about to surrender, or the character and extent of the estate of the testator. He was reputed by some to be a man of wealth, and known by all business men in his town to have been at the time in independent circumstances, but still his estate was invisible or composed mostly of cash and cash notes, and when dealing with this inexperienced and uneducated woman it was his duty not only to have explained to her what rights she was surrendering, but to develop to her, approximately at least, the value of his estate. His lawyer doubtless supposed that the parties understood each other and wrote as directed by the testator, and while no blame is to be attached to him, still here was a shrewd business man, with his counsel on the one side and an illiterate, uneducated woman on the other, the latter parting with all of her marital rights in an estate worth $15,000 or $20,000, for the use of a house and lot worth not exceeding $1,000 for her life only, and the relinquishment by the husband of his interest in her estate that had no value to it. No one of her friends present to advise with her on the subject, and the wedding hastened before friends could arrive to witness the ceremony and bring with them the wedding garments. Why such haste? Was it the fear that those of her friends, more intelligent than the appellant, should arrive and give the appellant the advice she was entitled to have in the first place? The parties were not dealing at arm's length, and while marriage contracts, when entered into in good faith and without fraud or imposition, will be upheld in equity, however inadequate the pecuniary consideration.

As said by the court in Pierce v. Pierce, 71 New York, 157, "the authorities go very far in holding that the court require strong proof of fairness when called upon to enforce an antenuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportional to the means of the husband. The rule undoubtedly is that in such a case every presumption is against the validity of the contract and the burden

of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a subsisting agreement." (71 New York, 157.)

In Rieves' Appeals, 92 Pennsylvania State Rep., 266, the contention was as to the validity of an antenuptial contract between Everhart Rieves and Ruth Shaw. The court said: "It is a sound rule that parties to an anenuptial contract do not, like buyer and seller, deal at arm's length, but stand in a confidential relation, requiring the exercise of the greatest good faith. There must be a full disclosure of the circumstances and property of each. If the provision secured to the wife is manifestly unreasonable and disproportionate to the means of the intended husband, it raises a presumption of intended concealment, and throws upon him the burden of disproving that presumption."

Rieves, in that case, was worth about $60,000, and Ruth without property of any value. It was agreed that in thirty days after his death she was to be paid $5, and that whatever property she had or might acquire should remain hers. In consideration of this she released her marital rights. It was shown in that case that the parties lived in the same neighborhood for many years, and the circumstances of each were known to some extent to the other, but the court held that this general information was insufficient to prove knowledge approaching correctness of the value of his property, and that it was not such a contract as a court of equity should enforce. The case before us presents as strong facts and circumstances, regardless of the testimony of the appellant, much of which is incompetent, for refusing to enforce this agreement, as the case of Rieves' appeal. In each case the evidence of fair dealing that must characterize all such contracts is wanting, and here it is manifest that this woman, if advised by friends, or if of sufficient intelligence to have known her marital rights, would never have entered into a contract that reduced her to a mere menial and left her, at the death of her husband, in the possession of a little cottage, disrobed of its furniture, and she deprived of means of support and maintenance.

On the evening of the execution of the contract, with her wedding day fixed and her friends invited, she was powerless to resist the will of one so vastly her superior, and to whom she had pleged her affections upon the promise that he would protect and care for her during life. As powerless at that time as she was to resist, after the contract was signed, his importunities to marry him in the absence of her friends at 5 o'clock the next morning. She was subordinated to his will, as the facts show, both before and after marriage. She surrendered to him in a short time, on his demand, the keys of the pantry and the meat-house, and was supplanted in everything that pertained to her domestic duties, and even handed over to him, at his instance, the small sum of money that was derived from the sale of her vegetables in the garden. It is a case of the exercise of an unlimited and tyrannical control by the husband over the wife's action from the date of the marriage contract until his death.

The case of Forwood v. Forwood, 86 Ky., —, is relied on by both sides as authority in this case. In that case the answer of the allegations made by the wife were denied and no proof whatever taken, and this court said: "If it appeared the appellant was inveighed into making this contract by unfair means, such as taking advantage of her ignorance, her affections, or concealing the truth from her, we would not hesitate to set the contract aside. But such a case does not appear. She fails to allege she did not

know the nature and legal effect of the contract, nor does she allege she did not make it freely and voluntarily."

It is clear the court further said "that she understood its meaning, for the proof is clear she was a woman of intelligence and possessed a clear and cool judgment, and she knew that her intended husband was a man of reputed wealth, and three years after her marriage she stipulated in writing drawn by herself that she was not entitled to dower in her husband's realty because she had relinquished it by the antenuptial contract."

The cases are entirely dissimilar, with the exception that each purports to be an antenuptial contract. After a most careful reading of the record we have no hesitation in concluding that the appellant was imposed on by her intended husband, and that, with promises of relieving her from the burden of a daily labor that was necessary by reason of her poverty, she was induced to become his wife and to execute a contract that is full of fraud, as shown from the facts connected with its execution.

There are some averments in the petition as to moneys or property the testator had advanced his children, with a view of defeating the claim of the wife for dower and distribution. We think a man of his means had the right to give to his children the sums alleged, and that this was no fraud on the wife.

As to the property, including lands, choses in action, money, etc., belonging to him at his death, the widow is entitled to dower and her distributable share as widow. The antenuptial contract is directed to be cancelled and the marital rights of the appellant enforced.

The judgment is reversed and the case remanded for proceedings as herein indicated.

CRAWFORD v. COMMONWEALTH.

(Filed October 24, 1893—Not to be reported.)

Criminal law—Instructions—On the trial of the appellant for murder, where the evidence shows that the homicide was committed with a pistol, the instruction limiting defendant's right to avail himself of the plea of self-defense, if he provoked the difficulty, is not erroneous in the use of the phrase "brought on the conflict," the language of the instruction being "brought on the conflict by attacking the deceased with a pistol," the purpose and manner of bringing on the difficulty being made clear.

Riddell & Riddell for appellant.

Wm. J. Hendrick for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant shot and killed Hampton Chambers in Lee county in March, 1892. He was indicted for manslaughter, tried, convicted and sentenced to confinement in the penitentiary for two years. His motion for a new trial having been overruled, he has appealed to this court, complaining of the instructions given the jury by the court.

The proof discloses the parties to have been unfriendly for some months prior to the fatal meeting. By the Commonwealth

it is shown that the appellant, upon approaching the mill where the deceased was engaged in drinking whisky with some companions, drew his pistol, advanced upon the deceased and fired the first shot.

The witnesses for the defendant show that the deceased, upon discovering the approach of the appellant, jumped to his feet, drew his pistol, advanced on the appellant and fired the first shot.

We think the jury reasonably could have found from the proof either (1) that the appellant commenced the conflict, or (2) that the deceased commenced it, or (3) that the parties voluntarily begun it upon discovering the presence of the other.

The instructions of the court cover these different aspects of the case, and are accurate statements of the law applicable thereto.

It is thought by counsel that the expression "brought on the conflict," found in instruction No. 3, is open to the objection pointed out in Robinson v. Commonwealth, 10 Ky. Law Rep., 914, and other decisions of this court, where similar language is condemned as being too general, and as not indicating the manner or intent with which the difficulty is "brought on;" but here the language is "brought on the conflict by attacking the deceased with a pistol," thus leaving no doubt of the manner or purpose of bringing on the conflict.

We think, too, that the instruction on the subject of the conflict being mutual, meets an aspect of the case shown by the testimony of a number of the witnesses.

Each combatant upon discovering the presence of his enemy, advanced to the fray with pistol in hand. There was no compact to fight, but certainly there is evidenced a mutual intendment to fight out the differences to a finish.

The judgment is affirmed.

SMITH v. COMMONWEALTH.

(Filed October 26, 1893—Not to be reported.)

1. Appeals—Weight of verdict in criminal cases—A judgment of conviction in a criminal case, based upon the verdict of a properly instructed jury, will not be reversed as contrary to the evidence unless there is no evidence to support it.

2. Same—Verdict not authorized by evidence—The verdict finding appellant guilty of manslaughter is not authorized by the evidence, and the judgment must be reversed.

Appellant and his brother were indicted for the murder of J., who was killed by one thrust with a knife. The brother was tried, convicted of manslaughter and sentenced to the penitentiary, where he died. Appellant was subsequently tried and convicted, not as an aider or abettor, but as a principal. Appellant and his brother could not both have made the one thrust with a knife, by which deceased was killed. The evidence showed beyond all doubt that the brother killed deceased, therefore, the verdict convicting appellant is erroneous.

This court will not assume that appellant was found guilty because he aided his brother, when he was not charged as abettor nor any instruction given on that subject, and when the decided preponderance of the evidence shows that appellant was not guilty as an aider or abettor.

John T. Hays for appellant.

W. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Pryor.

This court has no power to reverse a judgment of conviction in a criminal case, when based upon the verdict of a jury properly instructed, unless there is an absence of evidence to support it, and we understand counsel representing the defense as insisting there is no testimony to support the finding.

A careful reading of this record must impress the mind with the belief that the accused has not had a fair and an impartial trial, and that a conviction has been had when the testimony establishes innocence rather than guilt.

John Smith and William Smith, brothers, were indicted in the Knox Circuit Court for the murder of James Jones. It is charged in the indictment that Jones was killed by being stabbed or cut by the defendants with knives or some other sharp instruments.

John Smith was first tried and found guilty of manslaughter; was confined in the State prison under the judgment of conviction, and there died.

His brother, William Smith, the appellant, being subsequently tried for the same offense, has also been convicted of manslaughter, and is now asking a reversal.

The deceased was killed by one stroke of the knife, as the testimony for the State as well as the defense clearly shows, and if the cutting was done by John, Wm. Smith, the present appellant, his brother, is not guilty.

There is no effort to convict him as aiding and abetting in the killing or an instruction to the effect that if he did so he was as much guilty as if he had inflicted the fatal stab.

The facts leading up to the assault resulting finally in James Jones losing his life are, in substance, these: Two men, one by the name of Jarvis and the other Gilbert, were talking of betting on an election when James Jones, the deceased, stepped up encouraging Jarvis to bet, and without provocation slapped Gilbert in the face, and when Gilbert offered to resent it he was taken away by his friends, the appellant being one of them, when a sort of general fight took place between John Smith, who has been convicted, and several others. John Smith was knocked down by some one, and when down was kicked and stamped upon by one Hibbard and two or three of the Jones.

The accused, Wm. Smith, was not in that fight, but is seen, after his brother John had crawled from under these men, as the Commonwealth proves, in conjunction with his brother John, cutting at James Jones, the deceased, with a knife, the testimony for the State showing that both the Smith brothers had knives and were striking at the deceased.

John C. Jones, a brother of the deceased, says that John Smith struck at him with a knife and this brought on the difficulty, and that he did not see Wm. Smith, the accused, at the time. After John Smith had gotten loose from those beating him, all the witnesses who were engaged in the fight on the side of the Jones' say that John and Wm. Smith both made at the deceased and were attempting to cut him.

Wm. Smith's theory of the case is, and such was his defense, that he had taken Gilbert away to prevent the fight between Gilbert and James Jones and did not return or attempt to do so until his brother John had taken the life of the deceased by cutting him with a knife.

The testimony for the State as well as for the defense is that

the deceased, who died in a short time, states that John Smith had killed him, and on the trial of John Smith the latter was sworn as a witness and stated that he did the cutting with the knife, his plea being self-defense.

Witness after witness of those present and not engaged in the fight, and who were in the position to see all that transpired, say that after John Smith had managed to get away from those who were beating him, and was, in fact, running, he met the deceased and each had knives, James Jones striking the first blow, when Smith cut him and Jones exclaimed: "I am killed;" that John Smith and James Jones, the deceased, were alone engaged in the fight with knives.

The substance of the statements of all the witnesses for the defense is embraced in the statement of one witness: "That John Smith was knocked down three or four times. Hibbard, John C. and Gillis Jones were fighting him, some were stamping him, some kicking him and others hitting him with their fists. Smith got loose somehow and ran up the road, and as he came around to the crowd at the lower side of the road he and James Jones, the deceased, met with their knives, Jones striking the first blow and Smith making the thrust that killed Jones."

This statement is made substantially by eight or ten others, and when you add to this the statement made by the deceased that he was cut by John Smith, and the sworn statement of John Smith that he did the cutting, and for which he was convicted, there is no room left for doubt as to who, in fact, inflicted the wound that killed Jones.

We do not mean to say that both of the defendants might not have been convicted of manslaughter upon a proper state of case and for the same offense, but what we do adjudge is that upon the issue of not guilty and the law of the case as presented to the jury, there was no evidence to support the finding.

The instruction to the jury was, in substance, "that if Wm. Smith did the cutting with malice, etc., he is guilty of murder, and if done in sudden heat and passion, he is guilty of manslaughter."

On this law applied to the facts the jury had to decide whether or not the cutting was done by the accused. The decided preponderance of the testimony is to the effect that Wm. Smith was not present when the cutting took place, but this court can not reverse for that reason; then the question arises, if the accused was present, did he inflict the fatal blow?

Not a single witness for the Commonwealth states that the stab or blow taking the life of Jones was made by the accused, but nearly all of them state (and they were, for the most of them, engaged in the fight against the brother of the accused and related by blood and marriage to the deceased) that both John and Wm. Smith were striking at the deceased with knives, and this left the jury to determine which of the two struck the blow that killed the deceased, and if there was nothing else in this case the verdict would be sustained; but it is shown in evidence that John Smith was tried and punished for the same offense. By the Commonwealth, that the deceased stated that John Smith had killed him, and by the defense it is proven that John Smith, when tried, upon his oath stated that he did the cutting, and in addition to this assuring testimony is that of ten or more disinterested witnesses for the defense, who state in substance that the accused was not present, and by four or five of these witnesses that the deceased said at the time that John Smith had killed him. There can be no rational doubt in any man's mind

after reading this record that John Smith did the cutting, and when tried and convicted for the offense by a jury of the same county upon his own admission, coupled with the declaration by the deceased that John Smith killed him, there is no mode of escape from the conclusion that this verdict is not sustained by the testimony.

The jury may have believed the statements of those hostile to Wm. Smith, and excluded as incredible the statements for the defense, made by eight or ten disinterested witnesses, as to the person guilty of striking the blow that took Jones' life. This they had the right to do, but when confronted with the former conviction of John Simth and the proof as to the confession and the dying statements of the deceased, heard by witness after witness, and taking place at the very moment of the cutting, there can be no rational doubt as to who did the cutting.

It may be argued that if an aider and abettor in the commission of the offense, he was equally guilty with his brother, and the jury having found him guilty of committing the act, the verdict should stand. He was not tried as aiding in the commission of the offense, and, besides, the decided weight of the evidence is that he was not present at the time of its commission, and for that reason this court will not hold that, although the accused has been convicted of the cutting, still, as the proof shows him to have been present, aiding in the commission of the offense, his substantial rights have not been prejudiced by the verdict. Such a view of the case can not be entertained, the preponderance of the testimony showing the accused was not in the fight, but away from the scene of the conflict when his brother took Jones' life.

The proof is clear that the appellant did not inflict the wound, and this court will not imply guilt upon an issue not made, and if made the weight of the evidence, as it now appears, being for the defense.

The judgment is reversed, with directions to award a new trial and for proceedings consistent with this opinion, and if a retrial is had it should be upon the question as to the accused aiding and abetting in the commission of the offense.

WATSON v. COMMONWEALTH.

(Filed October 28, 1893—Not to be reported.)

1. Failure of the court to follow the language of the statute in its instructions on the trial of a defendant for a statutory offense is not a ground for reversal, provided the instructions embraced the meaning of the statute.

2. Harsh or abusive language is not a justification for an assault or for an attempt to take life, although proof of the use of such language by a deceased may reduce the crime of his slayer from murder to manslaughter.

3. Malicious shooting and wounding—Instructions—On the trial of one for willful and malicious shooting and wounding, with intent to kill, when the evidence shows that the parties engaged in the mutual combat did so willingly on account of previous harsh language used by one of them, it is error to instruct the jury that defendant can not avail himself of the plea of self-defense in case he brought on or sought the difficulty. The instruction was misleading in that the jury may have understood that the use of harsh language was a bringing on of the difficulty that would deprive accused of a right to the plea of self-defense.

John K. Hendrick, J. W. Bush and John Worten for appellant.

Wm. J. Hendrick for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Pryor.

Under this indictment the appellant was found guilty of willfully and maliciously shooting John Minitree and wounding him, with the intention to kill him.

On the trial the testimony on both sides developed the fact of a mutual fight between these parties, both no doubt willing and anxious to engage in mutual combat. The court gave instructions 1, 2, 3, 4 and 7, that embraced the law of the case, but in instructions 5 and 6 made the guilt of the accused depend upon whether or not he brought on or sought the altercation in the first place, when from the testimony it was a quarrel between the two, originating from some misunderstanding as to what a third party had said in relation to a fight the father of accused had with one Dungan Alley.

It is immaterial in a case like this who brought on the trouble or sought the quarrel. If one becomes angry with another and uses harsh language merely, it is no justification for the party aggrieved by it to take the life of the one speaking the words, or even to inflict a blow with his fists. When death ensues the circumstances may reduce the offense from murder to manslaughter, but the use of bad language is not a provocation that will in law justify an assault.

The jury may have supposed in this case that the language used by the one party or the other was seeking the difficulty, and, if so, the right of self-defense no longer existed.

The simple question in the case is, was this shooting and wounding done by the accused willfully and maliciously, with the intention to take the life of the injured man? If so, it is a felony. If in sudden heat and passion, it is a misdemeanor.

If the shooting was in self-defense, the accused is not guilty.

Instructions 1, 2, 3, and 7 cover the law of the case. The only criticism they are subject to is the failure of the court to follow he language of the statute, but this is no cause for reversal, as the language used embraces the same meaning.

Judgment reversed for a new trial in conformity with this opinion.

KENTUCKY SUPERIOR COURT.

BAMBERGER, BLOOM & CO. v. BANK OF TUPELO.

(Filed October 11, 1893.)

1. Bills of exchange—Negligence of bank in demanding payment and giving notice of dishonor—Where a bill of exchange, payable on December 15, 1888, "fixed" (the effect of which was to disallow grace), was indorsed to a bank for collection, a demand of payment by the bank on the 15th of December was sufficient to exonerate the bank from the charge of negligence in failing

to present the bill for payment, although the officers of the bank when they made the demand supposed that the acceptors were entitled to three days of grace, there being no evidence that they agreed to wait three days or any other time.

2. Same—The bank's relation was that of a mere collecting agent, and the plaintiffs who drew the bill, and to whose order it was made payable, must, in order to recover of the bank, not only show negligence on its part, but must show loss as the result of that negligence.

3. Same—As the next day after the dishonor of the paper was Sunday, the bank had at least until Monday to mail notice to plaintiffs of the dishonor, and as a notice mailed on that day would not have reached them in time to have enabled them to sue out an attachment earlier than they in fact did, they were not damaged by the failure of the bank to give the notice, there being no intervening parties to whom they had the right to look upon the failure of the acceptors to pay the bill.

W. B. Dixon and Humphrey & Davie for appellants.

Geo. B. Eastin for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

In November, 1888, Bamberger, Bloom & Co., of Louisville, Ky., drew their bill of exchange on Ballard, Mitts & Co., of Tupelo, Miss. The bill was payable on December 15, 1888, "fixed" to the order of Bamberger, Bloom & Co., and was endorsed by them to the bank of Tupelo for collection. The bill was sent to the bank of Tupelo, and was accepted by Ballard, Mitts & Co., and the bank undertook, for a valuable consideration, to collect it.

It is conceded that by the use of the word "fixed" in the bill that grace was disallowed, and that the bill was due and payable on the 11th of December. The bill was never paid.

On the 18th of December other creditors of Ballard, Mitts & Co. sued out attachments against them, and all their property was subjected to these attachments, leaving nothing out of which Bamberger, Bloom & Co.'s debt could be made, though they, on the same day, but after the other creditors had attached, also sued out an attachment.

In this action by Bamberger, Bloom & Co. against the bank of Tupelo, after setting out the bank's undertaking to collect the bill, they allege that the bank negligently failed to present the bill for payment on the 15th of December, and did not present it for payment until the 18th; that on the 15th Ballard, Mitts & Co. were good for the said debt and were willing and able to pay the same, and would have paid it had it been presented on that day. They say that their debt was, in consequence of this negligence, not collected, and they seek to hold the bank responsible for the amount.

The bank denied the material allegations of the petition, and averred that it did present the bill for payment on the 15th of December, and that payment was refused.

In a reply the plaintiffs allege that if the bill had been presented and not paid on the 15th, that they would have sued out an attachment on that day and would thus have secured their debt. The court below having dismissed the plaintiffs' petition, they prosecute this appeal.

Upon the issue as to whether the bill was presented for payment on the 15th, the evidence is conclusive that it was so presented—not only in the morning, but also in the afternoon. But

counsel insist that this demand was not a proper one, for the reason that the bank, without authority, extended the time of payment three days beyond the 15th.

We fail to find any evidence to justify this contention. The officers of the bank say that though the bill was payable "on December 15, 1888, fixed," they thought Ballard, Mitts & Co. were entitled to three days of grace; but this does not alter the case if the bill was in fact presented for payment on the 15th. No matter what they thought of the legal effect of the word "fixed," they swear, and are corroborated by Ballard & Mitts, that payment was demanded on that day, and there is no evidence that they agreed to wait three days or any other time.

The cashier and Ballard state that in the afternoon of Saturday, the 15th of December, and after the demand had been made in the morning, the cashier again took the paper to Ballard, Mitts & Co.'s place of business and, referring to the demand in the morning and their failure to pay, said that he brought it over for collection, when Ballard replied that he would see what he could do for it Monday. Demand was again made on Monday, and still again on Tuesday, when, the bill not having been paid, the bank notified the plaintiffs by mail.

So upon the issue as tendered by the petition the judgment of the chancellor is fully sustained by the evidence. It is, however, insisted in argument that if the bank had given prompt notice to the plaintiffs of the failure of Ballard, Mitts & Co. to pay the bill when it was presented on the 15th, they could and would at once have sued out an attachment, and thereby have secured their debt.

We doubt whether this question is presented by the pleadings —it being referred to only in a reply to an amended answer, and then in the nature of a denial of affirmative matter pleaded by the defendant—the averment being that if the said acceptance had been presented on the 15th, and it had not been paid, the plaintiffs would have then sued and attached, not that if they had received notice of the nonpayment on the 15th they would have had time to attach and save their debt, thus adhering to the issue presented in the petition that no demand was made on the 15th, which was the gravamen of the complaint; but as counsel have argued the question at considerable length, we will treat the case as if the question was properly presented by the pleadings.

It will be observed that the note was indorsed to and sent to the bank for collection merely. Ballard, Mitts & Co. were the debtors, and Bamberger, Bloom & Co. were the creditors. There were no intermediate parties who would be released by the failure to promptly demand payment, or to give notice of nonpayment. The bank's relation was that of a mere collecting agent, and the plaintiff, in order to recover, must not only show negligence, but must show loss as the result of that negligence.

If there had been intervening parties, drawers or indorsers, whom Bamberger, Bloom & Co., as holders of the paper, would have had the right to look to in the event of the failure of Ballard, Mitts & Co. to pay it, after due presentment and demand, it is conceded that the bank would have had until the day after the paper was dishonored to mail notice to Bamberger, Bloom & Co., and that if that day happened on Sunday, as it did in this case, that it would have had until the followng day, Monday, in which to mail the notice.

It is also admitted that if the notice had been sent out in the first mail of Monday, which was the 17th, it could not have

reached the plaintiffs at Louisville until 2:30 o'clock in the afternoon of Tuesday, the 18th.

As it happened the plaintiffs had an agent in Tupelo on the 18th, and this agent sued out an attachment for the plaintiffs for this debt, which was placed in the officer's hands at 3 o'clock in the afternoon of the 18th of December, but nothing was realized from it, other attachments having obtained precedence. Thus it is manifest that if the notice had been given as required by the law, it could have been of no service to the plaintiffs.

Whether, if the plaintiffs had received notice of the nonpayment of the bill on the 18th of December, they would, without further investigation, have at once ordered an attachment, or whether they would have made the order by telegram or by mail, are matters of the wildest conjecture; but waiving all this, and assuming that they would have acted at once and in the most expeditious manner, it is plain that they could not possibly have gotten out an attachment earlier than they did.

We see nothing in the case that required the bank to take extraordinary steps in the collection of this debt. It is true that Goldsmith, who represented the plaintiffs, says that Clark, the president of the bank, in the latter part of October or first of November, told him that the debt was rather unsafe, and that it would be well to get "our" money out of the firm. Still Mr. Goldsmith, notwithstanding he says he was uneasy about the debt, gave no instructions of any sort to the bank, but, on the contrary, in his letter to it written on the 19th of November and inclosing the draft in question and another due December 1st, said: "We desire to have the matter in shape so that it will be paid before Christmas."

We are of opinion the plaintiffs have failed to make out a case, and the judgment of the chancellor dismissing their petition is, therefore, affirmed.

BAYLESS STOVE CO. v. McCARTHY'S ASS'EE.

(Filed October 18, 1893.)

1. Evidence as to transaction with decedent—A stockholder in a corporation can not testify for the corporation as to a transaction with one who is dead when the testimony is offered to be given. (From this Judge Yost dissents.)

2. Same—In this action by a corporation against an assignee for the benefit of creditors, the defendant having testified for himself as to acts done and statements made by the assignor, who was dead when the testimony was given, it was competent for a stockholder in the plaintiff corporation, who was present on the occasion referred to by defendant, to testify in rebuttal as to all that was said and done on that occasion.

W. H. Mackoy for appellant.

Tarvin & Hall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barbour.

Some time prior to June, 1891, John McCarthy, a merchant, made an assignment of his property for the benefit of his creditors to T. W. Sanford. Included in the property received by the assignee were a lot of stoves. To recover the possession of these

stoves the D. B. Bayless Stove Company, a corporation, instituted this action against the assignee, claiming that they were merely delivered by it to McCarthy for sale on commission.

A judgment was rendered for the defendant, from which the company prosecutes this appeal. Before the trial of the action McCarthy died, and the court refused to allow the company to prove by D. B. Bayless, a stockholder in the company, and its president and general manager, the verbal contract made by him for the company with McCarthy when the stoves were delivered to him; and also refused to allow it to prove by George Fennell, also a stockholder in the company, and one of its salesmen, a conversation had by him with McCarthy some time before the action was brought. The correctness of these rulings of the court present the principal question for our decision. The provisions of the Code bearing upon the question are embraced in sections 605 and 606: "Subject to the exceptions and modifications contained in section 606, every person is competent to testify for himself or another. * * *

"No person shall testify for himself concerning any verbal statement of or any transaction with or any act done or omitted to be done by * * * one who is dead when the testimony is offered to be given."

In construing these provisions of the Code it was said, in Hardin v. Taylor, 78 Ky., 593, that "the evident design of section 606 was to place parties to an action, or those interested therein, on an equal footing when their rights are being passed upon."

And in Apperson v. Exchange Bank of Kentucky, 10 R., 948, the court said: "While we do not think it was intended to limit the operation of section 606 to the testimony of a person a party to and directly interested in the result of a suit with the representative of one who is dead, yet to render such testimony incompetent it must appear that it will have the effect to directly or indirectly benefit the person giving it pecuniarily."

But the contention is that a stockholder in a corporation has not such an interest in the result of the action as disqualifies him under section 606; and the case of the C. & L. R. R. Co. v. Ingles, 15 B. M., 687, is relied upon as decisive of the question. But it will be observed that that decision is based upon section 675 of the Code of 1854, which is omitted from our present Code. That section was as follows: "An officer or inhabitant of a county, city or town, or an officer, member or trustee of a corporation or religious society, although a party to the action, shall be competent to testify on behalf of such county, city, town, corporation or religious society."

It is true that the court, in addition to citing the section and holding that it applied to all corporations, including railroads, argued that the interest of the stockholder was so remote and so contingent that it should not disqualify him as a witness. This argument, it seems to us, was made to demonstrate what the court doubtless regarded as a wise provision of the Code, than as a conclusion independent of the provision. Counsel, however, takes a different view and contends that this section of the Code was but declaratory of the common law rule. But Mr. Greenleaf, in his work on Evidence, is of a different opinion. He says, in sections 331 and 333, that "corporations are classed into public or municipal and private corporators;" and, speaking of municipal corporations, says: "But considering the public nature of the suits in which they (the inhabitants) are parties, and of the interest generally involved in them, the minuteness of the private and formal interest concerned, its contingent character and the almost certain failure of justice, if the rule was

carried out to such an extent in its application, then inhabitants are admitted as competent witnesses in all cases in which the rights and liabilities of the corporation only are in controversy. But where the inhabitants are individually and personally interested it is otherwise." And then he divides private corporations into "pecuniary or moneyed institutions, such as banks, insurance and manufacturing companies and the like, and institutions or societies for religious or charitable purposes," and says "the members or stockholders in institutions created for private emolument, though not parties to the record, are not, therefore, admissible as witnesses; for in matters in which the corporation is concerned they, of course, have a direct, certain and vested interest which necessarily excludes them."

When the opinion in the C. & L. R. R. Co. v. Ingles was written almost all the corporations in the State were of a public character, such as railroads, turnpikes, banks, etc. There were comparatively few corporations created for the purpose of carrying on a mercantile business, and the interest of the stockholders was not so manifest as in cases of mere private institutions, when, as is generally the case, the persons conducting and managing the business are practically the only stockholders. But in recent years these conditions have changed, and in the large cities a great bulk of the dry goods, grocery, hardware and other businesses are incorporated, and it is not infrequent that such is the case in the towns and villages of the State. In these cases the persons carrying on or managing the business are generally the principal if not exclusive stockholders. Their interest is as direct and as positive as if they were carrying on the business as partners. Mr. Bayless and Mr. Fennell, had they been partners in the business they were conducting when the transactions and conversations were had with McCarthy, no matter how small or contingent the interest of either in the result of the suit, neither could have testified as to these transactions or conversations after McCarthy's death. Now, does it accord with the common rules of construction or with reason and justice that the mere fact that they have organized themselves into a corporation render them competent witnesses to testify to matters about which they could not have testified had they been doing business as individuals, when their interest is just as certain and just as direct? We can not think so. They represent the corporation not merely as agents, but as the parties directly interested in its welfare. Their business, or that of their corporation, is conducted solely for pecuniary profit. Their profit as stockholders lies in the successful prosecution of this business. Their interest in the profits is as clear, as distinct and as certain as the interest of the members of a firm are in the profits of the partnership.

The legislature, as said in Hardin v. Taylor, intended to place parties to an action, or those interested therein, on an equal footing when their rights are being passed upon. To allow parties having the interest that Bayless and Fennell have in the result of this case to testify under the circumstances stated would establish a rule which would operate as an unjust and unreasonable discrimination in favor of parties doing business under articles of incorporation, and we do not think that the letter or the spirit of section of the Code quoted either demands or permits it.

We are, however, of the opinion that the court erred in refusing to allow Bayless to testify in rebuttal. Sanford, the assignee, had testified as to what took place, and as to the conversation between Bayless, McCarthy and himself when the goods were appraised. Upon what principle this evidence was excluded we

can not understand. Here is a party, the assignee, testifying as to what Bayless did or failed to do, and what he said in his presence, and Bayless is denied the right of contradicting it and his statement excluded because McCarthy, who was also present, was dead when the testimony was offered. Balyess unquestionably had the right to testify as to all that was done and said on that occasion, i. e., in the presence of Sanford.

The same may be said as to the evidence of Bayless offered in rebuttal to that of Seely. In fact all the evidence offered by Bayless in rebuttal was competent, and should have been admitted.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

PURDY, &c. v. WOOLSON-SPICE CO., &c.

Filed November 15, 1893. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Yost, reversing.

Sufficiency of levy of attachment—While to constitute a good levy upon personal property under an attachment the officer must do such acts as would subject him to an action of trespass but for the protection of the writ, yet the officer may leave the property in the possession of the debtor or any other person, the person in whose custody it is left holding it as the bailee of the officer. Therefore, the mere fact that an officer who has levied an attachment upon personal property leaves it, by the direction of plaintiff's attorney, in the defendant's possession, is not prima facie proof of a fraudulent collusion between the attaching creditor and his debtor, nor does it discharge the attachment or in any way affect its validity.

John H. Barker for appellants; L. P. Fryer for appellees.

CLARK, FOR USE, &c. v. GALLOWAY.

Filed November 15, 1893. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Yost, reversing.

Payment—Where, in an action upon an assigned note, the court refused to allow the defendant credit by the amount of a note which he had transferred to plaintiff's assignor as a payment on the note sued on, the plaintiff had no right thereafter, without defendant's consent, to apply the transferred note as a credit upon his judgment, and the fact that he had done so constituted no defense to a subsequent action by defendant to recover of plaintiff's assignor the amount of that note, which it was alleged he had collected and failed to account for.

Leslie T. Applegate for appellants; W. M. Rardin and James F. Ellis for appellee.

McDONALD, &c. v. McDONALD'S ADM'R, &c.

Filed November 15, 1893. Appeal from Ballard Circuit Court. Opinion of the court by Judge Barbour, affirming.

Distribution of amount recovered under foreign statute—Where an administrator recovers in this State under the statute of another State for the loss of the life of his intestate in that State the amount recovered should be distributed as provided by the statute under which the recovery is had. The

case is not that of an ordinary distribution of the personal estate of an intestate, where the law of the domicil of the decedent governs.

J. D. White & Son and W. G. Bullitt for appellants; J. M. Nichols and I. E. Conley for appellees.

HARTMAN'S ADM'R v. HARTMAN.

Filed November 15, 1893. Appeal from Carroll Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Deputy clerk can not take depositions—The provision of the Civil Code naming the clerk of a court as one of the officers before whom depositions may be taken does not confer upon a deputy clerk the power to take depositions, the duty being quasi judicial.

2. Evidence to establish gift—Although the holder of a certificate of deposit indorsed it and delivered it to another without saying anything at the time, yet, as he had immediately before expressed to another person his intention of giving it to the person to whom he delivered it, the whole may be regarded as one transaction, and there was sufficient evidence to authorize the submission to the jury of the question as to whether a gift was intended.

John D. Carroll and H. K. Bourne for appellant; J. A. Donaldson for appellee.

HILL & HILL v. JOHNSON, &c.

Filed November 15, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Attorney and client—Right of action in personal representative for loss of intestate's life by negligence of another—J. and wife entered into a contract with appellants, attorneys at law, whereby they employed appellants to institute suit for damages against a railroad company on account of the killing of a son of the wife by a former marriage, appellants to receive an amount equal to one-half of all recovered or received. Thereafter F. qualified as administrator of the decedent and compromised with the company, receiving from it on account of the killing $2,000. This action was instituted by appellants against J. and wife and F., alleging that as much as $10,000 would have been recovered from the railroad company, and that the mother was entitled to the whole amount received from the company, the deceased having died unmarried and without issue and having no brothers or sisters. They further allege that they investigated the law and facts of the case and were preparing to have an administrator appointed in order that they might, through his agency, effect a settlement with the company, when, without their knowledge or consent, and with fraudulent intent, defendants procured the appointment of F.; that F. has the $2,000 in his hands and that they are entitled to a lien upon it for the amount they claim as their fee. Held—That the petition is not good for several reasons. The mother of the decedent, who was the sole beneficiary, being a married woman, could not bind herself by the contract relied upon; and even if she could there are no facts alleged which show that she or her husband derived any benefit from the services rendered by the appellants. Besides, neither she nor her husband, nor the two together, had any cause of action, as the right of action was in the personal representative by virtue of section 250 of the present Constitution, which applies, the action having been instituted in August, 1892.

Hill & Hill for appellants; R. S. Todd for appellees.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. DECEMBER 15, 1893. No. 12

KENTUCKY COURT OF APPEALS.

HARGIS & EASTIN v. LOUISVILLE GAS CO.

(Filed April 13, 1893—Not to be reported.)

Attorney and client—Contingent fee—Quantum meruit—The Louisville Gas Co. had and claimed exclusive right to manufacture and sell gas in the city of Louisville until December 31, 1888, when its corporate existence was to cease, but by a judgment of the Kentucky Court of Appeals, in a suit filed against it by the Citizens Gaslight Co., the Louisville Gas Co., had been enjoined from asserting or claiming such exclusive right. From this judgment an appeal was taken by the Louisville Gas Co. to the Supreme Court of the United States, and this appeal was pending on June 10, 1885, and in the ordinary course of business would not have been decided for two or three years, or perhaps not before the expiration of corporate existence of the Louisville Gas Co. On June 10, 1885, said company employed Hargis & Eastin as assistant counsel for a certain fee of $500 to assist in the appeal pending in the Supreme Court, and the company further agreed to pay H. & E. $25,000 on December 31, 1888, on condition that if, by determination of said appeal or by other proceedings, H. & E. should exclude the said Citizens Co. from making and vending gas in Louisville from October 1, 1885, until December 31, 1888, said sum was to be paid. By the efforts and advice of H. & E. the case in the Supreme Court was advanced on the docket, and decided in favor of the Louisville Gas Co. in December, 1885, only two months after October 1, 1885. Before October 1, 1885, H. & E. prepared a petition to enjoin the Citizens Gas Co. from making and vending gas in Louisville, which the gas company refused to have filed on the advice of its other counsel. In this action by H. & E. to recover the $25,000 conditional fee, Held—

First. Such fee can not be recovered because the rival company was not excluded from making gas on October 1, 1885, and not until December, 1885.

Second. The rule that he who prevents a thing being done shall not avail himself of the nonperformance can not be applied to this case, since the application for injunction prior to October 1, 1885, would have been very hazardous and probably resulted in failure.

Third. H. & E. may recover, however, for the actual value of their services in advancing the appeal in the appellate court and in preparing the petition for an injunction.

Simrall & Bodley, Muir & Heyman, O'Neal, Jackson & Phelps, Thomas H. Hines and Hargis & Eastin for appellants.

Humphrey & Davie, Helm & Bruce and Dodd & Dodd for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Hargis & Eastin brought this action to recover of Louisville Gas Company amount of the conditional fee stipulated for in the following contract: "The Louisville Gas Company agrees to pay Thomas F. Hargis and George B. Eastin, as assistant counsel, the sum of $500, certain and without condition, as attorney at law in the appeal now pending in the Supreme Court of the United States between said company and the Citizens Gaslight Company, and for his (their) services in any other judicial proceedings which may be necessary to said case, the aforesaid sum to embrace and include all expenses the said Thomas F. Hargis and George B. Eastin may be at personally.

"Said Louisville Gas Company further agrees to pay said Thomas F. Hargis and George B. Eastin $25,000, said amount to be paid on the 31st day of December, 1888, on the following condition that if, by the determination of said appeal, or by any proceedings they may institute or aid in instituting for said company, the said Citizens Gaslight Company shall be excluded from making and vending gas in the city of Louisville, and to its citizens from the 1st day of October, 1885, until December 31, 1888.

"June 10, 1885. LOUISVILLE GAS CO.
"Witness—George W. Morris. HARGIS & EASTIN."

In order to ascertain the proper meaning of that contract and rights and duties of the parties, it is necessary to look to the character and attitude towards each other of the two rival gas companies, and also the cause of litigation between them then pending by appeal in the Supreme Court of the United States.

In 1869 a charter, being renewal of a previous one, was, by act of the general assembly, granted to Louisville Gas Company, containing exclusive privilege of manufacturing and vending gas in that city, for a period ending December 31, 1888. But in 1872 a charter was granted to Citizens Gaslight Company, containing also privilege of manufacturing and selling gas there, though it was not exclusive.

In 1879 the last-named company instituted an action in equity, alleging the claim of the former to the exclusive right to manufacture and supply gas in the city of Louisville, cast a cloud over plaintiff's title to its franchise, prevented it selling stock to raise money with which to work under its charter, and judgment was prayed for that defendant had no such exclusive right as asserted, and for an injunction restraining it from asserting such exclusive rights.

Upon final hearing judgment was rendered dismissing the action. But upon appeal to the Court of Appeals that judgment was, June 10, 1883, reversed and the cause remanded, with directions to the lower court to issue a perpetual injunction restraining defendant from claiming or exercising the exclusive right to manufacture and supply gas to the city and citizens of Louisville. Fifty-nine days thereafter a writ of error to the Supreme Court was sued out. But no supersedeas was applied for or issued; and, consequently, the mandate of the Court of Appeals

was sent to the lower court and judgment was there entered as indicated in the opinion delivered.

The case thus stood on the Supreme Court docket when the contract here sued on was made, and it seems to be conceded it would have probably remained undisposed of for two or three years longer, if not to the end of the period for which Louisville Gas Company was chartered, but for the order to advance the case for trial, that will be hereafter considered.

The evidence shows it was at date of the contract in question very important for Louisville Gas Company to have an early decison by the Supreme Court, and also in the meantime, using language of the contract, to exclude the Citizens Gaslight Company from making and vending gas in the city of Louisville and to its citizens which it was then preparing and at liberty to do, for not only was stock of Louisville Gas Company depreciated on account of suspense and uncertainty about the Supreme Court decision, but competition with the rival company would probably, and did, in fact, subsequently cause price of gas to be lowered. Besides, it was important to have the Citizens Gaslight Company destroyed or so crippled by that decision as to be out of the way when needed legislation was to be applied for.

In view of these circumstances there need be no serious question about the true meaning and purpose of the contract, if the language was not itself too plain to be misunderstood. Though by the terms of the contaret Hargis & Eastin were, for the certain fee of $500, to render service as assistant counsel in the appeal then pending in the Supreme Court, and also in any other judicial proceeding which might be necessary in said case, it is manifest such was not the main purpose of the president of the company in employing them, nor the principal service expected of them, for, in addition to Goodloe & Roberts, their regular attorneys, two others were employed to argue the case before the Supreme Court.

What Hargis & Eastin advised President Baxter could be done, and what they undertook to do as condition of the fee of $25,000, was to exclude by legal proceedings the Citizens Gaslight Company from making and vending gas from October 1, 1885, to December 31, 1888. And the scheme by which it was to be accomplished was first obtaining a supersedeas on the pending appeal, and thereafter, by an independent action, to enjoin the Citizens Gaslight Company manufacturing and vending gas pending the appeal, to be followed, in case of favorable decision of the Supreme Court, by a perpetual injunction.

Accordingly in March, 1885, Hargis, Goodloe and Morris, a director of the company, went to Washington and, having given notice to the opposite party, applied to a judge of Supreme Court for a supersedeas, but it was not granted, the parties agreeing, however, that an order might be made, which was then done, advancing the case and fixing November 1, 1885, as the day for submission of it for decision.

The supersedeas, if granted, would obviously not have had the effect to exclude the Citizens Gaslight Company from manufacturing and selling gas. But the advice of Hargis & Eastin, which was, however, not concurred in by their associate counsel, and subsequent effort to obtain an order of supersedeas, resulted in a decision of the Supreme Court reversing judgment of the Court of Appeals in December, 1885, two or three years before it would have been otherwise rendered. And if that decision had been rendered prior to October 1, 1885, we think Hargis & Eastin would, by a fair construction of the contract, have been entitled

to the conditional fee, for it would have been thus and thereby determined, finally and conclusively, that the Louisville Gas Company had the exclusive right to manufacture and sell gas in that city, and that the Citizens Gaslight Company had no legal right to do so, and that decision might have been inevitable and immediately followed by a perpetual injunction if applied for, as, of course, it would have been their duty to do, a court having jurisdiciton, just as any other judgment ascertaining and determining the rights of two litigants may be rendered effectual or enforced by ancillary or supplemental proceedings. But although Hargis & Eastin, by their advice and efforts in causing the case in the Supreme Court to be advanced, had rendered great service to their client, the result of the order was to make impossible a decision prior to October 1, 1885. Consequently the only way left by which they could exclude the Citizens Gaslight Company from making and vending gas from that date, and thereby become entitled to the conditional fee, was by injunction, which had, of course, to be applied for in a different and distinct action. And both the language of the contract and extrinsic evidence show that the parties contemplated that as the proceeding to be resorted to for the purpose.

It is proved that not long after the order to advance the case was made Hargis & Eastin advised Morris, then president of the company, Baxter being dead, that an action to obtain the injunction was, in their opinion, a feasible and proper remedy, and informed him of their readiness to bring it. In fact, at his request, they did prepare and submit to him a petition for that purpose. But he refused to authorize such action to be instituted; and as it was necessary in order to maintain the action for him to swear to the petition and give the injunction bond required in such case, he had power, which he exercised to prevent any action being instituted or injunction obtained. Thus they did not nor could peform the condition by October 1, 1885, upon which, according to the contract, they were to become entitled to the fee of $25,000.

It is a general rule, more than once sanctioned, and applied by this court, "that he who prevents a thing being done shall not avail himself of the nonperformance which he occasioned." (Majors v. Hickman, 2 Bibb, 217; Marshall v. Craig, 1 Bibb, 886; Jones v. Wallace, 14 B. M., 162.)

In the first cited case the action was on an obligation given by a person indicted for murder in consideration of agreement of an attorney to attend his trial and defend him, but a condition of payment was that defendant should be acquitted and discharged. But no trial took place because the defendant failed to appear. Nevertheless, upon allegation and proof of the attorney being present and ready to perform the required service, the rule quoted was held to be applicable.

But it seems to us this is not such case as the doctrine can be fully applied to. For in view of the decision of the Court of Appeals, adverse to the claim of their client, then in full force and unreversed. Hargis & Eastin could not conscientiously advise President Morris either that a court of equity would certainly grant the injunction, or that, if granted, the decision of the Supreme Court would not be such as to necessarily involve dissolution of it and consequent liability on the injunction bond for a large amount of damages. Besides, it is manifest the contract was made in contemplation of the advice and co-operation of Goodloe & Roberts, regular attorneys of the company, with Hargis & Eastin in respect to any proceeding that might be commenced for exclusion of the Citizens Gaslight Company from

manufacturing and selling gas in Louisville, and such being the case it does not seem to us the Louisville Gas Company was bound to consent to or authorize any proceeding for an injunction to be instituted by Hargis & Eastin, against which Goodloe & Roberts advise and with which they refused to co-operate, especially when it would have involved risk of liability for damages, without, in opinion of Goodloe & Roberts, a reasonable prospect of being available. It, therefore, follows that, as the condition upon which Hargis & Eastin would be entitled to the fee of $25,000 was not performed, and the Louisville Gas Company is not legally liable for its nonperformance, they can not recover it.

But it seems to us they are fairly and justly entitled to recover full value of services rendered, aside from what they agreed to do in respect to the appeal pending in the Supreme Court and other judicial proceedings necessary to that case, and for which they were promised and have received the certain fee of $500; for, in addition to causing the case to be advanced for trial in the Supreme Court, which would not have been done but for their advice and suggestion, Hargis & Eastin, upon faith of compliance by the company with its part of the contract, and cooperation of its regular attorneys in the effort to procure the injunction, obviously contemplated by the parties to the contract, expended time and labor in advising and consulting with their client and its other attorneys, and even went so far as to draft, at request of Morris, the president, a petition in the expected action for the injunction.

It may be, as argued by counsel, that there are not in the petition filed in this case, substantive averments authorizing recovery at law upon a quantum meruit, nor distinct prayer therefor. But it seems the defendant and appellee in this case, by operation of its charter, succeeded to the rights, and, as alleged, holds in trust the property of the former company, now defunct, with which Hargis & Eastin, plaintiffs and appellants, made the contract in question, and for that reason the action was brought and determined in the chancery court. It, therefore, seems to us clear that as the chancellor had jurisdiction, it was not only in his power, but his duty under the prayer for general relief, to adjudge to the plaintiffs whatever they were in equity and justice entitled to.

Wherefore the judgment is reversed and cause remanded for proceedings consistent with this opinion.

(Extended opinion—Filed November 4, 1893.)

It was evidently not contemplated by parties to the contract in question as at all probable the Supreme Court would, in due course of business, reach and try the case of Louisville Gas Company against Citizens Gaslight Company before December 1, 1888, when corporate existence of the former would end; consequently the only way by which the latter could be "excluded from making and vending gas in the city of Louisville and to its citizens" on and from October 1, 1885, was by means of provisional remedies. To accomplish that object Hargis & Eastin advised application for an order of supersedeas, to be followed by action for injunction restraining Citizens Gaslight Company making and vending gas, pending appeal in the Supreme Court, and they were employed principally for that purpose.

But the effort to obtain the order of supersedeas, though abortive, resulted in an order for advancement and submission of the case November 1, 1885. And it was actually tried and decided in favor of Louisville Gas Company in December, a few days more than two months after October 1, 1885, and more than three

years before expiration of corporate existence of Louisville Gas Company. Thus the provisional remedies contemplated by the contract became of little, if any, practical value to Louisville Gas Company. But it is plain the case would not have been advanced and tried by the Supreme Court but for advice and efforts of Hargis & Eastin to apply for an order of supersedeas. And, therefore, while they did not nor could stop Citizens Gaslight Company making and vending gas by the identical day mentioned in the contract, the result followed their advice and efforts, even thereafter and in time to subserve the purpose of their employment by Louisville Gas Company. So that as they acted in good faith throughout, and did not obtain the injunction contemplated, simply because their previous service had rendered it unnecessary and not desired by the company, it seems to us the chancellor should and is now directed to fix value and allow for their services in procuring or causing the case to be advanced and tried in the Supreme Court, as well as for advice and service in respect to the action for an injunction. But as the condition upon which the company agreed to pay the fee of $25,000 was not performed, the simple criterion of recovery now is the value of services rendered without regard to the contract, except as to the fee of $500 already paid.

WAYMAN, &c. v. WAYMAN.

(Filed May 25, 1893—Not to be reported.)

1. Contract by aged parent to compensate child for caring for him—Evidence—Where an aged and infirm father, about seventy years of age, stated to his son, who was talking of leaving the father's farm, "I want you to stay here and take care of me; there will be property enough to pay you when I am gone," and the son did so take care of the father for thirteen years thereafter and managed his farm for him, after the father's death such declaration of the father can not be considered as creating an enforcible contract against his executors or heirs. Such a contract should not be hastily implied from loose conversation where a natural duty exists on the part of the child to care for the infirm parent.

2. Same—The son with his wife lived on the farm of his father and used it as his own, and took care of the father and his wife for thirteen years. The annual rental value of the farm was $300. During the last five years of his life the father was an invalid, and required so much of the son's time and attention that none or very little of it was left for the business of the farm. In this action to settle the father's estate, Held—That the son will be allowed compensation for caring for the father only during the last five years of his life. He should be allowed $400 per year, making $2,000, and charged with $300 per year rent during the same period, or $1,500, leaving $500 due him. He should also be compensated for medicine furnished and physician's bills paid for the father during these five years.

Hallam & Myers for appellants.

O'Hara & Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

Stanton Wayman, when about seventy years of age, became diseased with rheumatism and other bodily ailments, and by reason of his condition was unable to work his farm or attend to business. His son, G. S. Wayman, controlled and managed his

farm for thirteen or fourteen years prior to his father's death, and for the services rendered by this son and his (the son's) wife this claim was presented in the court below in the settlement of the old man's estate, and allowed.

About thirteen years before the death of Stanton Wayman the appellee, G. S. Wayman, who was then living with his father, talked of leaving the place, saying that it took all he made to pay doctor's bills and debts. The old man replied: "I want you to stay here and take care of me; there will be property enough to pay you when I am gone." To this the son assented, at least he remained on the farm and used and controlled it as his own from that time to his father's death, a period of thirteen years.

This conversation between the father and son is established by a single witness, after the lapse of thirteen years, and is relied on as establishing a contract, to be fully executed, so far as the consideration is mentioned, at the death of the father.

In the case of Reynolds v. Reynolds, 13 Ky. Law Rep., 793, the testimony was that "the daughter should be well paid for her services," and the facts of that case presented as meritorious claims as this in almost every particular.

To construe such declarations by the parent as amounting to a contract would enable almost every child to assert claims against the father's estate, and soon cause the child to forget the natural obligation he is under to support and maintain his aged parents in their declining years, and a court should never be hasty in implying a contract from such loose conversation in cases where this natural duty on the part of the child exists.

We can not affirm the judgment below upon the idea that this statement of the father evidenced a contract, to be performed by his executors or heirs after his death.

While the old man was sick he was furnished with medicines from time to time and physicians' bills paid and other items of necessaries by the son, all of which were embodied in this account. The son and his wife lived with the father and his wife on the farm and were all supported from it, and the widow of the father is now complaining of the exhorbitant allowance made her son under what is termed the contract. The appellee was allowed $5 a week for a part of the time and $10 a week after the old man became helpless; is also allowed for every item of expense incurred by him for the father until the amount is sufficient to swallow up the entire estate.

The widow of the old man and six children survived him, all of whom, except the appellee, are resisting this claim. The proof shows that this land was worth, by way of rental, $300 per annum, and it is manifest that any child of the decedent would have taken care of the two old people for its use. They could have rented it out and lived in comfort on the income, and to say that the entire estate is to be consumed for the attention and services rendered them by the appellee is not sustained by the testimony.

This case differs from the Reynolds case in this particular: Towards the close of the old man's life, for the last five years preceding his death, he became a lunatic, or rather imbecile, and required much attention, and more than the son could well give him. The entire neglect of the son's interest in the farm was required by reason of the paramount duty of attending to the wants of his father in his helpless and imbecile condition.

He should be allowed for the last five years of the old man's life $400 per annum, without interest, making in all $2,000, and

should be charged with $300 rent of the farm for each of those years, making $1,500. This deducted leaves $500 to be allowed the appellee. His physician bills, during the last five years of his life, should be allowed, if any paid, and also his burial expenses—all other claims should be rejected. The equity of the case requires this allowance to be made, as the old man was incapable of contracting. It was necessary that some one should take care of him, and the allowance to the son is ample for the services rendered.

Judgment reversed and remanded for proceedings consistent with this opinion.

MOORE v. OFFUTT.

(Filed Spetember 23, 1893—Not to be reported)

Deed of trust construed—Vested estates—A father conveyed by deed of trust a certain part of his estate to the trustee for division between his children. The deed provided that the real estate should be charged with the grantor's debts; that the trustee should make a settlement of advancements given the children; that in making the settlement whatever was found coming to a son, H., and grantor's daughters, one-half should be paid them in money, and one-half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs; that when the advancements were settled and the costs of executing the trust paid, the remainder was to be divided into six equal parts and invested for and paid over to the children * * * in the same manner as provided for in the accounts of equalization. Held—That H. had a vested interest in one-half of the sixth of the estate coming to him which he could dispose of by will, though he died before the settlement of the advancement or the payment of grantor's debts, the other half of his sixth passed under the deed of trust to his heirs.

O'Hara & Bryan for appellant.

Simrall & Bodley for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

Col. James Taylor, of Newport, Ky., prior to his death, and with a view of making a disposition of his estate between his children as provided in his will, executed a deed of trust to one Wm. H. Lape, conferring upon the trustee large powers in reference to the sale of his realty.

He first declares that all of his real estate conveyed to the trustee shall be chargeable with his debts, and the latter is empowered to sell so much of his lands as may be necessary for that purpose.

The trust further provides: "After my debts are paid by my trustee, he will take the advance book and settle the accounts among my children and the children of my son James. In making the settlement, whatever is coming to Harry and my daughters, one-half will be paid them in money and the other half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs forever.

"When the matter of advancements is settled, after paying all cost and expenses incident to the management of the estate, the surplus, or whatever remains of the sale of real estate or what may be coming from any other source, will be divided into six equal parts, and invested for and paid over to my children and

the children of my son James and their mother, in the same manner as provided for in the accounts of equalization. If at the time the equalization takes place any of my children are dead, no investments will be made for their children, but the amounts coming to them will be paid to each in equal proportions."

The grantor of the trust had five children living, and one, a son, James, dead at the date of the deed. His plain purpose seems to have been to equalize his children in the distribution of his estate, and to see that this was done in his life time, reserving to himself a competency until his death.

The question in this case arises from a will made by Harry Taylor, a son of the grantor, who died after his father, by which he attempts to dispose of the estate conveyed to him, or to the trustee for his benefit, by the deed of trust to Lape.

Harry Taylor, the son, had been twice married, having one child by his first wife and two children by his last wife. At his death he made a will, by which he disposed of his interest in the trust estate to his last wife and her children.

Logan Taylor, the child of the first wife, contends that under the provisions of the deed of trust to Lape the whole estate at his father's death passed to his children, or that his father had no interest in the trust estate, he dying before the equalization was made or the estate of the grantor settled and his debts paid.

We have set forth so much of the deed of trust as affects the question involved, and it seems to us it is plain, by the terms of the deed, that Harry Taylor, the son of the grantor, took a vested interest in the one-half of the one-sixth of the estate, and a life interest in the other half. The language used is plain and unambiguous, and made still more so by subsequent provisions of the same instrument. His purpose was to secure one-half of Harry's interest to his (Harry's) children at his son's death, and this having been done by giving Harry, as to this half, a life interest.

The grantor then provides that when the matter of advancements is settled the estate will be divided into six equal parts, and invested for and paid over to my children and the children of my son James and their mother, in the same manner as provided in the accounts of equalization. Now the provision in reference to the accounts of equalization gives one-half to Harry in fee and the other half to him for life, remainder to his children.

The deed further provides: "If at the time the equalization takes place any of my children are dead no investments will be made for their children, but the amounts coming to them will be paid to each in equal portions."

His object was to secure the one-half to Harry's children, and, therefore, he required the investment of this one-half to be made by the trustee, giving to Harry an estate for life, with remainder to the children; but Harry having died no investment was necessary or required of the trust because, in express terms, it is stated that no investment in that event is to be made, but the sum to be invested only if Harry should be alive.

The object of the trust in securing the one-half interest to the child of the deceased son or daughter having been accomplished, there was no necessity for the reinvestment.

The grantor further provided by this trust to enable his children to live, that the trustee should pay over to the children annually the sum of $2,000 each, as they will need money before distribution and investments can be properly made.

The grantor evidently supposed that much time would elapse

before his large landed estate could be sold and before an account of advancements could be taken, and, therefore, required the trustee to pay over to the children this $2,000 annually.

The right of Harry Taylor to demand of the trustee (Lape) his (Harry's) half of the one-sixth interest could not arise until the debts of the grantor were settled and the account of advancements made. These matters the trustee had to ascertain and before he could distribute, but this did not make the interest of Harry in the one-half of the one-sixth contingent. It was a vested interest to be received into possession and enjoyed after the happening of certain events that must take place.

A devise to the son of one-half of an estate, to be paid over when the estate is settled and debts paid, vests in the devisee an absolute estate. The time of possession is only postponed, and nothing more.

It has been said by both Blackstone and Kent, and often quoted, that "it is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks the distinction between a vested and contingent interest."

The chancellor, in our opinion, properly held that Harry Taylor had a vested interest in the one-half of the one-sixth of the estate, and could, therefore, devise it.

The fact that the grantor had provided in his will for the child of Harry by his first wife can not affect the construction given the trust deed. The other provisions of the trust must alone continue, and the child by the first wife, Logan Taylor, takes only an interest with his half brothers in the one-half of the one-sixth that was held by their father for life. (Mercantile Bank of New York v. Ballard, 83 Ky., 48.)

Judgment below affirmed.

ELLIS v. DITTEY.

(Filed September 26, 1893—Not to be reported.)

1. A husband is entitled to curtesy in land owned and possessed by his wife at the time of her death, although neither he nor his wife ever resided upon it or exercised acts of ownership over it.

2. Same—Possession—A tract of land on which there was no residence was conveyed to E. in 1845; it adjoined land belonging to her father; E., who never lived upon the land, married appellee in 1847, and died in 1849, having given birth to a child which died shortly after she did. It does not clearly appear who had possession of E.'s land during her coverture, but it is probable that the father used it in connection with his adjoining land. No one claimed or had any title adverse to E., nor was there any adverse possession. Held—That as E. clearly held the legal title, it must be presumed that the possession of her father or other person was in law her possession, and since she had both title and possession at the date of her death, her husband is entitled to curtesy in the land.

A. C. Ellis for appellant.

Simmons & Simmons for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Hazelrigg.

The appellant, claiming to be the owner and in the possession of about ten acres of land in Kenton county, brought this action

to quiet his title thereto against the appellee, who is alleged to be setting up some kind of claim to the property. The plaintiff's title is derived by deed from one Joseph Marshall, who, through his mother, inherited the land from the infant child of the defendant, Dittey. The defendant by his answer puts in issue the plaintiff's possession and sets up ownership in himself as heir of his infant child. Afterwards, convinced of his error as to this claim, he amends his answer and claims as tenant by the curtesy.

As to the possession of the property at the time the suit was instituted, we think the proof is sufficient on plaintiff's behalf to show possession in him, and this, combined with the legal title, authorized him to sue.

The real question in the case is whether the appellee, by himself or wife, had such possession of the land during coverture as entitles him to curtesy.

In August, 1845, one James Dedman conveyed the land in controversy to Elizabeth McCullough for the recited consideration of $200. This tract appears to have been bounded on one of its sides by a tract of some ten acres owned by the grantee's father.

In 1847 Elizabeth, then living in Cincinnati, Ohio, intermarried with Dittey, the appellee, who lived in the same city. To them a child was born in December, 1848. Thereafter, in March, 1849, Elizabeth died, and in about August of the same year the child died.

Just who, if any one, occupied or used this land in 1845-6-7-8 is not clearly shown. There was no house on it, but there was one on the adjoining tract belonging to the father of Mrs. Dittey, and this is shown to have been occupied by him during his lifetime and by his widow afterwards. The latter died some thirty years ago.

The two tracts then appeared to have been "all in the same field," though at one time the tract in dispute was under fence, which, however, had rotted away some twenty odd years ago.

The appellee never occupied the land or used it in person or by tenants; but if the wife was the owner and had possession of it during her marriage, it is sufficient to entitle the appellee to curtesy.

The statute giving curtesy reads as follows: "Where there is issue of the marriage born alive the husband shall have an estate for his own life in all the real estate owned and possessed by the wife at the time of her death, or of which another may be then seized to her use." (Section 1, article 4, chapter 52, General Statutes.)

The proof as to her possession is scant, but the appellee speaks of the land as that of which "his wife was in possession at the time of her death," though at that time, as appears in proof, she was a resident of Cincinnati, and her father was probably using it or occupying his own land in the same enclosure with the tract in dispute.

There is no hint of any adverse holding. She alone had a deed of record for it or claimed it. We are, therefore, inclined to conclude that it was held for the legal title holder by those by whom it was actually occupied, and whose possession was, therefore, her possession, which satisfies the requirement of the statute.

In Carr, &c. v. Givens, &c., 9 Bush, 680, neither the husband, Givens, who was claiming curtesy, nor the wife ever lived upon the land or exercised any acts of ownership over it, but on the death of the wife "her mother entered on the land or retained the possession after the death of her husband, recognizing the right of the children as the owners in fee simple. Her possession was not adverse to the children, but only strengthened the com-

mon estate, and her possession and seizin were the possession and seizen of all."

Possession by some coparceners, amicable to the others, was thus held to be a sufficient seizen in fact to invest and sustain an estate by the curtesy in the husbands of certain others not in the actual possession.

Still later, in the case of Yankey, &c. v. Sweeney, &c., 85 Ky., 64 (1887), it was said that the reason of the rule requiring actual possession on the part of the husband being for the purpose of strengthening the wife's title whenever its equivalent is complied with, then the rule is complied with. "For instance," says the court, "if the guardian of the wife holds possession of her land at the time of her death, then the reason of the rule is complied with, and the husband is entitled to curtesy in the land; and if a joint tenant with the wife holds the friendly possession of the land at the time of her death, here his possession is her possession, and the reason of the rule is complied with. So, if a trustee of the wife holds possession," etc. "Indeed," says the court, "if any person, at the death of the wife, is seized of her land for her use, the reason of the rule is complied with and the husband is entitled to curtesy."

Here the proof is the wife was in possession at the time of her death. The proof that she resided in Cincinnati at the time does not disprove the fact of her possession under the deed by her father or other person for her. If she died in possession it was all the statute requires to entitle the husband to curtesy.

The amended answer asserts that the wife died owning and possessing this land, and we think this is a sufficient allegation to meet the demands of the statute, and in fact is substantially in its language.

Judgment affirmed.

SNELLBAKER v. PADUCAH, TENN. & ALA. R. R. CO.

(Filed September 30, 1893.)

1. Ejectment of passenger from railroad car—Damages—One who takes passage on a railroad train for the purpose of being ejected for the violation of a rule of the company which he believes to be unlawful, and which he intends to violate, and for the purpose of instituting an action to recover damages for such ejectment, can recover only the actual damages sustained by him.

2. Same—Cash fare on train for passenger in excess of ticket fare—A rule of a railway company, which has some stations along its railway where tickets are not sold, requiring all passengers, who enter trains without tickets, to pay a cash fare of twenty-five cents in excess of the ticket fare, which extra twenty-five cents the company refunds upon presentation at any of its ticket offices by the passenger of a "rebate check," which is given to him by the conductor, is not unreasonable or oppressive or void.

3. Same—A passenger, who had full knowledge of such rule and who knew that round-trip tickets to his destination from the point where he boarded the train were sold at such point, bought a ticket to his destination only, and then, upon entering a car to return from his destination, refused to pay the twenty-five cents' extra car fare and was courteously ejected, Held—That the passenger can not recover damages for the ejectment, since he had an opportunity to purchase a ticket and did not do so.

4. Same—Burden of proof—Where the defendant in its answer admits the ejectment complained of and pleads facts authorizing it, which are denied by plaintiff, the burden of proof is on defendant.

C. H. Thomas for appellant.

Reed & Husbands & Husbands for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

Upon his refusal to pay the conductor of the appellee twenty-five cents in addition to the usual fare between the station at which he took passage and that of his destination, on the line of appellee's road, the appellant was ejected from the passenger coach of the appellee. He sued for damages, and upon a trial of the case the jury found a verdict for the appellee. The appellant's motion for a new trial, based upon various grounds, having been overruled, he has appealed to this court.

The facts established by the proof and necessary to be considered by us in testing the accuracy of the instructions, of which the appellant seriously complains, are about these: Upon the completion of its road in 1890 the appellee established a number of stations between Paducah, in this State, and Paris, Tenn., then being its terminal points. Some of these were ticket stations and others not, being known as mere flag stations. A rule or regulation was promulgated when it began business, and of which notice was given, to the effect that passengers entering the train without tickets would be required to pay twenty-five cents extra fare. This sum, however, was to be refunded to them upon presenting to any ticket agent for the road what was called a "rebate check," which was to be furnished the passenger by the conductor when he collected the cash fare.

Of the location and nature of these flag and ticket stations and of the rule of the appellee the appellant, from the proof, had ample knowledge. He was a large lumber dealer, quite a traveler and, from his own statements, had studied the rebate question. In a discussion with some of the employes of the appellee, a few days only before he embarked on the trip resulting in his expulsion from the train, he had declared that the rebate system was unlawful, and that every man who had been put off for nonpayment of this excess had recovered damages.

Round-trip tickets were kept for sale at Paducah and other ticket stations for all points on the road, and of this the appellant must have known, as he had traveled over this road and on divers occasions had gone out from Paducah to flag and ticket stations thereon, using on one or more trips "the rebate check."

He resided at Paducah, and on the morning of June 4, 1891, bought a ticket to "Oaks," the first station south of that city and some nine and one-half miles distant. Upon his request he was allowed, without further charge, to go on to Burkholder's mill, about one and a half miles further, where a large sawmill was being operated and where he had business. After transacting his business he started to walk back to Oaks, the regular flag station, when he was informed by Judge Burkholder that he intended flagging the train at the mill, and he could then take passage.

He did so, and when he was approached on the train for his fare he offered the usual sum to the conductor. Some discussion ensued, the conductor explaining his situation and the necessity for obeying the rules of his superior officers, and the appellant insisting that he knew the law of the case and his rights in the premises.

The dispute ended in the courteous expulsion of the appellant from the train, without rudeness or violence beyond the gentle laying of the conductor's hands on the apepllant's arm and politely helping him down the steps of the train at or near "Oaks," from which point the appellant walked to Paducah and instituted this action.

Upon this state of case the court instructed the jury to find for the plaintiff, unless they believe from the evidence that the appellee had adopted the rule or regulation, the nature of which we have explained, and that return or round-trip tickets were kept for sale at Paducah for "Oaks," and that the appellant, prior to his trip, knew of the rule and of the fact that such tickets were kept, in which event they were to find for the appellee.

An additional instruction, defining the measure of damages, was given, and one charging them to find only actual damages, if they believed that the appellant had purposely taken passage on the train in order to be ejected, and for the purpose of instituting suit. The first instruction is the only one we need notice.

If the appellant, before starting on his trip, knew that he would be required to pay twenty-five cents extra upon being found without a ticket, either as he went to or returned from "Oaks," and that he could purchase at Paducah, if he desired, a ticket to Oaks and back, and thus avoid this deposit of twenty-five cents, upon what principle shall he be allowed to complain of his failure to buy a return ticket? Certainly upon none, unless the requirement of the regulation is unreasonable.

Whatever knowledge may be attributed to him of the location of these stations, and of the rules and regulations of the company, he is not bound to comply with them if they are oppressive or unreasonably inconvenient to him; but what is there unreasonable or oppressive in this rule? The passenger does not in fact pay a cent additional fare, and the inconvenience of presenting his "rebate check" at the end of his journey and getting his money is not more than the inconvenience of paying his money and getting his ticket when he starts on his trip; and that he may be required to so purchase his ticket before entering the train is admitted on all hands.

Even additional fare is allowed to be collected and retained if a passenger fails to provide himself with a ticket when he can do so. It constantly occurs that when round-trip tickets are on sale, and a careless passenger fails to buy one and his co-traveler does buy, the one pays more than the other for being carried the same distance.

In this case the appellant actually paid no more, and only subjected himself to a very slight inconvenience, while to the road the rule was obviously of great pecuniary importance; but, it is urged, that there being no ticket station at "Oaks," the appellant could not have bought a ticket en route home, and ought not to be inconvenienced by not having one. The answer is, there was a station at the starting point at which, by the purchase of a ticket, the supposed inconvenience could have been provided against

We are not considering a case where a passenger has not had an opportunity to provide himself with a ticket. The Oregon and Pennsylavnia cases, relied on by appellant, were such cases.

On many of the great trunk lines of the country the collection of this excess is omitted under the express provisions of the regulation when passengers are taken on at "nonticket" stations, or when children or infirm persons are traveling alone and do not have money sufficient to pay the excess.

There are no circumstances surrounding the appellant which render the application of this rule to him unreasonable or harsh. Ordinarily a prompt compliance with the reasonable requests of these carriers conduce largely to the safety of the traveler, and we hesitate to interfere with rules which, by facilitating the business of the company, inures in the end to the benefit of the public.

The burden of proof was properly placed on the company. It

admitted the expulsion and pleaded facts authorizing it, which were denied by the plaintiff. The rulings of the court as to the pleadings and on the competency of the proof were substantially correct. On the whole case, upon the law and the facts as they appear in this record, the finding of the jury could not have been otherwise.

Judgment affirmed.

BRILL v. RACK.

(Filed October 3, 1893—Not to be reported.)

An action by a mortgagee to set aside a mortgage on property bought by the mortgagee from the mortgagor (the lien being created to secure the deferred payments of the purchase price) can not be maintained on the ground that the contract of purchase was obtained by the mortgagor's fraud, it not being alleged that the mortgage was fraudulently obtained, unless plaintiff also seeks to set aside the contract instead of permitting it to stand in full force.

John H. Barker for appellant.

Leslie T. Applegate for appellee.

Appeal from Pendleton Chancery Court.

Opinion of the court by Chief Justice Bennett.

The appellant bought the appellee's bakery and fixtures at an agreed price, and gave his note for the deferred payment and executed a mortgage on said bakery and fixtures to secure the payment of the note.

This suit is brought to set aside the mortgage upon the ground that the contract was obtained by the appellee's fraud, but the mortgage is not attacked as having been obtained by fraud. The sole question is, can the mortgage be set aside upon the ground that the contract was obtained by fraud without also seeking to set aside the contract, but permitting it to stand in full force?

The mortgage was given to secure the payment of the debt, and as long as the debt stands in full force the security ought likewise to stand in full force, unless that is attacked for fraud. To allow the appellant's contention the case would stand thus: The contract would stand in full force and the mortgage would be set aside and the appellant would dispose of the mortgaged property and the appellee go whistling for his money.

The judgment is affirmed.

YOUNG, &c. v. MOREHEAD, &c.

(Filed October 3, 1893.)

1. Construction of devise—Life estates—A testator provided in his will as follows: "I give * * * to my * * * wife one-third of my entire estate, real and personal; that is, she is to have all the land during her life. I give * * * to my son * * * the remaining two-thirds of my estate. * * * In the event of my son's death in infancy, my will is that his part go to his

mother. * * * At the death of my wife all her * * * part to go to my son." Held—The wife took an estate for life in all the land, remainder to the son.

2. Same—Dower—Homestead—Where the son died before testator's wife, in such case his (the son's) widow is not entitled to either dower or homestead in the land devised, since he was not seized of any part of it in his lifetime.

Porter & McQuown for appellants.

W. E. Settle and John E. DuBose for appellees.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Hazelrigg.

If, under the will of Alexander Stephens, who died in Allen county in 1852, his widow took an estate for life in his realty, then the son of the testator, who died before the widow, was not seized of any part thereof, and his (the son's) widow is not entitled to homestead or dower.

If, however, the widow took an estate in only one-third of the realty, and the son took the remaining two-thirds, as he lived on the land with his mother, his widow would be entitled, at any rate, to dower, if not to a homestead.

The will, after some preliminaries not necessary to notice, and omitting the fifth clause appointing an executor, is as follows:

"Second. That I give and bequeath to my beloved wife, Mary Catherine, one-third of my entire estate, real and personal; that is, she is to have all the land during her life.

"Third. I give and bequeath to my son, James Crittenden, the remaining two-thirds of my estate.

"Fourth. If in the event of my son's death in infancy, my will is that his part go to his mother.

"Sixth. My will is, at the death of my wife, Mary C., then all her aforesaid part to go to my son, James Crittenden."

The appellants, who were the plaintiffs below, are the widow of James C. Stephens, son of the testator, and her present husband, Thos. L. Young. They insisted that the widow of the testator, Mary Catherine, took an estate for life in only one-third of the estate; that this is shown in the succeeding clause giving the son "the remaining two-thirds;" that the words "that is, she is to have all the land during her life," are words reducing or restricting the devise of one-third that stood as one in fee to a life estate; that the sentence was intended to read "give to my wife one-third of my entire estate, real and personal, but she is to have the land thus devised to her during her life only; and that such must be the construction if effect be given to the devise to the son of "the remaining two-thirds of the estate"—a devise importing an immediate taking by him in fee.

However plausible this may seem, and is, we are constrained to think that the words "she is to have all the land during her life" mean just what they say. Having given her one-third of the estate, real and personal, he remembers the infancy of his son, his dependence on his mother and the fact that upon her will devolve his care and oversight, he enlarges his seeming original intention and provides that she is to have all the land during her life. This gives her a home and the small farm, of some 140 acres, on which to sustain herself and son.

The remaining two-thirds given the son consist necessarily of two-thirds of the personal estate, and is taken absolutely. It is all that is left. That which remains is what is left after the

wife gets what is specifically given her. He gets two-thirds of the estate "remaining" undisposed of.

Should the son die in infancy "his part," which is two-thirds of the personalty, is given the mother, and upon her death, according to the sixth clause, her part goes to the son—in accord with the construction giving her a life estate, with remainder to the son, should he survive her.

The son intermarried with the appellant, and died before coming into possession of this remainder interest, and hence she is entitled to neither dower nor homestead.

The only difficulty we have in adopting this construction lies in the fact that by it we restrict the devise to the son in the third clause to an interest only in two-thirds of the personalty, but when we consider the sixth clause in connection with it, giving him the whole after her death, we think the meaning of the testator becomes reasonably plain.

The suggestion is not without force that by the second clause the widow took one-third the land in fee, but was to have the whole land during life. Then the "remaining two-thirds" of the estate would consist of realty and personalty, though the son would take the realty subject to the life estate of his mother.

The sixth clause, however, giving the whole of the wife's part to the son at her death, is inconsistent with her taking one-third in fee, unless, as suggested by counsel, the testator was making provision for the disposition of the wife's part in case of her death before his own, which is not improbable.

The only question here, however, is whether the widow took a life estate in the whole. The express words to that effect, it seems to us, must control, even though they be not perfectly reconcilable with the supposed meaning of some other clause.

The judgment is affirmed.

COMMONWEALTH v. DAY.

(Filed September 16, 1893—Not to be reported.)

1. Local option—When provisions of special act take effect—Where a "local option statute" provides that the county board of examiners shall canvass the votes cast at the election to determine whether or not whisky may be sold in the county, and shall issue a certificate showing the result, and that if the result be against the sale the certificate shall be recorded in the office of the county clerk and that "then the provisions of the act shall be in full force," the Commonwealth must show that the certificate was so recorded, otherwise one can not be convicted for a violation of the provisions of the act.

2. Same—Bill of evidence—A recital in the bill of exceptions that the original certificate of the board was exhibited on the trial, "showing that the law known as the F. county prohibition law was in full force and effect" at the time of its alleged violation, is merely an erroneous conclusion as to the effect of the certificate and of no effect.

W. J. Hendrick and James H. Sallee for appellant.

W. G. Dearing, A. E. Cole & Sons and G. A. Cassidy for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee was indicted for a violation of what is known as the Fleming county prohibition law. Upon the trial it was shown by the court that one Robert J. Samuels' wife was sick and the family physician gave her a prescription for brandy. It was not directed to any one, nor did it state the quantity, but was otherwise regularly made out and signed by the physician. Samuel took the prescription to the appellee, a distiller, who hesitated to fill it, but finally, at the urgent appeal of the husband of the sick woman, sold him a quart of brandy and kept the prescription. In some two weeks thereafter Samuel returned and without a further prescription induced appellee to let him have another quart for the same purpose. He testifies that the liquor was used solely by his wife as a medicine, save a small quantity he let his brother have for sickness in his family. No other testimony was offered by the State, save that the original certificate of the Fleming County Board of Examiners was read, showing that a majority of the votes of the county had been cast against the sale of liquors at an election held under the act specified. The orders of the county court appointing the officers of the election were also read.

Now the law under consideration provides that this certificate of the examining board should be recorded in the office of the clerk of the county court, and that "then the provisions of the act shall be in full force."

The indictment—as was necessary it should do—charged that this certificate "had been duly recorded in the clerk's office of the Fleming County Court 'by the clerk of the court,'" but nowhere does it appear from the evidence that the certificate was so recorded. Without this there was no evidence that said law was in force. Immediately following the certificate in the bill of exceptions is this language: "Showing that the law known as the Fleming county prohibition law was in full force and effect in said county at the time of the sale by Day to Samuel." This is but a conclusion, and an erroneous one at that. This certificate does not show the law to have been in force. It must appear to have been recorded as provided by the act before the law can be held to be operative for any purpose. By his plea of "not guilty" the defendant put the allegation of the indictment on the vital question of whether the certificate was recorded in issue as well as the other allegations therein.

The Commonwealth having failed to make out the case, the motion of the defendant to have the court instruct the jury to find him "not guilty" should have been sustained.

The jury, on instructions given by the court and supposed by the Commonwealth to be erroneous, but which we need not discuss, found the defendant not guilty.

Judgment affirmed.

WEST v. COMMONWEALTH.

(Filed September 28, 1893—Not to be reported.)

Criminal law—Instructions—On this trial of appellant for the murder of a constable, who was endeavoring to arrest him by virtue of a warrant placed in the officer's hands for execution, and the defense of the accused was that at the time he shot he mistook the officer for an enemy, who was seeking to take his life, as he had just then been informed, the instruction concerning appellant's right to rely on the plea of self-defense in the event he thought the officer was his enemy, about to take his life, etc., is more favorable to the accused than he had any right to demand.

Stewart & Stewart for appellant.

W. J. Hendrick for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant had a difficulty with the Blackburns, and a warrant for the arrest of the appellant was placed in the hands of Jake Runyan, the constable of the precinct, who, in company with a posse summoned for the purpose, went to the store of Harvey Williamson for the purpose of arresting the appellant. As Runyan stepped into the storehouse he threw up his hands and said: "Don't do that;" and then as quick as he could speak he said to the appellant to consider himself under arrest, and immediately he was shot with a gun in the hands of the appellant. He says that at the time the gun was fired he did not know that the person was Jake Runyan, but he believed he was one of the Blackburns, who, as he had been just informed, were seeking to take his life. The court instructed the jury that if they believed at the time the appellant shot he believed that Runyan was one of the Blackburns, who were then seeking the appellant for the purpose of taking his life, and were, as he believed, about to take it, unless prevented, and he shot the deceased, believing that he was one of the Blackburns, for the purpose of saving his own life, then he was excusable. The appellant says that it was the Blackburns that he apprehended danger from, and the instruction confining the apprehended danger to them simply repeated the evidence upon that subject. It said that Runyan ought to have proclaimed that he had a warrant for the arrest of the appellant, and to have shown it, etc. It is sufficient to say that he did not have time to do that, for the reason that he was shot down instantly. Besides, he was not shot on account of any action of his as Jake Runyan, for the appellant had not a word of complaint against him, either as constable or otherwise, but because the appellant mistook him to be an enemy who was about to kill him.

The appellant has reason to congratulate himself on the fact of having received said instructions.

There is no error in the record. The jury passed upon the question of the appellant's guilt.

The judgment is affirmed.

HAYS, &c. v. BRADLEY.

(Filed October 5, 1893—Not to be reported.)

1. Sale of infants' real estate—Jurisdiction—Where the title to a tract of land is held by a trustee for the use of a father for life, with remainder to his children, and the father is the statutory guardian of the children, a court of equity has no jurisdiction to order a sale of a small part of such land upon the petition of the father and the trustee, for the purpose of raising money to improve a dwelling house on the unsold part of the land, the children not being made parties to the suit. The chancellor's jurisdicton to order a sale of infants' real estate is altogether statutory, and the statute does not authorize a sale of a part of an infant's realty for the purpose of improving the remainder. An order of sale for such purpose is not erroneous merely, but absolutely void.

2. Same—Rights of purchaser under void order of sale—But where the

money paid by the purchaser at the sale made in pursuance of such void order has been actually applied to the improvement of the remainder of the land and has actually enhanced its value, and the children have come into possession of it after arriving at full age and after the death of their father, the life tenant, and have received all the benefits resulting from such enhanced value, they will not be permitted to recover the land sold by court under the void order without accounting to the purchaser of it for the value of the enhancement of their estate by his money.

Where the purchaser paid $1,250 for the land and is made to account for rents, and the value of the difference between $1,250 and such rents is $725, which sum represents the enhanced value of improvement put on the infants' estate, that sum of $725 should be allowed the purchaser as against the remainderman who seeks to dispossess him.

W. H. Miller and Robt. H. Tomlinson for appellants.

R. P. Jacobs, W. O. Bradley, R. J. Breckinridge and R. C. Warren for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

Hugh Hays in his lifetime devised a tract of land to Campbell Hays as trustee for William Hays. The terms of the trust vested in William Hays a life estate, with remainder to his children.

Not long after the death of the devisor William Hays qualified as guardian for his children (the remaindermen), and in conjunction with the trustee filed a petition in equity asking for a sale of a part of the trust estate, to enable them to repair or rebuild the homestead.

The infants were not made defendants, but the wife of William Hays, she having no interest, was made a defendant to the proceeding. The land was sold (sixteen acres) for $1,200 to the cross appellant, G. N. Bradley, the sale confirmed and a deed made.

William Hays, the life tenant, died, and after his death his children, two of whom are adults and one at the time an infant, brought this action against Bradley to recover the sixteen acres of land.

The appellee insists, first, that his title is good, by reason of his purchase under the judgment of sale, and for further defense sets up an equity by reason of the application of his money to the improvement of the remainder interest, alleging, in substance, that the money paid for the land was actually applied to rebuilding the homestead, by which the value of the remainder interest was enhanced, and to that extent he should be reimbursed, etc.

We think the evidence shows that the remainder interest was enhanced in value, and the trustee fixes the enhanced value of the entire tract at $10 per acre. This may be in excess of the increased value, but yet the party who was invested with the legal title, and whose duty it was to protect the infants, and who no doubt sought the sale of the sixteen acres in the best of faith, places an estimate upon the value of this land, by reason of the expenditure, that can not well be disregarded. Besides, the adult children had the entire tract of land (except the sixteen acres) sold after their father's death, recognizing the sale and purchase of the sixteen acres, and have actually received the benefits resulting from this improvement.

They filed a petition in equity in which they sought to have the entire land sold, alleging that sixteen acres had been sold off by a judgment of the court to Bradley, and asking that the balance of the tract be sold, because it was indivisible.

The land was sold, except the sixteen acres, and the remaindermen received the purchase money. They have received all the benefits resulting from the improvements made by the appellant on their land, and now claim they are entitled to recover the sixteen acres, and the appellant must surrender to them the possession and lose the benefit of his purchase because, as they contend, the sale was void.

The object of the sale of the sixteen acres was to enable the life tenant to erect the building for the benefit of all the parties in interest, and while we are inclined to adjudge the sale void for the reason the chancellor had no jurisdiction to render such a judgment, as his jurisdiction is conferred by the statute; but as the remaindermen received and enjoyed the benefits of the expenditure made by the appellant, they should be required to account to him to the extent his money enhanced the value of the remainder interest.

The sum to be allowed the appellee is to be determined by the testimony, and we are not prepared to say that the judgment is not warranted by the testimony. He paid for the land $1,250; has been made to account for rents, and deducting rents from the purchase money paid, the appellee has been allowed, as against the remaindermen, the sum of $725, and this, we think, is equitable.

The attempt to convert this sixteen acres into money, so as to erect a building on the remaining tract, was not authorized by the statute and the chancellor's jurisdiction being statutory, and the guardian by his petition seeking to do that which the statute did not permit, we must adjudge the sale not only erroneous but void. (Falls City Building Association v. Vankirk, 8 Bush, 459; Wornack v. Loar, 11 Ky. Law Rep., 6.)

It was not such a reinvestment as was authorized or contemplated by the statute, and to permit the life tenant, although the guardian, to make such investments, would be fraught with much danger to infant remaindermen who are not in court as defendants or represented by any one except the life tenant, who is seeking the relief.

Judgment below is affirmed on the original and cross appeal.

NICKELL, &c. v. FALLEN, &c.

(Filed October 5, 1893—Not to be reported.)

1. A judgment that "a cause be filed away for want of prosecution" is not a final order or a bar to a subsequent action on the same case.
2. Petition for new trial not filed in time—Where a judgment was rendered at a January term, 1889, and the grounds set out in the petition for a new trial were discovered in July, 1889, and such petition was not filed until the August, 1891, term, the relief must be denied because the application was not made until after the second term beginning after the discovery.
3. Same—In the absence of a bill of evidence it will be presumed on appeal that the evidence heard on the trial authorized the dismissal of the petition.

Z. T. Hurst and A. F. Byrd for appellants.

McGuire & Kash for appellees.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

This is an application for a new trial, made by petition, upon grounds discovered after the expiration of the term at which the judgment complained of was rendered. The petition of the appellants was dismissed and they have appealed. The facts relied on seem sufficient to entitle them to the relief asked, but the judgment sought to be vacated was rendered at the January term, 1889, of the Wolfe Circuit Court, and the petition for vacation was filed at the August term, 1891, of that court.

The petition does not disclose when the grounds were discovered, but this record discloses that the appellants knew of them as early as July, 1889. It is provided in such cases that the application may be made not later than the second term after the discovery. From the record the application appeared to have been made too late, and was properly dismissed.

Moreover, under the provisions of the Code, the evidence might have been either by depositions or witnesses examined in court. In this case the order recites that the case was submitted, and after proof heard in open court it was adjudged that the plaintiffs had not shown themselves entitled to the relief sought, and, therefore, the court dismissed the petition with costs.

There is no bill of evidence in the record, and the court presumably did right.

It may be observed that the judgment sought to be vacated, ordering that "the cause be filed away for want of prosecution," is not a final order or a bar to a subsequent action.

The judgment dismissing the petition is affirmed.

SMITH, BY, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed October 10, 1893.)

1. Authority of brakeman to eject trespasser from train—Question for court and jury—Whether or not the brakeman on a certain train had authority to eject a trespasser found by him on the platform of the train, and who refused to pay any fare, is wholly a question of law, or at most a mixed question of law and fact, to be determined by the court, the question should not be submitted to the jury.

Where a brakeman finds a trespasser on the platform of a train, who refuses to pay fare, the right to eject him, in a proper manner and without the use of unnecessary force, is to be conceded to the brakeman as an essential incident to his employment. The act of the brakeman in such case, as a matter of law, is within the scope of his employment, and is, therefore, the act of the company enploying him.

2. Same—Malicious injury of trespasser on train by brakeman—But if the purpose of a brakeman in ejecting from a train in motion a boy seventeen years of age was the intentional and malicious infliction of an injury upon him, then the railroad company is not liable for such act. Whether the ejectment was with willful and malicious design, or was devoid of such design and was done merely to protect the company, is a question for a jury to determine from all the evidence of the case.

3. Same—Pleadings—An allegation in a petition that the railroad "willfully, negligently and carelessly, by one of its agents and servants, to wit, a brakeman," kicked and threw plaintiff off a train, etc., does not of itself show that the act of the brakeman was willful and malicious, and, therefore, not within the scope of his authority.

4. Same—Pleadings—The allegation of the answer that defendant voluntarily swung himself off the train is merely the converse of the statement of the petition that he was kicked off, and no reply to it was necessary.

James Andrew Scott and Rufus K. Dinkle for appellants

John W. Rodman for appellee.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The plaintiff, a minor, suing by his next friend, alleged that while he was riding on the defendant's car from Collins' Station to the city of Frankfort, and while the car was in rapid motion, "the defendant wilifully, negligently and carelessly, by one of its agents and servants, to wit, a brakeman, kicked and threw" him off of its train, thereby breaking his arm and causing him other serious injury.

The defendant denied these averments, and for a further defense alleged that the plaintiff secretly got on the rear end of one of its trains for the purpose of obtaining a free ride to Frankfort, and whilst so riding was discovered by its agent and servant, and thereupon voluntarily jumped off the car when in rapid motion, and whatever injury he received was caused by his own act.

The plaintiff, who was seventeen years of age, and whose home was in Frankfort, testified that he had been working at Collins' Station, some two miles west of the city, and, becoming sick, had gotten on the train for the purpose of stealing a ride home; that he was sitting on the platform with his feet on the steps and was discovered by the brakeman, who demanded his fare, and upon his not having either a ticket or any money he was told that he must get off. He replied that he would if the train would stop. The brakeman then said: "I thought I told you to get off of here," and at the same time kicked him upon the hip, which broke loose his hold on the railing and he fell headlong on the ground, becoming unconscious, etc.

The brakeman testified that when he discovered the plaintiff and ascertained that he had neither a ticket nor money, he told him that he must get off when the train got to the bridge, and that before he finished the sentence the plaintiff answered that he would get off now, and swung himself off in the cut, etc., etc. He also testified, over the objection of the plaintiff, that "he had no authority from the conductor, or in any way, to put persons off the train," and that it was not his duty to do so, but that it was his duty to look after the comfort of the passengers and to assist them in getting on and off at stations, and in the absence of the conductor to take up tickets and collect fares for the convenience of the conductor when he was engaged in other parts of the train; that if the plaintiff had paid him he would have handed it to the conductor, etc.

The conductor testified that the brakeman had no authority to put anyone off for nonpayment of fare, and he gave him no such instruction. "It is his duty," testified the conductor, "to look after the safety and comfort of passengers; to assist them on and off the train, and to assist me in ejecting an unruly passenger, or one who has no right to ride, and, when I am otherwise engaged, to collect tickets and fare and give them to me," etc.

Upon this state of case the court told the jury that if they believed from the evidence "that it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off of the train persons who failed or refused to pay their fare, and they shall further believe that the brakeman kicked plaintiff off the cars while in motion, or used unnecessary force in putting him off the car, they should find for the plaintiff such damages as he sustained thereby, not exceeding $10,000;" but that if

they believed from the evidence "that the plaintiff jumped off the train and was not kicked off by the defendant's employe, they should find for the defendant;" and lastly, that if they believed from the evidence "that the brakeman was not charged or required, as part of his duty under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant."

The jury found for the defendant, and did so possibly because, without regard to the question of whether the brakeman kicked the plaintiff off the train the proof submitted to them was conclusive that the brakeman had not been instructed to put persons off the train, and that such service was no part of his duty. We are of opinion that the only question under the pleadings and the proof, which should have been submitted to the jury, was whether the brakeman kicked the plaintiff from the train.

It was admitted that the brakeman was an employe of the defendant, and that the train was in rapid motion when the plaintiff got off or was kicked off.

Whether or not what the brakeman did was in the scope of his authority or in the line of his employment was a question of law, or of mixed law and fact, to be determined by the court alone from the proof, if, indeed, that were required, and from common observation and experience, from knowledge of the nature of the business, and the daily practices which obtain in its exercise. Now we know it to be held universally that the conductor, using no unnecessary force, may remove from the car persons who refuse to pay their fare, or are drunk, riotous or unruly.

It is an authority conceded to him—indeed a duty required of him—and we would refuse to hear a railroad company's effort to plead or prove that it gave no such authority to its conductors or did not charge them with such duties. And such we believe should be the rule with respect to brakemen. Even from the proof in this case, if we were to be so confined, we learn that he was to assist in the ejection of persons who had not the right to ride, and upon the conductor's being engaged in another part of the train he was to collect fares, and, necessarily, to enforce the regulations of the company to whatsoever extent the conductor might himself enforce them. We are so fully in accord with the view of the subject taken by the court in Hoffman v. New York Central & Hudson River Railroad Company that we quote its language: "It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders, but he is a servant of the company on the train, concerned in its management and fully cognizant of the obvious fact that intruders who jump upon the trains for a ride without intention of becoming passengers are wrongfully there. Suppose a train was standing still and a trespasser was put off by force by a brakeman using no unnecessary violence, would it not be a good defense to an action against him for the assault that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise according to common observation and experience.

"But assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains, whether, when a conductor or brakeman, without warning or

notice of any kind, kicks a boy of eight years from the platform of a car while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act.

"Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal; but the point is, was the act within the scope of the employment and authority? * * * In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it." And the company was held responsible. (41 Am. Rep., 387.)

In this case the brakeman sought to collect the fare from the defendant—not for himself but for the company. Upon his failure to pay he sought to eject him from the car, not to accomplish his own ends, but to subserve the interests of the company.

The company, it is true, owed the plaintiff no duty arising out of a contract to carry him or to protect him, nevertheless it might not violate the common instincts of humanity or treat the plaintiff brutally in its process of ejecting him from the car. Undoubtedly when the object of the servant, the end sought to be reached by him, is the intentional or malicious infliction of an injury upon the person of the trepasser, the company is not liable for his act, and the existence of malice or intentional and willful design is a question of fact to be ascertained from all the circumstances of the case. If the end sought by the employe was the infliction of an injury, if the purpose he had in view when he kicked the plaintiff off the train, if he did kick him off, was to injure him, then the company is not liable because the act would be malicious and willful; but if the end sought was the ejection of the intruder, if his purpose was devoid of evil design and merely to protect the interest of his employer, then, however careless or reckless the means employed, the company is liable.

The case cited by counsel for the appellee, and said to be directly in point, illustrates the distinction. The plaintiff, a boy and a trespasser, was driven off the train by a brakeman, who threw coal at him so as to cut and blind him and cause him to slip and fall on the track, whereby he was injured. The company was held not to be liable. (Towanda Coal Co. v. Heeman, 86 Penn. St. Rep., 418.)

So this court, in the case of Winnegan's Adm'r v. Central Passenger Ry. Co., 85 Ky., 547, said: "If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible."

The principle involved and stated by this court in Sherley, &c. v. Billings, 8 Bush, 147, in this language, that "if the servant goes beyond the scope of his employment, he is as much a stranger to his master as to any third person, and his acts can in no sense be regarded as the acts of his master," is easy of announcement, but sometimes difficult of application.

In all cases where unnecessary force is used it may be said that the servant acted without authority, express or implied. It can truthfully be claimed in all cases and by all companies that the authority of their servants is limited to the exercise only of force sufficient to eject a trespasser or passenger in a lawful manner.

Nevertheless the company is liable if the servant, in the exercise of his authority, within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would be seriously injurious to the person ejected.

In this case it does not matter that the act of ejection is charged in the petition as having been done willfully, as well as negligently and carelessly. The willfullness is charged against the defendant company, and for this reason it can not be said that the use of the term willful in itself shows the act to have been malicious on the servant's part, and, therefore, beyond the scope of his authority. The servant is not charged with committing the act willfully; but the company is charged to have willfully done it by its agent and servant.

The allegation of the answer that the plaintiff voluntarily swung himself off the train is not such an affirmative averment as required a reply. The simple issue was presented whether or not the brakeman kicked him off. The statement that he swung himself off is merely in emphasis of the denial that he was kicked off. It is mere surplusage, and at any rate is in direct conflict with the averment of the petition that the plaintiff was kicked off, and is in substance a denial of that averment.

We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off the car, as testified to by the plaintiff, and whether he did so with or without malice or evil design, as indicated above, and upon the determination of these issues depend the question of the company's responsibility for the defendant's injury.

Judgment reversed, with directions to proceed as indicated by this opinion.

NORTHWESTERN MUTUAL LIFE INSURANCE CO. v. BARBOUR, &c.

(Filed October 10, 1893.)

1. A plaintiff, as a matter of right, may dismiss his action without prejudice at any time before its final submission. This right belongs to the plaintiff absolutely and without condition, and the court has no discretion in the matter.

2. Same—Counterclaim—The dismissal of an action without prejudice by a plaintiff does not preclude a defendant from continuing to prosecute any counterclaim or set-off properly pleaded.

But after plaintiff has filed a motion to dismiss without prejudice, it is then too late for defendant to offer to file a counterclaim, although the offer to file may be made before the court sustains plaintiff's motion and enters the order of dismissal.

3. Same—Notice of motion—Rules of Jefferson Circuit Court—The rules of the Jefferson Circuit Court do not require a plaintiff to give a defendant notice of motion to dismiss without prejudice before entering it. The right to dismiss belongs to plaintiff absolutely and without condition, and no notice of such motion can be required.

Barnett, Miller & Barnett for appellant.

Dodd & Dodd for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

This action was originally brought by James P. Barbour and others against the Northwestern Mutual Life Insurance Co., 18 Ky. Law Rep., 619, to recover on two policies of life insurance; and a demurrer to defendant's answer having been sustained, judgment for plaintiff followed; but on appeal to this court that

judgment was reversed and case remanded for the demurrer to be overruled, and further proceedings consistent with the opinion of this court.

It appears from transcript of the record before us that March 7, 1892, defendant moved to file in the lower court the opinion and mandate of this court, and for both the order sustaining demurrer to the answer and judgment in favor of plaintiff to be set aside; but that motion was not then decided, being assigned to March 15th for hearing. On the same day, March 7th, plaintiffs moved to dismiss the action without prejudice, which motion was likewise postponed to March 15th.

In the meantime, that is, March 14th, defendant moved the court to file an amended answer and counterclaim; but an order was then made postponing the action until March 15th for hearing on all pending motions, though no decision was made thereon until March 28th.

No exception was or could properly be taken to filing the opinion and mandate of this court, or to setting aside the previous order and judgment as directed thereby. But the motion of the plaintiffs to dismiss the action without prejudice was at the same time sustained, while that of defendants to file an amended answer and counterclaim was overruled, and from these two orders defendant has appealed.

After the motion to dismiss the action was sustained, if legally done, a denial of the motion to file the amended answer and counterclaim was inevitable, because the action had then terminated, and there were no allegations to be traversed, nor any contract or transaction in litigation out of which the counterclaim could arise.

Whether the motion to dismiss the action was proper, it seems to us, must depend upon construction of the Civil Code. Section 871 provides that "an action, or any cause of action, may be dismissed without prejudice to a future action by the plaintiff before the final submission of the cause to the jury or to the court, if the trial be by the court."

The right of a plaintiff to dismiss his action without prejudice, at any time before final submission, existed at common law, and a denial of it would often work hardship and injustice.

We are, therefore, satisfied it was intended by the Civil Code that right might be exercised absolutely and without condition; but though such be the case, it does not necessarily follow the defendant can be thereby precluded from maintaining any cause of action already pleaded as counterclaim or set-off.

Section 372 provides that "a defendant is entitled to a trial of a set-off or a counterclaim, though the plaintiff dismiss his action or fail to appear;" but clearly such right of defendant exists only where the counterclaim or set-off has been filed in court while the action was pending, and before the plaintiff has made a motion to dismiss it.

We are thus limited to the single inquiry whether the lower court correctly gave precedence to and decided the motion to dismiss before passing upon that of defendant to file the answer and counterclaim, and as to that question we see no room for doubt; for, inasmuch as the right of plaintiffs to dismiss was absolute, and the court was bound to sustain the motion when made, on March 7th, the intervening motion of defendant to file the answer and counterclaim did not or could legally deprive them of the right or in any way affect it.

Counsel, however, contends that the motion to dismiss, of March 7th, was void because made and entered without notice as required by a rule of court. It does not seem to us the rules of court, made part of the bill of exceptions, fairly construed,

were intended to apply to a motion of a plaintiff to dismiss his action, for we can not conceive the necessity for or validity of a rule of court requiring one party to notify the other of an intended motion that the Civil Code gives the unconditional right to make, and makes imperative upon the court to sustain.

In our opinion the lower court had no discretion, but was bound to dismiss the action upon motion of the plaintiff, and, as a consequence, to overrule the subsequent motion of defendant to file the amended answer and counterclaim.

Judgment affirmed.

DAVIS v. COMMONWEALTH.

(Filed October 12, 1898.)

1. Criminal law—Confessions are competent evidence only against a person charged with a crime or, in a proper state of case, against his confederates. Ante mortem statements or dying declarations are competent only when they come from a declarant, whose personal injuries by another have resulted in death, and when they relate to the manner or circumstance of the injury or to the person that inflicted it.

On the trial of one for murder, the dying declaration of another that he committed the crime for which defendant is indicted is incompetent.

2. Same—Impeachment of witnesses—Where witnesses are introduced by and are sworn and testify for a defendant, the Commonwealth may impeach their reputation for veracity, although their evidence may be immaterial.

3. Evidence of the bad reputation of a witness for veracity, two years before he testifies, may be competent.

R. T. Burns and Stewart & Stewart for appellant.

W. J. Hendrick for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant having been convicted of the crime of murdering Viana Pack by the Lawrence Circuit Court, he appeals, and complains as follows: First, That the court erred in not allowing him to prove by G. W. Miller that Granville Pearl confessed to him on his deathbed that he, Pearl, killed Viana Pack.

It seems to us that admissions and confessions as to competency stand upon the same footing. Admissions can not be used in evidence, except against the person making them, in an issue between him and another person, wherein the truth of the admissions is involved, or against his privies claiming through him; and confessions are incompetent evidence except against a person charged with crime or, in a proper state of case, against his confederates; nor is the proposed evidence competent as a dying declaration because such evidence is only competent when it comes from a declarant, whose personal injuries by another have resulted in death, and the declarations must be confined to the manner and circumstances of the injury and to the person that did it.

Second. In allowing evidence to go to the jury impeaching witnesses who had testified for the appellant, but who had not testified to any material fact for the appellant, the material fact

which the appellant desired to prove by them having been excluded by the court.

It seems to us that the fact that the witness is sworn and testifies entitles the adversary to impeach his general reputation for truth without reference to the materiality of his evidence, otherwise there would be constant strife and litigation over the question as to the materiality of the witness' evidence, in order to determine whether or not the impending evidence was admissible.

Third, It is contended that evidence of the bad character of a witness sought to be impeached, two years before the time that he testified, is incompetent.

It is true that the character of a witness, at the time he testifies, is in issue before the court or jury; but it is equally true that his reputation before then may be inquired into in order to throw light upon his reputation at the time he testifies.

There is no doubt that Viana Pack was assassinated, and we think that the evidence authorized the jury to believe beyond a reasonable doubt that the appellant was the guilty party. The court committed no error.

The judgment is affirmed.

LOUISVILLE TRUST CO. v. COUNTY OF MUHLENBERG, &c.

(Filed October 14, 1893—Not to be reported.)

A court of equity has no jurisdiction to enforce tax liens existing in favor of a county on the property of the citizen thereof, even though the ordinary machinery provided by law for the collection of such taxes has failed to make such collection. Such an attempt on the part of the judiciary would be an invasion of the powers that belong exclusively to the legislative department of government under out Constitution.

Holders of bonds issued by a county in payment of a subscription to the capital stock of a railroad company filed a suit in equity against the county and some of its property owners to enforce alleged tax liens existing on the defendant's property to secure payment of taxes assessed to pay amounts due on said bonds. They allege that the ordinary mahinery appointed for the collection of the tax had failed to do so. Held—That a court of equity had no jurisdiction of such action.

E. H. Brown and D. M. Rodman for appellant.

Johnson & Wickliffe and T. W. Brown for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Hazelrigg.

By virtue of an act of the general assembly of the Commonwealth of Kentucky, approved February 24, 1868, the county of Muhlenberg subscribed to the capital stock of the Elizabethtown & Paducah Railroad Company the sum of $400,000, and issued and delivered to that company its bonds for that amount.

Under the provisions of a further legislative act, approved March 18, 1878, the county compromised a sufficient amount of its original bonds to aggregate the sum of $100,250, and issued new bonds therefor.

The appellant, for itself and others as owners of certain of these unpaid bonds—old and new—brought its suit in equity

against the county and a number of property owners thereof, seeking to enforce the tax liens alleged to be existing on the property of the defendants as provided by the acts mentioned.

It appears from the petition that the machinery provided by law for the collection of taxes levied by the county court for the payment of these bonds had, up to the institution of this suit, failed to accomplish the end sought, the county court failing or refusing to appoint collectors, and the sheriff, when one existed, failing and refusing to act in this behalf, hence this appeal to the chancellor.

The liens under which the estate of the property holder is alleged to be placed are created by this clause of the act of February 24, 1868: "And all taxes levied under this act shall be a lien on the real estate of the person taxed, which shall lie in the county in which such tax is levied" (section 12, chapter 548, volume 1, Acts 1867-'68, page 626); and by this clause in the act of March 18, 1878, "said county shall have a lien on all the property taxable or taxed under this act, and on all other property of each taxpayer, for the payment of all taxes payable by such taxpayer, which shall not be defeated by gift, sale, devise, alienation, or any other means whatever." (Section 7, chapter 519, volume 1, Acts 1878, page 604.)

It will be observed that the language of these provisions is substantially the same as that employed in the General Statutes of the State (section 2, article 1, chapter 92) creating similar tax liens, so that there was no intention to give the county any other lien than that which existed prior to the passage of these acts.

These liens can not be enforced in courts of equity; courts can not be transformed into tax collectors.

In speaking of the power of the chancellor in a similar case, this court said because "the remedy had been suspended by reason of the failure or refusal of those living within the precinct to accept the office"—meaning the office of tax collector—"or had been temporarily obstructed by reason of a defect in the law under which the collection was to be made, did not enlarge the jurisdiction of the chancellor or confer upon him the exercise of such an extraordinary power." (McLean County Precinct No. 5 v. Deposit Bank of Owensboro, 81 Ky., 254.)

To the same effect are the decisions of this court in Johnson v. City of Louisville, 11 Bush 527, and Pennington v. Woolfold, &c., 79 Ky., 13.

These powers and duties belong exclusively to the legislative department of the government, and their exercise by the executive or judiciary departments would be subversive of the fundamental principles of our organic law. (Section 27 of the Constitution of Kentucky.)

The judgment sustaining the demurrer and dismissing the petition is affirmed.

BRAFFORD v. COMMONWEALTH.

(Filed October 21, 1893—Not to be reported.)

Criminal law—Verdict supported by evidence—A verdict convicting defendant of manslaughter, under an indictment against him and others for murder and conspiring to murder, is not contrary to or inconsistent with the evidence, although it appears that two of the other parties indicted have confessed that they killed decedent.

James N. Braffqrd and Wilson & Rawlings for appellant.

Wm. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant and others were charged with the crime of murdering and conspiring to murder James Tuggle; and the trial of the appellant resulted in convicting him of the crime of manslaughter. There was evidence before the jury that the appellant and two of the others charged in the indictment were seen on the morning of the day of the killing together, armed with guns and a pistol, the appellant having the pistol, and the appellant was heard to say that the matter would be settled that day; that they went to the schoolhouse, armed as indicated and where Tuggle was shot, with gun and pistol, and the appellant was present at the shooting, and it also appears that appellant was only one of the party that had a pistol.

The verdict of the jury was authorized from the evidence. The confession of two of the parties charged that they did the killing is not consistent, if true, with the fact that appellant was guilty of the offense charged. The jury was properly instructed.

The judgment is affirmed.

SUPERIOR COURT ABSTRACTS.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. McBRAYER.

Filed November 15, 1893. Appeal from Carter Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Jurisdiction of justice of peace—Where a summons against a railroad corporation is issued by a justice of the peace in one district and properly served upon the defendant in another district, it must be returned for trial in the district in which it was served; and if the justice who issued the summons attempts to try the case, or to take any step in the case except to transfer it to the proper district, a writ of prohibition will lie to prevent him from doing so.

2. The writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction; and it is not necessary that a defendant should wait until it has exhausted all of his remedies in an inferior court before he applies to a circuit court for this relief. The mere fact that a court is attempting to exercise control over a cause of which it has no jurisdiction is a sufficient ground for the issual of the writ.

E. B. Wilhoit for appellant.

CLORE & SONS v. DAVIS, &c.

Filed November 22, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Where an officer has levied an execution upon personal property owned jointly by the execution defendant with another, he has no right to sell the interest of the execution defendant, as the lien must be enforced by an action in equity; but where the officer has sold the interest of the defendant by the direction of the plaintiff, and the plaintiff has appropriated the proceeds, in an action against him by the person who owned the property jointly with defendant to recover damages he is estopped to deny the authority of the officer to make the sale.

2. The sale of the officer in such a case passes no title to the purchaser,

and if the person who owns the property jointly with the execution defendant sells his interest to the purchaser and voluntarily surrenders the possession, which has never been disturbed, he has no cause of action against the plaintiff in the execution unless he alleges and proves that he surrendered the property under a mistake of law or fact.

3. Where money is paid or property is delivered through a clear and palpable mistake of law or facts, essentially bearing upon or affecting the contract under which the money was paid or the circumstances under which the property was surrendered, and when it ought not in honor and conscience be retained, the money in the one case or the property in the other can be recovered.

S. B. & R. D. Vance for appellants; Yeaman & Lockett for appellees.

DENNY v. MARKSBURY, &c.

Filed November 22, 1893. Appeal from Owen Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Landlord and tenant—Measure of damages for breach of contract—In leases of real property the law not only implies a convenant on the part of the landlord for quiet possession against paramount title, but against such acts on his part as destroy the beneficial enjoyment of the lease; and in actions for a breach of this covenant the lessee can recover such damages as legitimately and directly arise from the breach, but nothing more. Conjectural profits which might have been realized by the lessee from the use of the land are not allowable, as they are too remote and uncertain. The correct measure, where no special damages arise, is the difference between the agreed rent and the actual rental value of the leased premises.

2. Right of jury to determine question without evidence—Such questions should not be left to the jury without some testimony showing what damages the plaintiff has sustained and of what those damages consisted. The jury is not presumed to have such knowledge of these matters as would authorize them to find a verdict in the absence of proof.

J. W. Greene for appellant; Lindsey & Botts for appellees.

McROBERTS v. HAYS.

Filed November 22, 1893. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. In order to revive a debt which has been barred by limitation there must be an express promise to pay or such a positive and unqualified acknowledgment of the debt as will raise an implied promise to pay. If the acknowledgment is accompanied by any circumstance or expression which repels the idea of an intention or willingness to pay, the debt is not thereby revived.

A letter from a judgment defendant to the plaintiff, saying "the judgment you speak of is unjust, but if I am ever in a condition to do so I will pay it," was not sufficient to revive the judgment, which was then barred by the statute.

2. In a number of the States it has been held that a new promise will not revive a judgment which has been barred, but it is not necessary to decide that question in this case, the promise not being sufficient in any event.

Hill & McRoberts for appellant; W. H. Miller for appellee.

SPEED v. CITY OF LOUISVILLE.

Filed November 22, 1893. Appeal from Jefferson Circuit Court, Common Pleas Division. Opinion of the court by Judge Barbour, affirming.

1. Mandamus to compel city to abate nuisance—Conceding that the general council of a city may, under certain conditions, be required by mandamus to abate a public nuisance in a street under its control, the relief will not be granted where the plaintiff has himself created the nuisance which he seeks to have abated.

2. Same—While one has the right to improve his property, yet it is his duty to see to it that in doing so he does not create a nuisance.

Abbott & Rutledge and Dodd & Dodd for appellant; H. S. Barker for appellee.

The Kentucky Law Reporter

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

VOL. 15. JANUARY 1, 1894. No. 13

KENTUCKY COURT OF APPEALS.

WHITLEY COUNTY LAND CO. v. LAWSON.

(Filed September 30, 1893.)

Interference between patents—Adverse possession—Where the claimant under a junior patent enters upon and occupies a part of the land described in his patent, the whole of which is embraced by a senior patent, and claims while in possession to the full extent of his patent boundary, such entry and occupancy give him constructive possession of the whole of the interference if the senior patentee is not in possession of any part of his land; and a subsequent entry by the senior patentee upon a part of his tract outside of the interference does not give him constructive possession of any part of the interference. His possession will not be constructively extended beyond his actual enclosure. And this is particularly true where the land included in the senior patent is composed of several tracts not adjacent to each other, and the senior patentee enters upon a tract not adjacent to the tract including the interference.

Hill & Denham for appellant.

Lester & King for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellant claims the land in controversy under a patent granted by the Commonwealth in 1876 for 48,040 acres of land.

The patent boundary includes about 106,000 acres, but the quantity alone named is all that is patented. The other is excluded because previously patented.

The boundary calls to run with county lines, etc. The appellee claims a small piece of land by patent, which is junior in date to that of appellant's, and by adverse possession for fifteen years. The appellant's patent covers the appellee's said land. The appellee has only occupied a small strip of the land claimed by him for fifteen years.

The appellant was not in the actual possession of any part of its survey at the time the appellee's occupancy commenced, nor has it entered upon any part of the interference since then and taken possession of it. The question is, does the appellee's actual possession of a part of the interference, and claim to the extent of his patent boundary, give him an actual possession of the whole and oust the appellant's constructive possession?

The court instructed the jury that if the appellee's patent covered the land claimed by the appellant, and the appellee had, for fifteen years before the bringing of this suit, been in the actual occupancy of a part of said land within his patent boundary, claiming to the extent of said boundary, they ought to find for the appellee, which the jury did.

When there are conflicting patents for land, and the junior patentee enters upon, holds the actual possession of a part of the interference, claiming the interference to the extent of his patent boundary, and the owner of the senior patent is not in the actual possession of his land at the time of such entry and occupancy by the junior patentee, then the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and occupancy of his land outside of the interference, does not give him the actual or constructive possession of any part of the interference; nor does his entry upon and occupancy of the interference give him the possession of it, except to the extent of his enclosure. (Fox v. Henton, 4 Bibb., 559, and Ware v. Bryant, 14 Ky. Law Rep., 852.)

There was no actual possession of any part of the appellant's survey at the time the appellee entered upon and took the possesion of the interference. But if we are mistaken as to the appellant being in the actual possession of some one of the pieces of land covered by its patent, for the patent covers many pieces that are not only separate, but many miles apart, it is certain that the appellant, or those under whom it claims, held no actual possession of any part of that piece, now the subject of controversy, at the time the appellee entered upon a part of the interference; and we think that no one will dispute the proposition that an entry upon one piece of land in the name of the whole under a conveyance that covers several distinct pieces that are distinct from each other, as in this case, does not give the owner the actual possession of the whole.

We have treated the patent as valid in passing upon this case, because the parties have treated as valid, but we do not wish to be understood as passing upon its validity. That matter is not passed upon.

The instruction quoted, according to the undisputed facts of this case, is correct.

The judgment is affirmed.

SCHMIDT v. CARTER'S ADM'R.

(Filed October 5, 1893.

Liens—Unrecorded agreement to create lien—Notice—A recital in the face of a note executed for borrowed money that the money was used to help pay for a house and lot of the maker, on which the payee has or is to have a lien, creates no lien on the house and lot even between the parties to the note, nor does it create any equity as to the house and lot in favor of the payee of

the note that gives him an equitable lien thereon superior to the lien acquired by an attachment sued out and levied thereon after the note was executed; and a mortgage executed to the payee after the levying of the attachment does not relate back to the date of the note, so as to create a lien superior to that acquired by the attachment. (Case distinguishable from Trimble v. Puckett, 14 Ky. Law Rep., 209.)

W. O. Harris for appellant.

Muir, Hayman & Muir for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The executor of James G. Carter, holding a claim against the one Charles E. Landram, originating from a partnership between Landram and his testator, had an attachment issued and levied on a lot of ground in Louisville that Landram had conveyed to his wife. The conveyance was held to be fraudulent and the lot ordered to be sold to satisfy the judgment for $7,000.

After the attachment had been sustained and the sale ordered, the appellant, Adelia Schmidt, claiming an equitable lien on the lot, instituted this action, alleging that her lien existed prior to the attachment lien, and asking that the property or its proceeds be first applied to the payment of her debt.

The lien asserted by the appellant is claimed to exist by reason of the following obligation, executed prior to the issual of the attachment:

"Louisville, Ky., June 3, 1889.

"One day after date I promise to pay to Adelia Schmidt or order $2,000, being money advanced to me to help pay for a house and lot on Jefferson, between Twenty-second and Twenty-third streets, and on which she holds a lien until paid—interest to be paid monthly at the rate of 6 per cent. per annum.

"C. E. LANDRAM AND WIFE, LEONA LANDRUM."

In the petition of the appellant it is alleged that she loaned the money to be used in the purchase of the house and lot, and in consideration of the loan the defendants, Landram and wife, agreed to give to the plaintiff a note due as the paper above shows, and to secure the same by a mortgage on the property; that the money was used in the purchase of the lot and a mortgage executed on the 22d of October, 1890, in accordance with the agreement and recorded in the proper office.

This mortgage was executed and recorded after the attachment had been issued and levied, and it is conceded that the mortgage created no lien or equity in favor of the appellant unless it is made to relate back to some agreement prior in date to the attachment by which the mortgage was to be executed. The only written evidence of any such agreement is the note evidencing the loan of the $2,000, in which it is recited "that it is for money advanced to help pay for the home and lot on Jefferson, between Twenty-second and Twenty-third streets, and on which she holds a lien until paid."

This verbiage in the note, it is claimed, creates an equity older in date than that created by the attachment, and, under the familiar doctrine that in a contest between equities the elder equity must prevail, it is contended the proceeds of sale should be applied first to the payment of appellant's debt, the attachment lien being made to yield to the equitable mortgage lien.

The statute provides "no deed of trust or mortgage conveying

a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law and lodged for record." (Section 10, chapter 24, General Statutes.)

It is insisted that before the equity of the appellee was enforced by a sale of the property it had notice of the agreement to mortgage, and, therefore, the statute referred to can not affect appellant's equity.

This court has adjudged in several cases that a mortgage not recorded, or a bond for title, has precedence over a lien created by an execution or attachment where actual notice has been given the creditor before the sale under the attachment or execution, the statute being construed as meaning (and in fact such is its language) that the purchaser holds, unless he has actual notice of the outstanding equity, and there is no reason why a creditor is not affected with notice in the same manner that a purchaser would be. The deed or mortgage unrecorded is not good against a purchaser for value without notice, and the decisions giving priority to unrecorded liens seem to follow the language of the statute and carry out the legislative intent. Valid liens, however, must actually exist and not such liens as are established alone by parol proof, or where, upon the face of the instrument, it is manifest that the lien is to be created by some subsequent agreement. Courts of equity can not be too careful in guarding the rights of bona fide purchasers and creditors against hidden liens, or such as exist only in the contemplation of the parties, and it should be made to appear from the terms of the instrument itself that a lien has in fact been created.

A mere recital in the face of a note for borrowed money that this is a lien on the land owned by the debtor, or that the debtor will thereafter execute a mortgage, creates no lien as against those parites, and to adopt a rule that would permit such liens to be enforced against others than the parties to it would open the door wide to fraud and destroy entirely the statutory effect of our registration laws.

The parties never intended the note to evidence any lien on the property as against creditors, because it is distinctly alleged that it was agreed the debtor should thereafter execute a mortgage to secure the note, and this was in fact done, but not until the attachment lien existed.

If the recital in any note given for borrowed money or for property, that the obligee holds a lien on the property of the obligor or that the obligor is thereafter to create a lien to secure the paper, creates an equity as against all other leins after notice, our registration laws should be dispensed with and the priority of liens determined by the antiquity of the paper evidencing the agreement to pay.

The case of Trimble v. Puckett, decided in May, 1892, 14 Ky. Law Rep., 209, is relied on as authority for the appellant. In that case Brenner, the vendee of a tract of land, owned a part of the purchase money. Puckett advanced the money, and by an agreement with Brenner, the vendee, was substituted to the rights of the vendor. The lien had not been released, but was satisfied upon the payment by Puckett and the execution of a note by Brenner to Puckett by which Puckett was made the vendor, and the land described "as the farm I now live on."

Of this note and its contents the creditor had actual notice, and, although unrecorded, a lien was held to exist. There was

enough in that note to show the entire agreement, and the substitution of Puckett to the rights of the vendor, or rather Puckett was made the vendor by the contract, and of this fact the creditor had notice. It was not an agreement to create a lien, but a lien arising from the discharge of a valid lien by Puckett, and of this the creditor was fully informed before he purchased.

In the one case a lien was created, and in the case before us the parties only agreed to create a lien.

Hidden liens, or such as usually arise when the debtor's property is about to pass from him, even if containing all the requisites of a mortgage, are looked upon with suspicion, and courts of equity should be reluctant to ignore the claims of bona fide creditors, unless such liens are clearly established. In this case there is not even a description of the property, or any of the essential elements of a mortgage, and no court of equity should hold that this note is evidence of an agreement to mortgage, or that such an agreement, if established, would supersede the rights of bona fide purchasers and creditors.

Judgment affirmed.

HARDY, &c. v. LOGAN COUNTY COURT.

(Filed October 14, 1893—Not to be reported.)

1. Suit by county court against tax collector and sureties—Parties—Where a tax collector executes bond, with sureties, to the county court for the faithful discharge of his duties as such, the county court can maintain an action against him and his sureties for the breach of the bond without joining the county as a party to the action. Section 21 of the Civil Code expressly authorizes this.

2. Same—Exemptions and exonerations—Where the provisions of a special act authorizing the levy of a certain tax by a county, to aid in the construction of a railroad, provide that such tax shall be levied on the same property in the county as is subject to taxation for State purposes, it must be held as meaning that the collector appointed to collect such tax is entitled to no credit for exonerations or exemptions or delinquents or removals, except such as are allowed the sheriff by the county court as collector of State and county revenue; therefore, an allowance to such tax collector of a greater credit than this by the commissioner of the sinking fund, even when confirmed by the county court, is unauthorized by law and not binding on the county.

3. Same—Interest—Where such tax collector, at the request of the commissioner of the sinking fund and of the county court, retained certain taxes and did not pay it over at the time prescribed by law, such collector and his sureties will not be required to pay interest on the same.

4. Same—Right of action—The rule that only the creditors of a county, for whose benefit a certain tax has been levied, can maintain an action against the sheriff for a failure to pay same, has no application where the taxes so levied turn out to be in excess of the amount of such debts. It is then the sheriff's duty to pay the excess over to the county, and it may maintain an action for his failure to do so.

5. Same—Tax receipts evidence against sheriff—Tax receipts are competent evidence against a sheriff to show that he has collected taxes from persons whom he had previously reported and been credited with as delinquents.

Wilbur F. Browder, Bowden & Bowden and John S. Rhea for appellants.

John Feland for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Lewis.

This is an appeal from a judgment rendered in seven actions in equity, consolidated and tried together, all instituted by Logan County Court, November 3, 1887, against G. L. Hardy and sureties in that number of bonds, then executed for collection by him of taxes imposed and assessed for the years 1878, 1879 and 1881, to pay interest on bonds issued in payment of subscription by Logan county to capital stock of Owensboro & Russellville R. R. Co., and fees for collection by him as sheriff of county levy taxes imposed at the October terms of the county court, 1878, 1879, 1880 and 1881.

It appears that Hardy, as collector of railroad taxes, made partial settlements for each of the three years mentioned with the county judge, who was ex officio commissioner of the sinking fund, and a final settlement on the ——— day of ———, all of which settlements were confirmed by the county court; but it is alleged in each of the petitions that the settlements were made by the commissioner of the sinking fund, and confirmed by the county court through mistake of law and facts, and that Hardy did not fully account for and pay over all the taxes it was his duty to collect and pay over, but is in fact indebted to the county large sums by reason of such failure.

The defendants first made question, to be now determined by this court, whether Logan County Court can bring and maintain these actions; but it seems to us there is no room for controversy on that subject, for Hardy and his sureties, in terms of each bond, covenanted and bound themselves to Logan County Court he would collect the taxes levied for the purpose mentioned, and pay same over to the Logan County Court or to any person upon its order; and as the several contracts, evidenced by the bonds of Hardy and sureties, were thus made by Logan County Court as agent of and for benefit of Logan county, the right of that court to maintain the actions, without even joining Logan county as party plaintiff, clearly exists in virtue of section 21, Civil Code.

There does not appear to be a great deal of difference between the result of settlements made by the commissoner of the sinking fund with Hardy, as collector of railroad taxes, and that stated in the report of the special commissoner appointed by the court; but the lower court disapproved of both in respect to the amount allowed Hardy, collector, as credits on account of delinquents, exonerations and removals of taxpayers; and the question to be now determined is whether the commissioner of the sinking fund had authority, in making settlements with him, to allow as credits any other lists or to a greater amount than fixed by the county court, at the time and in the manner prescribed by law, in regard to collecting the State revenue. If he did not have such authority, subsequent confirmation by the county court did not validate its settlement in that respect so as to prejudice the interests and rights of Logan county.

The taxes in question were collected under special acts of the legislature, and no power or discretion was thereby conferred upon the commissioner of the sinking fund to give credit to the collector on account of delinquents, exonerations or removals from the county, in excess of what had been fixed by the county court. On the contrary, it is manifest it was the intention of the legislature that he should, in settling with the collector for each year, be controlled by the lists of delinquents, exonerations and

removals allowed by the county court as credits to the sheriff in collecting the State revenue.

For the provision of the special acts that the railroad tax shall be levied on the same property subject to taxation for State revenue purposes, fairly construed, means that the collector of railroad tax shall not merely have the same power, but be subject to the same duties and responsibilities as the sheriff in collecting the State revenue.

Otherwise, while the sheriff, in collecting State revenue, can not be allowed any such credits until the lists have been duly, and according to law, examined and passed on by the county court, composed of the county judge and justices of the peace, the collector of the railroad tax, who in this case was the sheriff, may, at the mere discretion of the sinking fund commissiners, be allowed credits without limit or reason.

The judgment complained of in this case is simply for the amount of taxes for which the commissioner of the sinking fund allowed the collector credit for in excess of what he was entitled to according to the lists allowed as credits to the sheriff by the county court, and in our opinion it is not erroneous.

The appellee, Logan County Court, insists upon cross appeal the court erred in failing to charge the collector with interest on taxes collected and not paid over at the time prescribed by statute; but as the taxes in question were retained at request of commissioner of the sinking fund, by sanction of the county court, it would not have been proper to charge interest.

Judgment was also rendered in favor of plaintiff on account of county levy taxes collected for two of the four years, and not paid over and accounted for by Hardy as sheriff.

The doctrine is well settled by this court, as argued by counsel, that where tax levies are made by the county court to pay claims against a county, the creditors only, not the county court, can maintain an action against the sheriff for defaulting paying the same; but that doctrine has no application where, as seems to have been this case, an appropriation has been made for a specific purpose, which afterwards turns out to be in excess of the amount needed or used therefor. In that event the duty of the sheriff is simply to return such surplus to the county court, for it clearly belongs to the county, and he has no pretense or right to withhold it.

The judgment against the sheriff was partly on account of county levy thus collected and not paid one or accounted for by him, and in part for taxes collected from delinquents after he had been allowed credit therefor.

The mode by which the plaintiff undertook to prove such payments to the sheriff was by procuring and filing tax receipts given by him to persons whom he had previously reported and satisfied the county court were delinquents.

We do not think such evidence is, as argued, incompetent, or by any means inconclusive, especially as the sheriff may, as was the case here, have an opportunity to show, by his books or other evidence, such receipts were not in fact given by him to persons he had previously reported as delinquents.

Wherefore, the judgment is affirmed on both original and cross appeal.

DOOLIN, &c. v. COMMONWEALTH.

(Filed October 14, 1893.)

1. Criminal law—An officer seeking to arrest a person for a misdemeanor has no right to shoot such person to compel him to stop his flight, when he is running to avoid the arrest.
2. Same—Instructions—But if the person seeking to escape endeavors to shoot the pursuing officer, and by so doing endangers his life, then the officer may shoot and kill in his own defense; and the officer is entitled to avail himself of the plea of self defense in such case, even though the person attempting to escape believed in good faith, from the officer's manner of pursuit, the officer was pursuing him for the purpose of killing him and did not attempt to shoot the officer until such danger became apparent to him.

W. O. Bradley, G. W. Shadoan and W. A. Morrow for appellants.

Wm. J. Hendrick for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Bennett.

As the case must go back for another trial, no facts will be noticed in the opinion further than are necessary to make it intelligible.

There was a Sunday-school meeting held at Oak Grove meeting-house, and during the meeting Watson and Gastineau fired their pistols within a short distance of the meeting-house, which created a disturbance. The minister requested the appellant, Doolin, who was a constable in good standing, to arrest the persons creating the disturbance, and in obedience to the request he, together with Cope, who was summoned to assist, started out to make the arrest.

Apprehending some trouble, they procured a rifle gun and finally they overtook Watson and Gastineau and ordered them under arrest. Gastineau obeyed, but Watson moved on, not obeying. He finally began to run and the appellants pursuing, Doolin being armed with the rifle gun and Cope with a stick.

The witnesses for the Commonwealth say that Cope said to Doolin: "Shoot him; shoot him, I say, and don't let him get away;" and immediately Doolin fired the gun and Watson fell wounded, from which he died.

The evidence for the appellants is that Cope did not say "shoot him," etc., but that while they were pursuing Watson, in order to arrest him, and telling him that they did not wish to hurt him, but only to arrest him, he said that if they followed him any further he would shoot them, and threw his pistol over his shoulder in the direction of them and snapped it at them; and that, believing that the pistol was loaded and that Watson intended to kill them, Doolin fired in their necessary self-defense.

The court instructed the jury that the appellants had the right to pursue and arrest Watson without a warrant, the offense having been committed in the hearing of Doolin; but the offense being only a breach of the peace, Doolin had no right to shoot Watson in order to compel him to stop his flight, and that if he Doolin, did so, that they must find him guilty; but if Watson snapped his pistol at Doolin, as if to shoot him in order to prevent the arrest, and that Doolin believed that his life was in immediate danger at the hands of Watson, then he had the right to shoot Watson in his own defense.

The court gave this other instruction: "If Doolin, in pursuit of Watson, gave him reasonable ground to believe, and he did believe, that it was the purpose of Doolin to take his, Watson's, life, or do him great bodily harm, then he had a right to protect himself from such danger and take the life of Doolin; and if in an attempt to protect himself from such danger he did endanger the life of Doolin, and Doolin shot to protect himself from danger, brought on by his own conduct in endangering the life of Watson, he can not be excused on the grounds of self-defense."

It seems to us that this instruction is erroneous, for its meaning is that if Doolin, in the pursuit of Watson, gave him reasonable grounds to believe that he, Doolin, intended to take his life or do him great bodily harm, and he tried to shoot Doolin in order to prevent the apprehended danger to himself, which might not have existed in fact, then Doolin could not avail himself of Watson's threatening conduct toward him as a ground of self-defense.

If Watson had shot Doolin, and was on trial for the shooting, the circumstances indicated in the instruction would avail him as self-defense.

Under the plea of self-defense it is not necessary that the apprehended danger should exist in fact, but if the facts and circumstances are such as to give the party a reasonable ground to believe, and he does believe in the existence of such danger, then he may act in his on self-defense, although the danger does not exist in fact. Hence it may sometimes occur that each party may be mistaken as to the existence of danger, and both be entitled to the law of defense, as this case illustrates, for Watson might have been induced to believe, from the fact that Doolin was armed and pursuing him, and the shouts shoot him, that Doolin's purpose was to shoot him; and, therefore, he would have acted in self-defense; and Doolin, not intending to shoot Watson, but to pursue and arrest him, as he had the right to do, might have believed that Watson intended to shoot him to prevent being arrested, and shot to protect himself.

So in such case each would be mistaken as to the purpose of the other, and each might be excusable on the ground of self defense. No instruction should have been given on that subject.

For the error indicated the judgment is reversed, and the case is remanded for a new trial.

SCHLENK'S ADM'R v. CENTRAL PASSENGER RAILWAY CO.

(Filed October 19, 1893—Not to be reported.)

Street railways—Neglect—Instructions—In this action by a father to recover damages from a street railway for the alleged negligent killing of his child by it, the evidence shows that the death of the child resulted from the carelessness of a young and inexperienced nurse in charge of it. The verdict of the jury for the defendant was clearly right and the case will not be reversed because of the failure of the trial court to instruct the jury as to the degree of care required of defendant in running its cars over populous street crossings, it appearing that defendant was guilty of no neglect in that respect.

R. Lee Suter, Hargis & Eastin, Geo. L. Everback and R. C. Davis for appellant.

Humphrey & Davie for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellant's intestate was his son, about three and a half years of age, and living in the city of Louisville. The son, in charge of a nurse about twelve years old and employed by the appellant as a nurse, went out on the streets and, when returning, came to a crossing which they had to cross. The nurse and son stopped on the sidewalk, apparently waiting for the defendant's electric street car, which was then approaching, to pass the crossing. The boy was in the rear of the nurse and he, just as the car was approaching the crossing, jerked away from the nurse and ran across the street to the track of the street railway and stooped down, as if to pick up something. Just then the car struck him and ran partly over him and killed him.

On the trial of this action for damages for killing the child the court instructed the jury, first, that if the death of the boy was caused by the negligence of any of the employes in charge of the cars they must find for the plantiff in damages equivalent to the boy's power to earn money, had he not been killed; second, that if the negligence was gross the jury might find punitive damages, in their sound discretion; third, the fact that the boy was killed by the car of the defendant did not place the burden upon them to show that it was not negligently done, but that the burden was upon it to establish contributory negligence; fourth, that if the boy was killed by the negligence of his nurse, they could not find for the plaintiff unless they also believed that the boy would have been killed by the negligence of the appellee, notwithstanding the negligene of the nurse.

The court then defined gross, ordinary and slight negligence. We are not prepared to say that any of the instructions given were wrong, but the appellant complains that the court should have given an instruction defining the duty and the precaution that should be used by the managers of such cars at populous street crossings.

It will be observed that the court's instructions tell the jury that if the appellee was guilty of any negligence, whereby the boy was killed at the crossing, they must find for the plaintiff, leaving the matter of the appellee's duty in regard to the public, when making the crossings, to the judgment of the jury.

Without going into the evidence in detail it is sufficient to say that it does not establish any negligence whatever on the part of the appellee at said crossing on the occasion of the boy's being hurt. On the contrary, if there was any negligence it was on the part of the inexperienced nurse, by reason of non-age, having the boy in charge, and as she was the agent of the plaintiff in the temporary control and custody of the boy, her negligence must be imputed to the father; and as the verdict of the jury was clealry right, and just what it should have been, we must decline to enter into a discussion of what is the legal duty of the appellee at populous crossings, especially so, as the evidence does not present that question, there being, as said, no evidence suggestive of negligence at the crossing.

The judgment is affirmed.

COMMONWEALTH v. MURPHY.

(Filed October 19, 1898.)

Sale or gift of whisky on election day—The act of 1891-'92, making it a misdemeanor to sell, loan, give or furnish to any person spirituous liquors upon the day of any general or primary election, applies where a gift of whisky is made after the polls of election are closed but within the twenty-four hours of the day on which the election is held. The fraction of a day is not regarded in the law, and the day of election means the twenty-four hours which includes the period during which the election is actually held.

Wm. J. Hendrick for appellant.

W. E. & S. A. Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

G. W. Murphy, now appellee, was indicted for violation of section 10, article 13, of chapter on elections, acts of 1891-'92, which is as follows: "Whoever sells, loans, gives or furnishes to any person or persons, either directly or indirectly, spirituous, vinous or malt liquors, or any other intoxicating drink in any precinct, town, city or county of this Commonwealth upon the day of any general or primary election therein, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined the sum of not less than $25 nor more than $50 for each offense, which may be recovered by proceedings in any court of competent jurisdiction, or by indictment in the circuit court. It shall be the duty of the circuit judges throughout the Commonwealth to make special mention of this section in charge of the grand juries of said court."

The evidence on trial of defendant showed that between 9 and 10 o'clock p. m. on November 8, 1892, being day of the presidential election, he gave a drink of whisky to a person and thereupon the court instructed the jury to find for him, which was done; so that the only question on this appeal by the Commonwealth is whether the gift of liquor, as proved, was made in terms and meaning of the statute upon the day of a general election.

Section 148 of the Constitution provides that "all elections by the people shall be between the hours of 6 o'clock a. m. and 7 p. m., but the general assembly may change said hours," which has been done, and 4 o'clock p. m. is the time prescribed by statute when voting on an election day shall cease.

Section 154 made it the duty of "the general assembly to prescribe such laws as may be necessary for the restriction or prohibition of the sale or gift of spirituous, vinous or malt liquors on election days."

An election day, or the day of any general or primary election, would, in legal contemplation, mean twenty-four hours, including the period during which the election is actually held; for it is a maxim applicable to every transaction or occurrence that the fraction of a day is not regarded in law; and, consequently, the sale or gift of spirituous, vinous or malt liquors, at any time during the twenty-four hours of an election day, must be held an infraction of section 154 of the Constitution as well as of the statute enacted in pursuance of it, unless we assume, contrary to the language used and without reason, that it was intended such sale or gift might be made with impunity up to a moment

before beginning of the voting, though the people had assembled for the purpose, and immediately after close of the polls, though a crowd still remained on the ground.

The objection to the statute that it prohibits the sale or gift of liquor for medicinal or sacramental purposes, even if well founded, can not be relied on or avail defendant, Murphy, as it is apparent he had neither purpose in view.

In our opinion it was error to give the peremptory instruction mentioned, and the judgment is reversed and cause remanded for proceedings consistent with this opinion.

VANCE v. LOUISVILLE COURIER-JOURNAL CO.

(Filed October 21, 1893.)

Libel—Criticism of conduct of public officers—Instructions—Animadversion upon the conduct of a public officer by a newspaper, however severe, is not libelous, if confined within the limits of fair and reasonable criticism and based on facts.

In this action by the supervisor of an election for congress against a daily newspaper for libel, the court properly instructed the jury to award the plaintiff damages if the publications complained of were false and malicious and that malice could be inferred or presumed from the falsity of the publications. But if such publications were substantially true and were fair and reasonable criticisms of plaintiff's conduct as superivsor and were made in good faith and without malice, then they should find for defendant.

The verdict herein was authorized by the evidence and can not be disturbed.

W. W. Thum and P. D. Muir for appellant.

F. Hagan for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

This was an action for lible, instituted by the appellant against the appellee by reason of the following publications appearing in the appellee's newspaper—The Courier-Journal—of date November 3, 1886:

"Wantonly Exceeding Their Province."

"Burton Vance, a defeated Republican candidate, was at the first precinct of the seventh ward as a supervisor of election. In defiance of the law he interfered in every way with the polling of Democratic votes, challenging the votes, insisting on naturalized citizens showing their papers, and otherwise retarding the election and intimidating the voters. He will be arrested this morning for violating his oath of office." Also the following:

"Officious Supervisors."

"Isaac Forst was arrested at the first precinct of the seventh ward on the affidavit of Burton Vance. This young man Vance has made himself very officious. Although a supervisor and, therefore, forbidden to do any electioneering, he worked constantly for Wilson and constantly interfered with peaceable

Democrats who wished to cast their ballots. He was seen to take several colored men aside and then vote them. He himself will be arrested this morning on the charge of bribery."

The appellee admitted the publications, and pleaded that the charges made therein were true; that the language was a fair and reasonable criticism upon the conduct of a public officer, and also pleaded facts in mitigation. After hearing the testimony the jury found a verdict for the defendant company. The appellant's counsel assign some twenty-nine errors in their motion and grounds for a new trial, all of which, however, are fully embraced in the alleged erorr of the court in giving and refusing instructions to the jury. Without considering in detail the facts shown in proof upon which the finding of the jury may be supported, we advert to it as showing the proper application of the law to the facts of the case. Vance, who was a lawyer, and an intimate friend of one of the candidates for Congress, had been appointed an assistant supervisor under the provisions of the Federal election law. At midnight before the morning of the election he met two Hazen detectives from Cincinnati, made a map or rough sketch of the streets of the city for them and agreed with them on certain signs by which he would furnish the names of voters whom the detectives had reason to believe had been bribed.

The candidate, at whose instance the detectives came from Cincinnati, was present when these plans were matured, and, according to the testimony of the appellant, gave positive instructions to make these arrests, irrespective of party. On the day of the election Vance was active, both inside and outside the room where the votes were being taken. He offered Wilson ballots to persons approaching to vote before they had expressed any preference or indicated that they wanted such a ticket; he challenged voters known to be entitled to vote and thus delayed and interfered with the election; he was seen to take voters aside and into a room a short distance away and talk with them secretly, who, when they came back, voted for Wilson. He consulted frequently with the strangers—the detectives. He arrested Forst and ordered Bills out of the precinct. He testifies "that he saw a number of persons going into a bar-room kept back behind the polling place by James P. Whallen and a number of voters going therein, and that he stopped it as he believed that some of the voters were bribed from the way in which they came out and voted."

The proof is that he browbeat and bullied the Democratic workers and voters and threatened to arrest them. The Republican workers and voter was unmolested. The Democratic supervisor was appealed to.

W. B. Haldeman, one of the officers of the defendant company, and who was on the ground in company with Bills, who expressed a determination to make the necessary affidavits, then sought the chief supervisor of the election for the purpose of having Vance arrested. After a fruitless search for him they postponed action until the following morning, at which time, however, the fight being over, the intention was abandoned. This is a brief synopsis of the testimony introduced by the defendant to show the truth of the publications and to establish that the comments complained of were fair and reasonable criticisms upon the official conduct of the appellant.

We may say in this connection that the appellant proved by a number of witnesses that his conduct was in no way reprehensible or officious, and that he performed his duties impartially.

The point of our inquiry is, however, was there proof in behalf

of the defendant and in support of the pleas tendered by it to authorize the verdict of the jury?

The court instructed the jury to award the plaintiff damages if they believed the publications were false and made maliciously, and malice was to be inferred or presumed from the falsity of the publications, but that if they believed the statement contained in the publications were substantially true as published, or reasonable and fair criticisms of the acts and conduct of the plaintiff as supervisor, and were made in good faith without malice, then they should find for the defendant. Proper instructions on the duties required of the supervisor were also given. We are of opinion that these instructions were substantially correct. The jury were the judges of the truth of the matters put in issue and they were the judges of the reasonableness of the ground upon which the newspaper charges were based. Animadversion upon the conduct of a public officer, however severe, is not libelous, if it be confined within the limits of fair and reasonable criticism and based on facts. It may be thought that the imputation of bribery contained in the printed matter was not supported in fact, but it will be observed that the supervisor, upon seeing persons go in and out of a room with his opposing workers, interfered with the freedom of their action upon the belief that it was evidence of bribery. Therefore, he can not complain if his activity, exercised in the same manner, be taken as evidence of the same offense.

Judgment affirmed.

WILSON, &c. v. TAGUE, &c.

(Filed October 21, 1893.)

Warning order—Affidavit—In an action to settle an insolvent decedent's estate, certain of his heirs were proceeded against as nonresidents. The petition, which contained the necessary allegations for a warning order, was signed by plaintiff. A warning order was entered in which it is recited that it was entered upon proof of nonresidency of the parties warned. An attorney was appointed for the nonresidents and made defense. A year before the order of sale of decedent's land was made plaintiff made oath to his petition. The nonresident heirs, fifteen years after the sale, seek to recover the land from the purchasers who paid full value for it on the ground that the warning order was void as to them, because not based on any affidavit. Held—Since the necessary allegations were sworn to before the order of sale, it is to be presumed that the warning order was readopted and reentered by the court before the order of sale, and since the original order recites that it was entered upon proof of nonresidency it will be presumed that the proper affidavit was then made, but by mistake not endorsed on the petition. The heirs can not recover.

Hill & Denham for appellants.

Lester & King for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

Peter Wilson died in 1874 intestate. His administrator brought suit against his heirs and creditors to settle his estate as an insolvent estate.

Three of the heirs were nonresidents at the time, and have been continuously ever since. The fact that they were nonresi-

dents was set out in the petition, which was signed by the administrator, and they were preceded against by warning order. A nonresident attorney was duly appointed and answered. The court gave judgment for the sale of the land in controversy, and it was sold in 1876 and possession delivered.

The appellants, the said nonresident heirs, bring this suit to recover their interest in said land, upon the ground that the judgment and sale as to them was void because, as they allege, the warning order was obtained without the affidavit required by the Civil Code then in force.

As said the allegations as to the nonresidency of the appellants were contained in the petition, and it has been expressly decided by this court that if the requisite facts are set out in the petition to entitle the party to a warning order, and is sworn to by the plaintiff, etc, it is sufficient.

The order of warning recites the fact that it was made upon proof heard as to the nonresidency of the parties, and the record also shows that the plaintiff did thereafter swear to his petition, and that the court treated the order of warning as sufficient and rendered judgment accordingly.

The affidavit was made at least a year before the rendition of the judgment, and the attorney for the nonresident acted for them thereafter, and the court likewise acted upon said order after the affidavit was made, rendered judgment; and the order of warning itself shows that it was not made without proof of nonresidency. Now then, after the lapse of neary fifteen years, the appellants ask the court to declare the order of warning void and restore to them land that was sold by virtue of the judgment rendered in the case to satisfy the debts of their father, and for the payment of which the land was bound and which it did pay.

It would be trifling with justice to now take the land away from the purchasers, whose money went to pay these debts, and give it to the appellants, freed from the debts for which it was originally bound and sold, unless there be some inexorable rule requiring us to do so. Happily there is no such rule, for, according to the facts stated, the order shows that it was made upon proof of nonresidency, doubtless by appellant himself, as an affidavit to his petition, but the clerk failed to write it in the usual form. At least, to prevent an absolute defeat of justice, we should so presume after the long lapse of time, and thus presuming, the order was erroneous merely and not void; and as long as it stands unreversed the appellants are bound by it. Besides, the proper affidavit having been made and the court subsequently acting on the order of warning, we must presume that the order was reentered and readopted by the court.

Judgment affirmed.

HANSFORD v. BERRY.

(Filed October 24, 1898.)

1. A right of way over an uninclosed and uncultivated woodland may be acquired by prescription, provided the adverse use has continued for fifteen years or more.

In this case the evidence shows that appellant has used and kept in repair for twenty years a passway over substantially the same way through appellant's woodland, and that he and those through whom he claims have so

used it for fifty years, from these facts a presumption of adverse use as a matter of right arises, and this use having continued for more than fifteen years, the right to it can not now be denied appellee.

2. The owner of land may apply to the county court to discontinue appellee's right of way over it and to establish another for him.

Sweeney, Ellis & Sweeney for appellant.

H M. Haskins for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant brought this action of trespass against the appellee for removing the fences on appellant's land. The appellee justified upon the ground that the fences removed obstructed his right of way, and that they were only removed to the extent of removing the obstruction.

The appellee claims a right of passway over the appellant's woodland. The appellant denies the right of passway, and claims that the use of the passway was by his permission only. So the question is, was the passway over the appellant's woodland by right or by permission only? The lower court decided that it was by right, and the appellant has appealed.

There is no proof that the right to pass over the appellants' land was ever given by any court, but the right to the passway is claimed by adverse use for more than fifty years.

The case of Bowman v. Wickliffe, 14 B. Mon., —, is relied on as sustaining the position that no presumption arises in favor of the adverse use of a passway over woodland, but that the presumption is that the passage over woodland is by permission of the owner. It will be seen from the Bowman case that for many years there were several passways over the owner's woodland; that they were changed from time to time by the owner, and one or the other discontinued as he cleared the land, and new ones opened, and that no one claimed the passway as a matter of right, but all claimed it by permission only.

Under these circumstances the court held that there was no presumption of adverse use, although such permission had continued for many years; that in order to create a right of way by prescription it must be shown that it was claimed and used as an adverse right for at least fifteen years, and as long as it was used permissively no presumption of adverse use could arise.

In the case of O'Daniel v. O'Daniel, 88 Ky., 185, and in case of Talbott v. Shaw, 13 Ky. Law Rep., 401, it was held in the first-named case that the Bowman case, supra, was unlike the O'Daniel case, because there the passway had not only been practically upon the same ground for many years, but the circumstances of the locality and constant and necessary use made it evident that it had been used adversely and under a claim of right.

The case of Conyers v. Scott, 14 Ky. Law Rep., 784, reviews the Bowman and O'Daniel cases and points out the distinction very clearly. The Talbott case does the same thing.

The doctrine established by the three cases supra, is, that a right to a passway may be created by prescription over woodland, if continued the requisite length of time. In such case the question is, was the passway used as a matter of right for the period of fifteen years or more. If it was, and not in the manner indi-

cated in the Bowman case, the right will be established over woodland as well as enclosed land.

Now let us see what the weight of the evidence establishes. It is, first, that the appellant has no other way to reach the Livermore public road, which lead to the county seat, than the way in controversy; second, that it has been used for such purposes for at least fifty years, and by the appellee at least twenty years; and third, that the passway has been all the time substantially at the same place and all the time has had a well-defined roadbed; fourth, that the way has been kept up by the appellee as his passway; that the changes in it are only such as resulted occasionally from the fall of a tree across the roadbed or similar obstructions.

These facts clearly create the presumption that the passway was used as a matter of right, and having been so used for fifteen years and more, the appellee's right to its continued use is established.

If it be a fact that appellant wants to clear his ground and fence it up there is nothing in this opinion that precludes him from applying to the county court to discontinue the right of way established in this case and have another right of way opened for the benefit of the appellee. In which case the court will take into consideration the equities of all the parties and act accordingly.

The judgment is affirmed.

LOUISVILLE BAGGING MFG. CO. v. CENTRAL PASS. RY. CO.

(Filed October 24, 1893.)

1. The legislature may authorize the construction of a railway upon a public street of a city, and its operation by steam or electricity.
2. The council of a city, when authorized by the legislature, may grant a right to construct and operate an electric railway upon the public streets.
3. The construction and operation of an electric railway operated by the trolly system in a public street of a city is not so dangerous and does not impose such additional burden upon the land abutting thereon as to entitle the owner thereof to previous compensation for the right of way before such construction.

Thos. F. Hargis for appellant.

Humphrey & Davie for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

The Louisville Bagging Manufactuirng Co., a corporation, brought this action for an injunction, which was temporarily granted, restraining the Central Passenger Railway Co., a corporation, and its officers from constructing or operating an electric railway on Walnut street, between Nineteenth and Twentieth streets, in the city of Louisville, where plaintiff has a large building used for manufacturing bagging.

R. H. Thompson, judge of the Louisville City Court, was also enjoined from proceeding until termination of the action to try J. J. Tapp, president of plaintiff, and others upon warrants against them for cutting down and removing posts erected by the railroad company for use in operating its cars.

The right to construct and operate by electricity the railway upon Walnut street it appears had been, before the action was commenced, granted to the company by resolution or ordinance of the general council of the city of Louisville, duly passed, in pursuance of authority conferred by acts of the general assembly; and as exercise of such delegated authority by municipal legislation has been often sanctioned and recognized by this court, the right so given to the Central Passenger Railway Co. must be regarded as valid and effectual, as if conferred directly by the general assembly.

Moreover, as legislative power to authorize construction of a railway upon a public street, and operation of it by even steam has been distinctly and often held by this court to exist, we see no reason to deny power to likewise authorize construction of such railway to be operated by electricity; for it is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated; and it is only where other ways of travel and transportation are prevented or unreasonably obstructed that courts can interfere to either enjoin or limit operation of railroad upon a public street.

It, therefore, seems to us the simple inquiry in this case is whether the manner in which the railway under consideration has been or is designed to be constructed and operated is such as to clearly impose a new and additional burden upon the land of plaintiff abutting Walnut street, and, as a consequence, entitling him to previous compensation for the right of way.

The first ground of complaint by plaintiff is that the railway track constructed in front of its manufacturing establishment will prevent loading and unloading vehicles used in transporting its goods and raw material in the manner heretofore done, which is by backing the wagon or dray up to and at right angle with the sidewalk.

The answer to that complaint is, first, that such way of loading and unloading necessarily seriously obstructs not merely operation of every double-tract railway, but proper use of a street for all other vehicles; second, there appears to be an ordinance of the general council prohibiting loading and unloading of vehicles in that mode.

The next ground is that operating an electric railway car upon a public street is dangerous to those who reside or do business thereon.

Practical application of electricity as a power to drive machinery or move carriages, as also for illuminating purposes, is of recent date, and it is shown the system best adapted for the purpose, if yet discovered, is by no means a perfect one. The evidence of experts and men having actual experience shows that three different systems for moving railway cars by electricity have been tried in this country, viz: The underground conduit system, storage battery system and that of overhead wire; and it fully appears that the two first are as yet so defective or imperfect that, of several hundred electric railways in operation, there are not a dozen to which either system has been applied, all others being run by the overhead wire or trolley system, the same used by the Central Passenger Railway Co.

To apply electrical power in that way requires erection at edge of the sidewalk, on each side of the street, of tall polls, about 120 feet apart, and from top of opposite polls is stretched across the street a sustaining wire, which holds up the electric wire that is thus suspended over middle of the railway track and from which, by means of the trolley pole, the electric current is connected with the motor placed under the car.

It will be thus seen that the electric wire is not like telegraph, telephone and electric light wires, but suspended over the railway track. It further appears that the electric pressure, measured by volts required to drive a street railway car, is not so great as to destroy or seriously injure a person or animal coming in direct contact with it; injury, when it is produced, resulting only when a broken or detached telephone or telegraph wire falls on it.

The evidence in this case, which need not be considered in detail, shows that, although new and not fully perfected, the trolley system of operating street railway cars, when properly adjusted, and supervised, is not much, if any, more dangerous than horse power, and much less so than steam power applied in the same way.

Moreover, while street railway cars thus operated go at greater speed, are more comfortable and must in time become a cheaper mode of travel, they can be easier controlled than horse cars, and do not really more obstruct the street or interfere unreasonably with business transacted thereon.

It, therefore, seems to us that, in view of the benefit and convenience to the public of electric cars thus operated, and comparatively little inconvenience or danger they are to individuals, it would be going beyond the province of a court, and contrary to decided weight of judicial authority, to enjoin or limit their use, especially when a party seeking such remedy so signally, as has the plaintiff in this case, fails to show he has been unreasonably obstructed or hindered in his business, or that his rights have been illegally interfered with.

The judgment dissolving the temporary injunction and dismissing the action is affirmed.

CUMMINS v. SHAWHAN, &c.

(Filed October 31, 1893—Not to be reported.)

Land held in trust by purchaser for insolvent debtor—Evidence—S. & L. were partners and L. became insolvent and largely indebted to S., to secure payment of which debt he mortgaged to S. a large tract of land. Subsequently the tract was conveyed by L. to S. for the recited consideration of $13,000. A small tract of 100 acres belonging to L. was sold under execution and purchased by S., who also purchased the equity of redemption in this land. This purchase of the 100 acres occurred before this execution of the deed to S. for the large tract. S. & L. are both dead. In this action by the heirs of L., in which they claim that the conveyance of the large tract to S. paid off all indebtedness of L. to S. and that S. thereafter held the 100 acres in trust for L. Held—That the evidence is not sufficient to support the allegations of the petition, and S. must be regarded as owner of both tracts in his own right.

J. Irvine Blanton for appellant.

A. H. Ward for appellees.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Pryor.

H. E. Shawhan and Pleasant Lilly were partners in certain business transactions, and both died in the year 1882.

Lilly, during his life, became insolvent and largely indebted to Shawhan. Shawhan paid debts for him amounting to $9,000, and took a mortgage on his land to secure it. This note was bearing 10 per cent. interest.

After the execution of this mortgage Shawhan took an absolute deed to the land mortgaged, with a consideration expressed of $13,200. Lilly owned a small tract of land, not embraced by the mortgage, of about 100 acres. This was sold under executions, and also purchased by Shawhan.

The land brought less than two-thirds of its value, and the equity of redemption having been sold, the purchaser, upon being paid by Shawhan, transferred to Shawhan his right, thereby investing Shawhan with the equitable title to this tract also. This was all done before the execution of the deed to Shawhan by Lilly of his main tract.

After Lilly and Shawhan had both died, and several years after these transactions took place, the creditors of Lilly instituted this action against Shawhan's heirs and devisees, claiming that the tract of 100 acres was purchased by Shawhan for Lilly and held in trust, and that when the deed was made for the principal tract all matters were settled between them, and the land was that of Lilly, and never belonged to Shawhan.

There is no evidence of any agreement by Shawhan to make the purchase for Lilly, except such as might be implied from the relation of the parties to each other and the circumstances surrounding them, nor is there proof of any final settlement between them, still the deed to the larger tract was made and testimony introduced, showing that Shawhan stated more than once that Lilly would have a few hunderd dollars and this small tract of land left, and Lilly did in fact use and appropriate the rents of this small tract for his own use after the deed to the larger tract had been executed, and this must have been with the consent of Shawhan.

It appears, however, that when the deed was executed for the large tract that nothing was said or done by Lilly or Shawhan towards releasing Shawhan's lien; but, on the contrary, Lilly, after that date, in trying to sell the land, stated that it belonged to Shawhan, and he was to get all over $3,000 that the land brought.

He made this statement to two or more persons, and must have regarded Shawhan's claim as still existing and unpaid, as there was no reason for his making such declarations to those who had no interest in the matters beteen himself and Shawhan.

Besides, after renting this land, when the last application was made to him to rent it, he told the party applying that he must now see Shawhan; that it belonged to him.

Besides all this he surrendered the possession to Shawhan and left the premises, removing to another part of the county, and stating, when told of the rumor existing to the effect that Shawhan was quietly holding this land for him, he said it was not so; that he owned no land. That he was utterly insolvent, without any property, is conceded, unless, as the creditors insist, he owned this land, and why he should abandon it in his destitute condition, is inconsistent with the fact of ownership.

It is evident that he and Shawhan lost money in the mule venture South, and the note for $1,600 paid for him by Shawhan and McGibben, shows other indebtedness than that Shawan had actually assumed.

If Shawhan was the man of integrity that both parties show him to have been, and that he no doubt was, he never would have taken possession of this land, or held it in the manner it is proven he did, without giving to Lilly some unmistakable evidence of the latter's right to it.

It is apparent from the whole case that Lilly was struggling

to sell this land and make something out of it, and finding that he could not accomplish this and satisfy Shawhan, he abandoned it, leaving Shawhan the owner and in the possession.

We concur with the conclusion reached by the chancellor, and must affirm the judgment.

MALONE v. CONN, &c.

AIMS v. SAME.

(Filed October 31, 1893.)

Sale of infants' remainder interest in land held by their father for life as tenant by the curtesy—Where a married woman dies the owner of real estate, in which her husband takes at her death an estate for life by the curtesy, with remainder to the infant children of the husband and wife, the father and his infant children are not joint tenants in possession, nor are the infant children to be regarded as joint owners in possession; therefore the chancellor has no authority, under section 490 of the Civil Code, on petition of the father, to order a sale of the land on the ground that the father and remaindermen were joint owners in possession, and that the land could not be divided without materially impairing its value The infants' interest in such land can be sold only under section 491 of the Civil Code and for a reinvestment of the proceeds for them.

Bullitt & Shield and C. M. Lindsay for appellants.

John S. Jackman for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

These cases involve the same question and are considered together. These were actions below to enforce the execution of contracts for the sale of realty, by which the vendors bound themselves to make a good title. The defense is a want of title in the vendors, or such a title as the purchaser should not be required to accept.

Mrs. Winstanly owned this land in fee, and dying, the land descended to her four children, two of whom are now infants. Her husband, the father of these children, became tenant by the courtesy. He held, therefore, an estate for life, with remainder to the children.

Winstanly qualified as guardian of the children, and filed an action in the law and equity court of the city of Louisville, asking to have the realty sold, alleging that the owners had a vested estate in possession; were joint tenants, and the property could not be divided, etc., filing the evidence of title.

There was no effort to have the estate or its proceeds reinvested, or a bond executed for that purpose, as provided by section 491 of the Code, but the parties proceeded to sell under section 490, upon the idea the remaindermen were in the possession and were holding as joint tenants.

There was no surrender of the life estate, by which that interest was merged in the remainder, but, on the contrary, the value of the life estate was deducted from the purchase price.

The father and guardian became the purchaser, and it is manifest held by his purchase as trusteee for his children, but

whether subsequent purchasers would be affected with notice, by reason of the judicial proceedings, presents a very different question, as the chancellor might authorize or sanction the purchase by the guardian when for the benefit of his wards.

In this case the life tenant is proceeding against the remaindermen, and the chancellor derives his power to sell the estate of these infants from the statute. Its provisions must be substantially followed.

Section 491 provides the manner in which a remainder or remainder interest may be sold, belonging to the infants. The owner of the particular estate may institute the proceedings against those in remainder, or the remaindermen against the life tenant, but the proceeds must be sold for investment in other real estate.

This is, therefore, not a proceeding under section 491. Section 490 provides that a vested estate in realty, jointly owned, may be sold by order of a court of equity if the share of each owner be worth less than $100; and, secondly, if the estate be in possession and can not be divided without materially impairing its value or the value of the plaintiff's interest therein.

This statute applies only to estates in possession by those holding jointly, and can not be held to apply in cases where the possession is with the particular estate or the estate for life; nor will the court construe the statute as permitting the life tenant to surrender the possession, and vesting it in the remaindermen by merely asking that his life estate be sold, for if this can be done there is no necessity for section 491, as in every instance where fathers who were the owners of the particular estate saw proper, or the guardians of the infants, a petition could be filed and the land sold under section 490 without making any investment for the infants out of the proceeds.

Section 491 was evidenty enacted to protect infant remaindermen, and section 490 to give relief to joint tenants in possession, where the land can not be divided without materially injuring the parties in interest.

This court has placed a liberal construction on these statutes, with a view of upholding sales where purcahses had been made in good faith and the interest of infants benefitted by a sale under them; but to permit the life tenant to proceed as in this case would be to disregard the plain letter and meaning of the two sections.

The case of Power v. Power 12 Ky. Law Rep., 793, was not a construction of this section, the court holding only that the widow acquired the title by virtue of the assignment, and not before.

The title vests, in such case, in the heirs, subject to the widow's right of dower, and there the title remains until dower is assigned.

Says Mr. Minor, in his Institute, "there is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife; on the other hand dower is not, in any sense, an estate until assigned. (12 Minor's Institutes, 157.)

This is the common rule, the widow not being vested with the title or possession. She had no legal seisin nor right of entry until dower is assigned. (Scribner on Dower, volume 2, page 27.)

Whether or not this right of entry is affected by our statute is not necessary to determine, as it is plain the vested interest in remainder, without the possession, did not authorize the case under section 490.

In the case of Kean v. Tilford, 81 Ky., 600, where the parties held as tenants in common, their several interests being different, this court held that as the parties before the court all

owned the realty, the mere fact of one interest being greater than another did not prevent the sale under the statute.

There may not be an unity or equality of interest, but where the parties, plaintiffs and defendants, all own the estate are in the possession, the fact that one of the unities required to create a joint tenancy at the common law is absent will not preclude a sale under the statute.

It follows that the title exhibited is not such as the chancellor should require the apppellees to accept.

Reversed and remanded for proceedings consistent with this opinion.

LOUISVILEL & NASHVILLE R. R. CO. v. RAINS.

(Filed October 17, 1893—Not to be reported.)

1. A railroad company is liable for injuries suffered by an engineer on one of its trains through the gross negligence of its employes in charge of another of its trains. It is not liable in such case if the injury resulted from ordinary neglect only.
2. Pleadings—Neglect—In common law actions to recover damages suffered through the negligence of another the plaintiff is not required to allege the degree of the neglect; under the general allegation of neglect he may prove either gross or ordinary neglect.
3. Railroads—Neglect—Negligence is a question of law and fact, and when the evidence as to the facts is conflicting the question as to the existence or nonexistence of negligence is for the jury to determine.
4. Same—Where an engineer of one train, by the gross neglect of those in charge of another train, is placed in a position that appears to him, in the exercise of a reasonable discretion as engineer, to be one of immediate danger, to avoid which, as a prudent man, he jumps from his engine, thereby injuring himself, the company is liable for the injuries so suffered if, under all the circumstances, the engineer acted as an ordinary prudent man would have done, even though the danger was only apparent and not real.

J. W. Alcorn and Edward W. Hines for appellant.

W. O. Bradley, M. C. Saufley and W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

New opinion of the court by Judge Pryor.

In this action is involved the right of recovery by the engineer (Rains) of one train for the negligence of those in charge of another train, both trains running on the road of the appellant under the same employment. The two were freight trains running in the same direction. The train in front was severed in some way, leaving the cars motionless, and the train behind approaching ran so near the standing cars of the front train as to indicate great peril to the engineer, who, to save himself from injury, after reversing his engine and giving the signal for breaks, jumped from his train and was seriously injured.

The rules of the company require that when a train is delayed by accident or an obstruction where there is a curve or down grade in its rear, and such accident occurs in the night, makes it the duty of the flagman to go back thirty-five telegraph poles, or 2,100 yards, and place down two torpedoes, and also place 480 yards from the delayed train a single torpedo. The explosion of

the two torpedoes means that there is an obstruction on the road —"Take your train in hand." The explosion of one torpedo is "to stop at once."

The testimony for the appellee conduces to show there was no explosion of the torpedoes until within six telegraph poles of the standing train. It was night and perfectly still and the explosion of the two torpedoes was the signal only that an obstruction was ahead, and, if given when it should have been, all danger would have been averted. It is proper to say that the conductor and brakeman on the delayed train both swear, or the breakeman at least, that the torpedoes were placed at the proper distance, and if so the signal was sufficient to apprise the appellee of his danger, and in time for him to stop the train and prevent placing his life in immediate peril. With this conflicting testimony the case went to the jury, and the only question necessary to be considered in this case arises from the instructions.

The court said to the jury: "It was the duty of those in charge of the broken train to give to a train approaching from the rear all signals which experience and ordinary prudence required, in order to warn those approaching of the danger, and if the jury believe those in charge of the broken train negligently failed to give such signals, and by reason of such failure the plaintiff was placed in a position which to him, in the exercise of a reasonable discretion as engineer, under all the circumstances, seemed one of immediate danger, and that he jumped from his engine to avoid such danger, even though the same might not have been real, and that in such jumping he acted as an ordinary prudent engineer would have done under the circumstances, and that he was injured thereby, the jury shall find for the plaintiff."

This instruction, it seems to us, embraces the law of the case, and the instruction offered by the defendant and refused is the converse of the proposition presented in the instruction given for the plaintiff, and may be said to be as favorable to the plaintiff as the one given, and its refusal was certainly not to the prejudice of the defendant, as it is conceded in the instruction asked that if the signal was not placed so as to give timely notice of the approaching train, the company is liable.

Negligence is both a question of law and fact, and if the facts established by the plaintiff are conceded to be true, the court would, in this case, as a matter of law, adjudge the company, through its agents, guilty of gross neglect, and if the facts established by the testimony of the defendant are conceded, the court, as matter of law, would have given a peremptory instruction.

The evidence being conflicting, it was with the jury to say whether or not the plaintiff could recover. Some confusion seems to have originated in this case as to the liability of the appellant for an injury to an employe engaged in running one train, by the ordinary neglect only of an employe in another and different train, but both engaged in the same service.

The petition in this case alleges gross neglect, and this is the degree required to be shown before a recovery in a case like this can be had.

This court has held, and such is the law, that under the general allegation of negligence in common law actions for injuries you may establish the degree by proof, and it is not necessary to allege this degree, whether gross or ordinary, in order to make a cause of action, the averment of negligence being sufficient.

This court has also held in numerous cases, beginning with the case of Collins v. L. & N. R. R. Co., 2 Duvall, 118, that a

railroad company is liable for the gross neglect of a superior by which a subordinate is injured when in the same department of service, but for ordinary neglect the company is not responsible. Nor is it material whether the subordinate or employe is injured by the neglect of a superior on the same train of cars; if injured, gross neglect must be shown before a recovery can be had.

The rule was modified to some extent, or rather enlarged, in the case of Louisville & Nashville Railroad v. Robinson, 4 Bush, 507, where the brakeman was injured by the neglect of the engineer. They were not associated in the same kind of service, but were both employed by the company and engaged as employes in the running operations of the road, and this court, following the rule in the Collins case, held the company liable for gross neglect only.

In the case of the Louisville & Nashville R. R. Co. v. Cavens, 9 Bush, 561, Cavens, an engineer on a freight train, was killed in a collision of trains caused by the negligence of the conductor of another freight train.

The action was for willful neglect and no other, and the contention on the part of the company was that as the two occupied the same position in a common service they were not the agents of the company but the agents of each other. The court, in the opinion in that case, answered this argument by saying that a different rule prevailed "where one occupies such a position in the service with reference to his colaborer as precludes him from having any control over his actions, or the right to advise even as to the manner in which the service or labor is to be performed."

There was no question as to the degree of neglect raised, nor was it contended that recovery could be had without showing willful neglect, and the language used in the opinion must be considered with reference to the question discussed. It was whether a servant on one train could recover for an injury caused by the neglect of a servant on another train. It was held that this could be done, and the cases in 2 Duvall and 4 Bush, were referred to as sustaining the view presented in the case being considered. The case of Cavens v. L. & N. R. R. Co. only follows the doctrine of former cases, and recognizes the rule that the company is liable for gross neglect only where a servant is injured by the neglect of another servant in the same department of service, athough on different trains. The authorities have been reviewed in the recent case of Voltz v. Chesapeake & Ohio Ry. Co. marked for publication. (See Post, —.)

As gross neglect was found to exist in this case by the verdict rendered, and that verdict sustained by the evidence, the judgment is affirmed.

BAIR, &c. v. MATTHEWS, &c.

(Filed November 2, 1893—Not to be reported.)

Conveyance by husband to wife—Contracts—Fraud as to husband's creditors—T. received from his wife $1,500, by reason of the marriage, which he promised to invest in land for her; he failed to so invest the money. T. being indebted, assigned to his brother L. his interest in land inherited from his father, in consideration of which L. agreed to pay certain of T.'s debts, and further agreed to convey the land to T.'s wife when T. should have repaid him money so paid on T.'s debts. In a suit between T. and L. it was adjudged that T. had repaid L. all of said money except $85, and was entitled to a conveyance of the land when this sum was paid. Subsequently

a judgment was entered, directing the conveyance to be made to T.'s wife. In this action by one of T.'s creditors to subject the land on the ground that his money and labor paid for it. Held—That the equity of the wife is at least equal to that of T.'s creditors; the contract between T. and L. to convey to T.'s wife was supported by a sufficient consideration; the conveyance to T.'s wife was not fraudulent and must be sustained.

Swinford & Evans and Ward & Dickson for appellants.

W. T. Cason for appellees.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Pryor.

The testimony found in the record conduces to show that Thomas Matthews, being much involved, made an arrangement with his brother, Lewis Matthews, by which the latter was to pay his indebtedness that seems to have been specified in the agreement between them, and in consideration of such payment Thomas conveyed to his brother an interest in some land he had inherited from his father, with the agreement that when Thomas repaid to his brother these sums of money he had or was to pay out for him, the land was to be conveyed to Sallie Matthews, the wife of Thomas. The consideration for the conveyance to the wife was the promise made by her husband to invest in land for the wife what money he had received of hers by reason of the marriage, amounting in all to about $1,500. This promise had never been complied with, and hence the agreement was entered into by which Lewis, the brother, was to convey this land to the wife.

A litigation originated between the two brothers as to the payment of this money back to Lewis that had been paid out to him and resulted in a judgment to the effect that Thomas had refunded to Lewis all the money the latter had paid out but $85, and when this was paid the judgment recited that Thomas was entitled to a deed.

At a subsequent term of the court the judgment was amended so as to have the deed executed to the wife under the agreement with the two brothers.

The appellant obtained a judgment against Thomas Matthews after this agreement had been made, with interest from April, 1874, and is seeking to have the land subjected to the payment of this debt for the reason, as is contended, the labor and money of the husband paid off the debts of Lewis Matthews.

It seems to us the agreement between the husband and wife was not tainted by fraud, but on the contrary they were endeavoring to pay creditors in order that the transaction would be above suspicion.

The suit against Lewis Matthews had been decided, and, although the judgment recited that the husband was entitled to a deed, it is manifest that the final order was properly entered for the protection of the wife, based upon the agreement filed that suit. The claim of the wife was fully recognized, and the deed should have been made to her. It never was made to the husband, and the amended judgment requiring it made to her was proper. It could not, of course, affect the appellant, who was not a party to the proceeding, or aid the wife if fraud was shown.

It seems to us the equity of the wife is as high as that of the creditor, and based on an indebtedness to her by the husband that

justified the agreement on the part of Lewis to convey this land to her. He evidently assumed and paid these debts for her benefit and to protect her in her rights, and if the debt had been previously contracted the assumption by Lewis to pay these debts that the wife might be reimbursed, or the contract between her and her husband fully executed, was a sufficient consideration, although Thomas Matthews after this repaid his brother. The question is, did the husband receive this money from the wife under the agreement to invest it for her benefit? and this being established, the judgment below was proper.

Judgment affirmed.

HERBERT, &c. v. LONG, &c.

(Filed November 2, 1893—Not to be reported.)

1. Wills—Testamentary capacity—Undue influence—Verdict contrary to evidence—The testator when he made the will in contest was 78 years of age, possessed of a rational mind, capable of understanding his relations to all the members of his family and of determining objects for his bounty, and there is an entire absence of evidence to support the verdict finding that he was not possessed of sufficient testamentary capacity or was unduly influenced when he executed the will.

The mere fact that a testator divides his estate unequally between his children, or stated after the execution of the will that he intended to change it, will not authorize a court or a jury to set it aside.

A change by a father, at the solicitation of his son, of the provisions of his will, so as to give the son only a life estate in the property devised to him, with remainder to his children, with the intent of keeping the estate devised in the son's family and preventing any of the son's creditors subjecting it to satisfy their claims, does not indicate that the son exercised an undue influence over the father in the execution of the will.

2. Same—Instruction—An instruction to a jury that an equal or unequal distribution of his estate by a testator among his children is a circumstance in common with other circumstances to be considered by the jury in determining the testamentary capacity of the decedent, is misleading and erroneous, in that it gave undue prominence to the circumstance of unequal distribution by the testator. Such an instruction has been frequently condemned by this court.

Robert Richardson and Robt. C. Simmons for appellants.

Chas. H. Fisk for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The last will of Lewis Herbert, deceased, was assailed in the court below upon two grounds: The first is that the writing purporting to be his will failed to express the intention of the testator as to the disposition of his property; second, the undue influence exercised by James Herbert, a son of the testator, in its execution.

The writing was admitted to probate in the county court, and on an appeal the probate was denied. The judgment below must be reversed on two reasons:

First. The instructions were erroneous; and, secondly, there is an entire absence of evidence to support the finding of the jury and the judgment upon it.

While the testator was about seventy-eight years old at the

time the paper was executed, he was possessed of a rational mind, capable of understanding his relation to the family, and of determining the objects of his bounty and the manner in which he should dispose of his property between his children.

The will was written by his attorney and wholly dictated by the testator. He knew its contents, and when read to him subscribed his name thereto, and it was then attested as required by the statute. The will was executed in August of the year 1886, and was substituted for a will written and signed in the year 1880.

The only difference in the two papers consists in changing the provisions of the first will, by which the fee was given to his children, into a life estate, remainder to their children, except as to his son James, his portion by the first will having been given in trust to his sister, Mrs. Long.

By the provisions of the paper in controversy James is given a life estate, remainder to his children, without power on the part of James to alien or encumber it during his life. The will that was canceled the testator had in his possession until the last paper was executed, and he lived four years after the last paper was signed, and, although the devisees and one or more witnesses prove the declarations of the testator, that he intended to change it because it was unequal or failed to carry out his wishes, no alteration was ever made, and if such had been his real purpose the attorney who wrote his will lived in the same city and was accessible to him at almost any time, yet he kept the paper in his own custody, and when solicited by a disinterested party to give to Mrs. Long her interest in fee, his reply was that he had given it to her as long as she lived, and that was as long as he wanted her to have it, and to another witness who had spoken to him about the division he had made of his land, "that if his children were not satisfied with what they got they could just let it alone and let some one else have it."

When the first will was executed his daughter, Mrs. Long, was unmarried, and having been married for several years and without children, he seems to have restricted her interest, as he had that of his other children, to an estate for life. In this there is nothing irrational or unreasonable, and to destroy this paper because the division was unequal, and, upon testimony as to the statements of the testator, that he intended to alter its provisions, would be to reform or cancel every will that failed to produce exact equality between children, and upon proof of statements made by the devisor, by reason of the importunities of those in interest, who, from their ideas of what was just and right, had concluded that their testator had failed to equalize them when distributing his bounty.

There is no testimony conducing to show a want of mental capacity when this paper was prepared by the draftsman and signed by the testator. That he became infected by disease after this, and was nursed and cared for by an affectionate and kind daughter, whose services were of more value than the devise made to her, affords no reason for setting aside his will, and when there can be no doubt that the manner he has disposed of his property was the offspring of his own mind.

It is argued, however, that the first will was cancelled because James Herbert did not want his sister to act as his trustee, and that James importuned the old man to so fix the devise to him as that some one of the devisees could not make out of the estate devised to James a debt that James was owing.

It is plain that the purpose of the devisor was to secure the estate devised to his grandchildren by giving them a remainder

interest, and the fact that James may have solicited his father to make his will or so alter it as to keep the estate in the family of the son is not the exercise of an undue influence unless there is something else showing that one mind controlled and subordinated the other, so much so as to cause the will to be executed contrary to the wishes of the testator. The provision itself is rational and made when James was not present, and just such a provision as should have been made, where it clearly appears the purpose of the testator was to make his grandchildren the recipients of his bounty as well as his children. There is no evidence of the want of capacity to make this paper, or the existence of an undue influence operating on the mind of the testator when he signed it.

The jury was told in instruction No. 4 that if one has capacity to make a will he may dispose of his estate as he sees proper, but an equal or unequal disposition of it is a circumstance in common with other circumstances to be considered by the jury in determining testimentary capacity. Such an instruction has been held misleading in more than one instance by this court, as it singles out the fact of inequality in the devise made as a circumstance the jury must consider, and makes it more prominent than any other fact or circumstance in the case bearing on the question of mental capacity. A jury with this circumstance against mental capacity, and the kind and considerate care of the daughter affected by it on the one side, and the propounders who have received a little more of the estate in value on the other, will not long hesitate in making for the testator such a will as in their judgment produces equality between those entitled to the bounty. This has been done in this case by disregarding the wishes of the testator, and the rendition of verdict under which his property passes by operation of law.

The case of Zimlich v. Zimlich, 90 Ky., 697; Stoke's ex'or v. Shipbill, 13 Bush, 180; Broaddus' Ex'ors v. Broaddus' Heirs, 10 Bush, 299, determined the law in instruction No. 4, and in this case, as there was an absence of any other testimony, it was in effect saying to the jury, if there was inequality in the distribution of the property you must find against the will.

It follows the judgment below must be reversed, with directions to grant a new trial and for proceedings consistent with this opinion.

SLAUGHTER & McCULLOCK v. KARN.

(Filed November 2, 1893—Not to be reported.)

Right of homestead in several adjoining tracts of land—One who lives with his family on his lot, containing six acres, which is not adjacent to his farm of sixty-four acres, but which is connected with the farm by a passway 200 yards in length, is entitled to claim both the six acre lot and the sixty-four acre farm as his homestead, provided the two are worth less than $1,000, and have both been claimed and used by the owner as one farm. The two pieces of property can not be considered as two separate tracts of land in such case.

Wier, Weir & Walker for appellants.

Karn & Hayes for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The appellee in this case owned a tract of land containing 84 acres, upon which he lived, and upon which an execution in favor of the appellant had been levied, and this land was valued at a sum sufficient to give the debtor the whole tract as a homestead. The appellee, his residence being in a delapidated condition, exchanged with one Boone 20 acres of the 84-acre tract for a lot of 6 acres of land, on which there was a house, and moved into it. This house was not directly connected with the balance of the 84-acre tract, but a passway was given the appellee for the distance of 200 yards that did connect the house he lived in with the balance of the tract, and the appellee used both as one farm. The question presented by the appeal is, can the appellee have a homestead in the several tracts of land?

This must depend altogether on what constitutes several or separate tracts. One may own land divided by a public way and may have separate deeds for each parcel, but when using both as one tract with only a highway intervening he is entitled to a homestead of the value of $1,000, and if he fails to get that much on the one side of the road, the deficit is made up on the other upon the idea that it is all one tract. (Travis v. Lucas, 14 Bush, 395.)

In this case is the proximity of the 64 acres to the house and lot such as would justify the conclusion that it is one tract, and is it one tract in contemplation of law? It all belongs to the appellee, and is directly connected by a passway not exceeding 190 yards in length and is used as one tract, and, therefore, the appellee is entitled to the homestead in this tract, consisting of the lot and the 64 acres. There is a plain distinction between this case and one where the distance is such, the one tract from the other, as would make the two separate tracts, and in this case the two should be regarded as one and homestead allotted. This the chancellor has done by giving to the appellee the lot upon which the house stands, valued at $350, and then gives him $650, to be paid out of the proceeds of the 64 acres. This is equitable, and if the creditors are willing to give more for the 64 acres it must go subject to the homestead lien.

Judgment affirmed on original and cross-appeal.

CAPERTON, &c. v. HUMPICK.

(Filed November 2, 1893.)

Implied dedication of streets—Acceptance and enjoyment of improvement made by the public—In 1869 the owners of a certain boundary of land near Louisville, by deeds of partition, divided it between themselves and made a plat of the tract so divided, wherein appeared various streets, among others Breckinridge; but the deeds provided that as between the partitioners and the public the descriptions of streets as set out therein and in the plat should not be considered a dedication of the land for a public street, but that each of the partitioners should be entitled to the use of such streets. The city of Louisville now extends beyond such tract and the partitioners have sold many lots abutting on such streets. Breckinridge street has been improved by the city at great expense and the partitioners have availed themselves of the benefits of such improvements. Held—That notwithstanding the declaration in the deeds of partition, a subsequent dedication of Breckinridge street must be implied from all the conduct of the owners of the abutting property.

Humphrey & Davie for appellants.

Lane & Burnett for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellee, Humpick, a contractor, brought this action to enforce a lien on certain land to pay for improvement of what is called Breckinridge street, between Underhill and Vine streets, done by him under an ordinance of the general council of Louisville. The land assessed to pay for the improvement and upon which the lien is claimed is composed of quarter squares between Breckinridge and Caldwell and Dupuy streets, situated north, and between it and Lampton and Vine streets south. And the only issue that seems to be involved, or that counsel argue, is whether that part of Breckinridge so improved is a public street.

It appears that James Guthrie owned and devised a body of land, within boundary of which are the improvement and also quarter-squares, to his daughters, Ann A. Caldwell, Sarah J. Smith and Mary E. Caperton.

It further appears that December 30, 1869, the three devisees, their husbands uniting, divided the land and executed deeds of partition. The various parcels allotted and conveyed to each partitioner were described and bounded in the deeds by streets and alleys, all those streets mentioned, including Breckinridge, being designated by name, as were other parallel streets north and south of Breckinridge, as well as streets that intersected it.

There was also made and recorded with the deeds a map of the entire tract devised, called and recognized in each deed as "Guthrie's Southeastern Enlargement to the City of Louisville." Upon that map is shown not only the relative position of the various streets, alleys and squares within the boundary of the original tract, but each block or square appears to have been subdivided into lots that are numbered. We, therefore, think the intention to dedicate Breckinridge, as well as all the other streets referred to, for use of the public would be manifest but for the following clause contained in each deed: "But it is distinctly understood and agreed between the parties to these deeds that the calls and descriptions of streets and alleys herein contained, so far as such streets and alleys have not been heretofore opened and established, shall not be construed as between the parties hereto of the one part and the city or the public of the other part to be a dedication of such streets and alleys so not heretofore opened or established. But said property is now laid off by squares and blocks, bounded by said so-called streets and alleys as shown in the plat herewith recorded and as herein called for, for the convenience and of fair and equal divisions in anticipation of the extension of the city to the lands herein described, and as between the parties they shall be severally entitled to use the said spaces called streets and alleys as outlets and easements in the proper use and enjoyment of their several parcels."

Although the streets within boundary of the original tract that had, previous to the partition, been operated and established were not designated in the deeds, we will assume that Breckinridge street was not one of them. But the division was made and partition deeds executed in evident anticipation that all the streets and alleys would in time become subject to the use of the public; and, besides, it was manifestly understood by

the partitioners that a sale and conveyance by any one of them of a lot or parcel of the land would give to the vendee, and, as a necessary consequence, to the public, use of the street or alley upon which such lot or parcel might abut.

The improvement of Breckinridge street, for which plaintiff in this case seeks payment, was made more than twenty years after execution of the deed of partition; and in the meantime the city had extended to and even beyond the original tract; each one of the partitioners had sold and transferred title and possession of many lots within boundary thereof; cisterns and wells had been made at expense of the city in streets even further out than where the improvement in question was made; and a bridge over south Beargrass, where Breckinridge street crosses it, had been erected at a cost of $40,000 to the city, whereby a convenient outlet from lots, not before existing, was afforded, benefit of which appellants have for several years enjoyed.

It is, however, argued by counsel that, inasmuch as during the progress of the improvement appellee was notified by appellants they would not pay or contribute to pay therefor, he is not now entitled to any compensation. But no objection was made to construction of the bridge and approaches to it, nor does it appear that appellants have declined to use either it or the improvement of Breckinridge street, full benefit and enjoyment of both which they and their vendees have and will continue to have. If Breckinridge was not at the time a public street, then the contractor who built the bridge, as well as appellee who made the improvement, were simply trespassers and appellants might have, by legal proceedings, stopped construction of both, and it seems to us good faith required them to do so, if they did not intend to abide by and avail themselves of the benefit thereof, and thus impliedly dedicate the street if not directly.

In our opinion the facts and circumstances of this case are such as to imply a dedication of Breckinridge, between Underhill and Vine streets, and to impose upon appellants the duty of paying for the improvement.

Judgment affirmed.

WILLIAMS' EX'OR, &c. v. WILLIAMS, &c.

(Filed November 4, 1893—Not to be reported.)

Testamentary capacity—Verdict not authorized by evidence—The evidence in this case clearly shows that the testator was of sound and disposing mind at the time he executed his will, and the verdict setting aside the will on the ground that the testator was controlled by "religious insanity," is so contrary to the evidence as to indicate passion or prejudice on the part of the jury; it must be set aside.

The fact that the testator read the Bible and a religious paper very frequently, and that he read the Bible aloud, and that he prayed much at night, before making his will, and claimed to have seen lights typifying the different churches, and that he talked of religion in a loud and excited manner, etc., does not indicate or establish religious insanity.

J. H. Dorman, Humphrey & Davie, T. J. Hardin and Strother & Gordon for appellants.

Wm. Lindsay and Lindsay & Botts for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Bennett.

In May, 1881, Joseph Williams made his will devising the bulk of his property to the Baptist Church. He died in March, 1887, and his will was duly admitted to record in Owen county. The appellees, who are his next of kin, appealed the case to the Owen Circuit Court and contested upon the ground the religious insanity of testator existed to the extent that he was rendered incompetent to make it, and also upon the ground of undue influence. The latter ground has been abandoned, leaving the question of insanity alone in issue. The case was tried in the lower court and appealed to this court, and this court reversed it for errors of law and sent it back for a new trial, which was had, and resulted in finding against the will.

The case is again here for review. The sole question for decision is, was Joseph F. Williams, at the time he made the will, incompetent to make it because of religious insanity? We will, in as short a way as practicable, give a full synopsis of the contestants' evidence upon that subject: It is that Joseph F. Williams was insane in 1859 about religion, and was sent to the insane asylum in the same year and remained there under treatment about seven months, when he was discharged as "recovered;" that he then returned home and pursued his ordinary occupation of farming, which he did well and successfully; that he read the Bible and Western Recorder a great deal and almost exclusively; that he was in good health, social and a good conversationalist, and most persons took an interest in hearing him talk; that he took care of his old mother and kept her comfortably as long as he lived and at no expense to herself whatever; and the money she received from her husband's estate by his management was never used, he supporting and caring for her out of his own means; that he was the statutory guardian for two of his nephews for four and eight years and managed their estate well, and also kept and cared for them; that he adopted an orphan girl and took good care of her and was greatly disturbed when she ran away from him; that he was on several official bonds as the surety of his brother; bought and sold property, and by prudence and judgment amassed a fortune of about $25,000, and he owned on his return from the asylum and in 1859 only about $600; that he was drafted during the war twice, the first time paying commutation money, the second time hiring a substitute for a discharge.

The principal circumstances relied on to establish religious insanity are:

First. That Joseph F. Williams was a great reader of the Bible and the Western Recorder.

It is sufficient to say that if that fact alone tends to prove religious insanity there are many persons, especially the farming class, that are not above the suspicion of insanity upon the subject of religion.

Second. That he often read the Bible aloud.

Well, we suppose that was a matter of taste and not an evidence of insanity.

Third. That before he made his will he prayed much at night on the farm, and at last he professed to have seen three lights —a large light, a smaller light and a still smaller light, and that God said that the large light was the Baptist Church, the second in size the Christian Church and the third was the Methodist Church.

Now these facts, in the light of other evidence, must be considered as the evidence of only a strong figure of speech, de-

signed to represent the superiority of the Baptist Church. It is not the first time that such expressions have been used to indicate the power of God in a strong and vivid manner. The Apostle Paul, the Christian lawyer, philosopher, statesman and soldier, said that his conversion was caused by a voice in the heavens saying: "Saul, Saul! why persecutest thou me?" And many things were revealed to St. John on the Isle of Patmos. It is not uncommon to hear men of strong and undoubted intellects speak of their conversion in strong and vivid terms, and believe that God was present aiding them in their efforts.

Fourth. That he talked of religion in a loud and excited manner at times.

Well, it is believed that such talk grew out of the heat of discussion, for the witnesses all state that he usually talked in a quiet and orderly manner upon that subject.

Fifth. It is said that he sometimes had a wild and excited look.

But we think that, from the circumstances of this case, that matter proves nothing.

Sixth. That he los tmuch sleep.

Well, the evidence is that he was in perfect health. Therefore, how could that fact be evidence of insanity.

Seventh. That he rebuked his brother for not having enough confidence in his mother not to require a receipt for money that he paid her.

We think this fact showed an affectionate heart but not insanity.

Now it is strange that the family, some of whom testified to the foregoing facts, would see Mr. Williams pay out money to be released from the draft and not suggest that he was insane; that they would give him on official bonds; that they would join him in business transactions and allow him to look after their own interest, and it would never occur to them that he was a monomaniac until he put his property out of their reach.

The appellant's witnesses, consisting of lawyers, bankers, merchants, church members of the different denominations and farmers, who had known Joseph F. Williams intimately for years, and who had seen him at church meetings and revivals and in the lodges, tesitfy that he was perfectly rational upon the subject of religion and upon all other subjects; that he had perfect health, slept well and was a fine business man and managed his business affairs successfully.

We think that the evidence establishes so conclusively that Joseph Williams was of sound and disposing mind at the time he made his will, that the verdict of the jury was the result of passion and prejudice.

The judgment is reversed and remanded for a new trial.

EDDY'S E'XOR v. NORTHUP, &c.

(Filed October 5, 1893—Not to be reported.)

1. Awards—When binding—An award determining the matters submitted for arbitration is conclusive and binding on the parties, although the arbitrators, after making such award, returned an additional or supplemental award relative to distinct and independent matters that had not even been submitted to them. The first award being within the scope of the authority of the arbitrators was conclusive on the parties and its validity was not impaired by the supplemental award, which was null and void.

2. Same—Accounts—Estoppel—When the parties to an account in 1879 submitted one side of it to arbitrators for settlement, and treated the other side of it as settled and not in dispute, one of such parties will not be permitted

in 1890, after the death of the other party, to discredit the part of the account so agreed upon and assail it as incorrect.

8. Contracts—Usury—The owners of standing trees made a contract with a sawmill firm by which the latter was to make advances on the trees and have a certain interest in them. After certain advancements were made another contract was entered into between the parties by which, among other things, the sawmill firm surrendered and reconveyed its interest in the trees, and the owners of the trees agreed to pay said firm the amount theretofore advanced, with 10 per cent. interest thereon, and further agreed to pay 10 per cent. interest on sums thereafter to be advanced under the second contract. Held—The agreement to pay 10 per cent. interest on prior advancement was a part of the consideration for the reconveyance of the trees, and was not a borrowing of money at usurious rates or an agreement to pay usurious interest; but the agreement to pay 10 per cent. on sums thereafter advanced was usurious.

Humphrey & Davie and John F. Hager for appellant.

Wm. Lindsay and Edward W. Hines for appellees.

Appeal from Body Circuit Court.

Opinion of the court by Judge Lewis.

Northup & Goble, having purchased a large number of timber trees on Blain Fork of Big Sandy River, and needing means to have them cut into sawlogs and floated to market, in January, 1876, entered into a contract of partnership with Hall & Eddy, owners of a sawmill in Louisville, by which the latter were to advance money and merchandise, and to receive and pay for at market prices all the sawlogs cut and rafted to Louisville. The net profit made on the logs, after re-payment of amount advanced by Hall & Eddy, to be equally divided between the two firms. Under that contract advances were made, and a large number of logs cut and delivered. But May 8, 1877, another contract was made by which the interest of Hall & Eddy in the timber ventures was transferred to Northup & Goble, who were to pay back amount of cash and merchandise already advanced, "together with interest thereon at the rate of 10 per cent. per annum."

It was further agreed that Hall & Eddy were to take two indicated fleets of logs at prices fixed; to advance three cents per lineal foot for logs thereafter delivered and also $500 for each month of "work in force" in getting the residue of timber out of said creek, and for use of that money Northup and Goble were to pay interest at the rate of ten per cent. per annum.

The latter firm continued to deliver logs under that contract, and the former to make advances of money until a short time prior to April 24, 1879, when a controversy arising respecting measurement and price to be paid for logs delivered, and to be delivered they agreed to refer the matters in dispute to arbitrators. The particular subjects of arbitration are thus stated in the written agreement: "The said arbitrators are to measure and set price on the aforesaid timber fleeted in the Ohio river; also any of said Blain timber that may hereafter come out, and take such proof as they may desire for the purpose of fixing the value of all timber heretofore delivered; in fact make a full and final settlement as to size and prices between all of the above parties."

July 18, 1881, the arbitrators made an award, a copy of which was delivered to the respective parties. By that award the number feet of logs delivered by Northup & Goble to Hall &

Eddy during the years 1877, 1878, 1879, and also prices to be paid therefor, were ascertained and determined.

But September 26, 1881, the arbitrators made or attempted to make an additional award in which they found the whole amount of money and merchandise advanced, and, by deducting therefrom the value of logs as previously ascertained and fixed by them, to determine and setttle a balance in favor of Hall & Eddy of $6,947.08 against Northup & Goble.

This action was brought August 15, 1882, by Hall & Eddy to recover amount of that assumed balance and judgment was rendered therefor. But that judgment was reversed by this court, and upon return of the case amended pleadings having been filed an additional evidence offered, the judgment now appealed from was rendered in favor of Northup & Goble for $1,000 and interest from May 3, 1883.

The first of two main questions presented is whether the award of July, 1881, as well as the attempted one of September, 1881, should be, as seems to have been done, by the lower court, entirely disregarded and held for naught.

The first award was clearly within the scope of authority given to the arbitrators in terms and substance of the written agreement of the parties, and if there had been no further act on part of the arbitrators would unquestionably have been conclusive and binding on the parties as to the quantity of timber delivered and value thereof. And such being the case we do not see how it was or could be impaired by a subsqeuent attempt of the arbitrators to make an award relative to a distinct and independent subject not even submitted to them. For if their action in September was without authority and consequently null and void, as seems to be conceded, manifestly it did not have the effect to release the parties from obligation to abide by and perform the award of July, that the arbitrators had authority to make and did regularly and duly make and complete. It is not only entirely reasonable but well settled by this court and other authority that if the portion of an award which exceeds the submission can be separated from the rest without affecting the merits of the award, it may be rejeced as surplusage and the rest will stand. And that being so, obviously a second award or attempted award relative to a new and different subject, should not affect the first one, complete in itself, and made in accordance with terms of agreement made by the parties.

It is true in the former opinion this court held that the award should have been disregarded by the lower court because the arbitrators did not confine themsleves to subjects submitted for their determination. But the award referred to was that of September, upon which the action was originally brought and in pursuance of which judgment was given for plaintiff in the action; the one of July not being referred to or considered in the opinion then delivered.

It seems to us in determining rights of parties in this case the lower court ought to have assumed the award of July, 1881, as a conclusive and final determination of the amount of timber delivered and value thereof, and rejected any additional pleading or evidence in derogation of that award.

As to the amount of money advanced by Hall & Eddy there does not seem to be much controversy, considering the large sum claimed and numerous items composing it. And as the parties deemed it, in 1879, necessary to submit to arbitration only the questions of amount of timber delivered and prices to be paid therefor, it is a fair and just inference there was then no

dispute between them as to amount of money advanced by Hall & Eddy. And if there was no controversy on that subject in 1879 it was too late in 1890, date of the judgment now appealed from, when both Hall and Eddy are dead, to discredit the account rendered of money and merchandise advanced.

The second main question is whether, under the contract of May 8, 1877, Hall & Eddy are entitled to interest at the rate of ten per cent per annum upon money advanced prior to that time. It seems to us the court erred in adjudging that a usurious transaction, for it was not in language or meaning of the statute a contract or assurance for the loan or forbearance of money. On the contrary the agreement to pay interest on the money and merchandise already advanced at a greater than statutory rate formed part of the contract by which Hall & Eddy sold and transferred their interest in the timber venture and constituted part of the consideration for that sale and transfer. And this court has, in many cases, upheld such transactions, recognizing a distinction between a simple loan or bearance of money at a usurious rate of interest, and an agreement to pay more than the statutory rate in consideration of sale of property. There is, however, a question of the right of Hall & Eddy to ten per cent. on the money to be advanced by them on the logs thereafter delivered, also stipulated for in the same contract. But we are inclined to the opinion that as the money had not been nor might be advanced on account of logs to be delivered in future, the promise to pay interest in excess of six per cent. should be treated as usurious.

Whether Northup & Goble are entitled to recover as counterclaim on account of alleged failure of Hall & Eddy to advance money as agreed was not specially referred to or decided in the judgment of the lower court, and, consequently, we need not now pass on the question further than to determine that if it is made to satisfactorily appear there was such failure, there should be a recovery on the counterclaim for amount of such damages as actually and directly resulted.

The pleadings in this case, it seems to us, authorize and require the chancellor to treat the award of July, 1881, valid and binding as to the subjects submitted to and determined by the arbitrators, and at the same time to consider all other subjects of controversy between the parties and make final a settlement thereof equitably and justly.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

SLOAN v. COMMONWEALTH.

(Filed November 2, 1893—Not to be reported.)

1. One assailed in his own house is not bound to retreat in order to avail himself of the plea of self-defense.
2. Criminal law—Appeals—In criminal cases a judgment of conviction will be reversed only for errors of law occurring on the trial prejudicial to the substantial rights of the accused.
3. Same—Verdict authorized by evidence—The evidence was sufficient to authorize the verdict convicting appellant of manslaughter as aider and abettor.

Stewart & Stewart for appellant.

W. J. Hendrick for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Chief Justice Bennett.

One evening Rice and Cunningham went to the house of the appellant to have a social game of cards with the appellant and one Droughan, who was staying with the appellant, and also a Mrs. Smith, who was staying there, and with whom Droughan was evidently criminally intimate.

There were facts before the jury to the effect that Cunningham, during the evening, was writing notes to Mrs. Smith and handing them to her across the table, and that she was responding; that a short time before the difficulty occurred appellant and Droughan went out of the house together and remained out about ten minutes; that they returned, and Droughan wrote Cunningham's name so as to give it a vulgar sound and handed it to Rice to read, and Rice said that was an insult to any man, and some say that Rice struck Droughan, but he says he did not; but that Droughan accused him of striking him and then knocked him down and shot him while down, and then he turned and shot Cunningham, who was in his seat and resting his head on the table and was taking no part whatever in the difficulty; that the appellant, who was sitting down at the time the trouble commenced, rushed up stairs and got his gun and returned immediately, with the gun presented at Cunningham, and would have shot him but was prevented by Mrs. Smith and Mrs. Sloan; that Cunningham asked him not to shoot him, as he was already killed, he then said he would not hurt him and went out of the house with Droughan, threatening to kill Rice; that he mocked Mrs. Cunningham, the mother, who had arrived and was weeping; that he then took Cunninghams' cap and he (Droughan) and Mrs. Smith, ran away.

Notwithstanding the evidence for the appellant the jury found him guilty of the crime of manslaughter, and fixed his confinement in the penitentiary for the term of two years.

It seems to us that the jury was authorized to believe that Droughan became offended at Cunninghams' conduct with the woman, and was determined to have a row with him, and that the appellant was to stand by him. Besides, it is so well settled that this court, in criminal cases, can only reverse for errors of law occurring on the trial that are prejudicial to the susbtantial rights of the accused that to reargue it would be time thrown away.

The instructions given were clearly correct and covered the whole case. The appellant was not accused of doing the shooting, but only aiding and abetting. The evidence as to the dying declaration was clearly sufficient to admit the declaration.

We adhere to the rule that one assaulted in his own house is not bound to retreat, in order to avail himself of the law of self-defense; but the appellant was not assailed in his own house; on the contrary he was the assailant.

The judgment is affirmed.

LACEY v. LACEY.

(Filed November 2, 1898.)

1. Right of wife to alimony when husband obtains a divorce—A wife may be allowed alimony if entitled to it, although the divorce is obtained by her husband in an action instituted by him. The statute allowing alimony to the wife was intended to apply whenever separation occurs without the wife's fault and embraces cases where the wife is entitled to a divorce, although the husband is seeking and obtains one.

2. Alimony—Pleading—Counterclaim—The failure of the wife to style her answer a "counterclaim" in which she prays for alimony does not deprive her of a right to a judgment therefor, especially when the husband by his reply joins issue on the matters alleged in the answer, thereby waiving his right to make such objection to the answer.

3. Same—Consolidation of actions—Even if the allegations of the wife's answer, when the answer was not styled a counterclaim, would not entitle her to a decree for alimony, a decree granting it could be upheld, since it appears that after institution of the husband's suit for divorce the wife brought a suit for alimony, which was consolidated with the husband's suit. The pleading in the wife's suit thus consolidated authorized the rendition of such decree.

4. Alimony—Where the wife is aged and infirm and possessed of only about $700, and the husband is young and in good health and worth $2,500 or $3,000, an allowance of $1,000 alimony is reasonable.

Thomas H. Hines, John M. Kash and T. C. Johnson for appellant.

Wm. H. Holt for appellee.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellee sought and obtained a divorce from his wife, the appellant, on the sole ground of his having lived apart from her, without cohabitation, for five consecutive years next before the institution of his action.

The fact of separation was not denied, but the wife sought alimony upon the ground that the appellee, without cause, had abandoned her, when she was without fault; that she had sheltered him in a home provided by her for the nine years of their married life, and been patient with his shortcomings; that she had very little property left, having been compelled, since his desertion of her, and in order to provide the means of subsistence, to sell her house and lot, where they had lived during the marital relation; that the husband had appropriated to his own use some $800 or $900 belonging to her, which he had collected from a sale of a small tract of land inherited from her father's estate; that she was old and in feeble health, while her husband was strong, without children or others dependent on him, and worth some $4,000 or $5,000 in real estate.

The appellee admits that he abandoned his wife, but denies that he was in fault, and sets up a series of petty grievances against her—evidently having little, if any, excuse for his conduct. He was about thirty-eight years of age and she forty-eight when they married in 1875. She was a widow with two daughters.

They kept a boarding house, and the wife was industrious and economical. The husband was addicted to frequent sprees, but was a proficient salesman and clerk and contributed to a considerable extent to the support of his family.

In his deposition he says that while he was married he bought

a town lot for $150 and a small tract of land, for which he paid $200; that just before the separation he had bought a piece of land and owed a sale bond amounting to $301, and was without money to pay it; that he told his wife and her daughter and son-in-law that if they would pay him some $245, that the son-in-law owed for board, he would stay at home and assist his wife in keeping the boarding house, otherwise he would be forced to leave, in order to make money enough to pay his debts; that they refused to let him have it and he left.

We cite these alleged reasons given by the appellee to show the utter want of legal excuse for his abandonment, and except for the arbitrary statutory provision as to the separation for five years, it is evident the appellee would not have been entitled to the divorce.

The chancellor seems to have been of the opinion that because the divorce was not obtained by the wife in a proceeding by her for that purpose she is not entitled to alimony, and such would seem to be the effect of a literal construction of the statute. It reads: "And if the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable," etc.

We do not think, however, that this statute deprives the wife of alimony, if otherwise entitled to it, simply because she may not have instituted the suit for divorce. It was intended to apply in all cases where the separation occurs without her fault, and embraces cases where she is entitled to obtain a divorce, though the husband is seeking it. Such was the effect of the decisions of this court in Davis v. Davis, 86 Ky., 32.

It is true that in that case the judgment of divorce obtained by the husband should not have been granted—here it was properly granted by reason of the statute—yet the point upon which the right of the wife to alimony rested was the conduct of her husband. Her equities are the same in this case, although either party, without reference to which one was in fault, might have obtained the divorce by making application; yet their conduct was a proper subject-matter of inquiry for the purpose of equitably determining and adjusitng their property rights.

It is insisted, howeevr, that because the wife's answer was not styled a "counterclaim" she is not entitled to a judgment for alimony. If this requirement of the Code be applicable to cases of this kind, yet the appellee, by replying to and joining issues on the matter set up in the alleged counterclaim, waived his right to make this objection. (Casson v. Casson, 79 Ky., 558.)

Moreover, after the institution of the suit of appellee, the wife instituted an independent action for alimony. There was an answer relying, among other things, on the pendency of the first action and the claim to alimony therein. This action could not be prosecuted independently of the first one, but the suits were consolidated and heard together.

If we hold that the statute does not allow alimony to the wife in the first action, because it would not be on a divorce obtained by her, or hold that the appellant did not waive objection to the wifes' pleading by replying to it, yet there seems no reason why she is not entitled to alimony in this independent suit brought by her. It is urged as an objection to this that only a partial record of this second suit is brought up, but when an amended petition is tenderd and an order made permitting it to be filed, yet if it be not in fact in the record, which is certified to be a

complete transcript, the presumption must be that, although the plaintiff had permission to file it, it was not in fact filed.

The only allowance to the wife was $75, pending the suits. The extent of her estate seems to be about $700. The husband seems to have gotten several hundred dollars of her separate property, and is worth some $2,500 or $3,000. We think she should have been allowed as alimony the sum of $1,000.

The judgment below dismissing her claim is reversed, and a judgment in her behalf is directed to be entered for this sum.

KENTUCKY SUPERIOR COURT.

EATON v. PHŒNIX INS. CO.

(Filed December 6, 1893.)

Fire insurance—Removal of insured property—Under a policy of fire insurance upon wearing apparel, household furniture, etc., "while contained" in a certain building occupied by the assured as a dwelling, with the provision that "there shall be no liability for loss on any personal property insured under this policy except while contained in the building or buildings herein described," the insurer is not liable for the loss of the wearing apparel while being transported to a distant State to be there used by the family of the assured while on a visit. While the insurer might be liable under such a policy where the property, though temporarily removed, was being put to its ordinary and legitimate uses at the time it was destroyed, yet it can not be said that this was true as to the wearing apparel in this case at the time it was destroyed.

Collins & Fenley for appellant.

Thos. A. Logan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Yost.

The Phœnix Insurance Co. issued to the appellant, Eaton, a policy of insurance, indemnifying him against loss by fire to his wearing apparel, household furniture, etc., "while contained in the two-story brick building then and to be occupied by the assured as a dwelling."

In this policy we find the following condition, not concealed in small type or clothed in ambiguous phraseology and technical terms, as so many of these conditions are, but printed across the whole front of the policy, in appearance so plain that he who runs may read: "There shall be no liability for loss on any personal property insured under this policy except while contained in the building or buildings herein described."

While this policy was in force Eaton's wife, son and daughter went to the city of Cincinnati and embarked on the Steamer Golden Rule, with the intention of going to New Orleans on a visit of several weeks. The steamer, while lying at the wharf, was burned, and in it about $630 worth of wearing apparel belonging to Eaton, and which was in his house when the contract of insurance was made, was destroyed.

Upon the company's refusal to pay the loss so incurred he brought this suit against it. In its answer the clause in the policy above quoted was pleaded in bar of the recovery. The court overruled a demurrer to this pleading, sustained a demurrer to the reply and on the plaintiff's refusal to plead further dismissed his petition. From that judgment this appeal is prosecuted.

As will be seen the decision of this case hinges upon the construction and effect of the words "contained in," as used in the policy to specify the location of the insured property, and as embraced in the condition quoted supra.

As a general proposition of insurance laws, it may be assumed that the location of property is of the essence of the contract; therefore, recovery cannot be had where the property, at the time of the loss, was not in the place described in the policy, but in determining this question not only the naked clause or condition in the policy must be considered, but the nature of the property and the use to which it is ordinarily put as well, for a customary and reasonable use of the property, having regard to its character, is presumed to be permitted.

The insurer insures property while used by the owner in the ordinary way, and for the ordinary purposes for which such property is kept, and the question in this case is, is wearing apparel put to its ordinary use, within the meaning of the policy, when it is taken from the building, not only as it is being worn, but in large quantities to be worn in the future, and carried to another State to be there used and deposited for weeks in some place where the insurer has no knowledge of its location or the consequent hazard of the risk?

In Lyons v. Providence-Washington Insurance Co., 13 R. I., 347, the property was removed and the company relieved from liability. In Peterson v. Mississippi Valley Insurance Co., 24 Iowa, —, the policy insured "seven horses, * * * section 22." While hauling his grain to market the assured housed his horses in a barn, distant from section 22, and they were burned, but the company was held liable.

Mills v. Farmers Insurance Co., 37 Iowa, 400, and McClure v. Girard F. & M. Insurance Co., 43 Iowa., 349, are similar cases, and the company was held liable.

These three last cases were decided upon the theory that the porperty, though temporarily removed, was only being put to its ordinary and legitimate use.

In London & Lancashire Insurance Co. v. Graves, 4 Ky. Law Rep., 706, decided by this court, the property insured was "two buggies contained in the frame building occupied by the assured as a livery stable." These buggies were burned in a carriage manufacturing establishment, where they had been sent to undergo necessary repairs. The court, holding the company liable for the loss, said: "The words * * * mean only that the place described was their place of deposit when not absent therefrom for temporary purposes incident to the ordinary uses and employment of the property."

In Noyes v. Northwestern National Insurance Co., 64 Wis., 415, a seal skin garment insured against fire, by a policy describing it as "contained in" a dwelling house, was burned while at a furrier shop for repairs. Said the court: "The dolman was a garment for outdoor wear, and necessarily would be chiefly used away from the designated dwelling house. It would or might be necessary, from time to time, to send it to a furrier for repairs; and it was liable to be burned when so absent from the place of deposit. It must be presumed that the parties entered

into the contract of insurance in contemplation of these incidents, for they are matters of common knowledge."

In Longneville v. Western Assurance Co., 51 Iowa, 553, the insured sustained damage to his personal apparel while wearing it away from the building which the policy described it as "contained in." There the court, holding the company liable, said: "Wearing apparel when used must of necessity be worn sometimes away from the dwelling. We must infer that the parties to the contract intended the apparel to be used, and hence intended it to be used sometimes away from the dwelling." Then said the court further, and to this language we call special attention as embodying our views of the case at bar: "Of course the use of the apparel away from the dwelling must be of an ordinary use, and the dwelling must be the place of deposit for the apparel when not in use. The policy, therefore, does not contemplate that the insured may take a journey or stop away from his dwelling; thus, when the apparel is not worn, keeping it in a place of deposit other than his own dwelling."

From these decisions we may deduce the principle that where the policy is upon property which, from its character and ordinary use, is kept permanently in one place, this language limits the risk to the property while in the place described, but can not receive the same interpretation when the policy is upon property, the real and beneficial enjoyment of which forbids its being kept all times in one place.

Courts, bending the rigid terms of a contract so as to serve rather than to defeat the evident intention of the parties, must act on the reasonable presumption that when these contracts were entered into some form and manner of protection were contemplated on the one side and a proper use and care of the property on the other.

While it is true that a policy on goods in a store covers goods to the same amount, though not the same which were there when the policy was issued, and that when wearing apparel "contained in" a certain house is insured, the company is liable for its destruction while being worn by the owner away from the house, or while at a tailor's for repair. We can not conceive that such a policy would cover, in the first instance, the same goods if removed to another house; or, in the second, the wearing apparel, where it was not worn away but carried away in trunks and valises for future use in a distant State.

While in this case it may be presumed that the company was willing to and did assume all risks to the wearing apparel while worn by Eaton or the members of his family while temporarily away from home, but deposited when not in use in the building described, it is surely going too far to say that it could have intended to assume such risks where the hazard was so greatly increased, and the property used in the manner which could not have been contemplated by it. That this was its intention is shown by two features in the policy which did not appear in any of the cases hereinabove cited. First, instead of words "contained in," we hear find "while contained in;" and second, the express condition to which we called attention in the beginning of this opinion.

The answer presented a good defense, and the court properly overruled the demurrer.

The judgment is, therefore, affirmed.

SUPERIOR COURT ABSTRACTS.

LOUISVILLE SOUTHERN R. R. CO. v. COGAR.

Filed November 29, 1898. Appeal from Mercer Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Injury to abutting property—Where, on account of the manner of the construction of a railroad at a particular point in the street of a city, though rendered necessary by existing conditions, unusual noises are made at the point habitually or so frequently as to be a continuous source of annoyance to the people residing in the immediate neighborhood, the noises are a nuisance to those disturbed and they have a right of actions, although the ordinary noises of moving trains are not an element of damage.

2. Same—In an action by an abutting lot owner against a railroad company to recover damages for injuries to his property by the construction and operation of defendant's road over the street in front of his property, the plaintiff may recover for the injury not only to his lot but to his house, although the house was not completed until after the road was constructed and put in operation. Whatever may be the rule where the lot owner commences the erection of his house after the road is put in operation, he is certainly entitled to recover for the injury to his house when it was in process of erection before the road was put in operation or before the damages it has sustained could have been forseen.

3. Same—For the damages growing out of the operation of the road as it was constructed by defendant, the defendant is liable, although it has leased the road to another company, by which it is being operated. The action to recover such damages is not an action for negligence.

4. Prejudicial errors—Although the amount of the verdict shows that the jury could not have taken into consideration the damage done to the house, yet there should be a reversal if the court erred in telling the jury that they might consider such damage.

C. A. Hardin, Frank D. Swope, Bullitt & Shield and E. H. Gaither for appellant; Bell & Bell for appellee.

LOUISVILLE, &c., R. R. CO. v. MURPHY.

Filed November 29, 1898. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Failure to comply with contract to erect depot—The plaintiff having conveyed to defendant railroad company the right of way through his farm upon condition that defendant would erect a depot on his land with the provision that if the company should fail to comply with the condition it should pay "the damage that may be awarded for said right of way," the defendant having failed to erect the depot as agreed the parties are remitted to their rights as they existed without the contract and the measure of damages is the same as in condemnation proceedings. Therefore, defendant is not liable merely for the value of the land taken.

2. Same—Measure of damages—The court properly instructed the jury that in arriving at the amount of damage they should "estimate, first, the value of the land taken, and second, the direct and actual injury to the value of the rest of the tract."

3. Parties to actions—An amended answer alleging that plaintiff was not the real owner of the land, but that the title was placed in him in trust to protect the land from the creditors of the real owner, who was named, presented no defense to the action. And even if the person named as the equi-

table owner should have been made a party, defendant can not complain, as he was one of the original plaintiffs, and upon the filing of defendant's answer alleging that he had no interest his name was without objection stricken from the case.

Helm & Bruce for appellant, Wilford Carrico and W. N. Sweeney for appellee.

KELLER v. GLEASON.

Filed November 29, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, reversing.

1. Street improvements—The general ordinance of the city of Louisville prescribing the grade, curbing, etc., for sidewalks not otherwise provided for by ordinance could not have been intended to apply to a case where the carriageway of the street had not been established. And as the general ordinance can not be applied in such case, the ordinance directing the work must itself prescribe the manner and extent of the work, and not leave it to the discretion of the engineer.

2. Same—Where the conditions are such as to require that the sidewalk on one side of the street should be wider than upon the other, the general council may so order. But where the carriageway or the line between the carriageway and sidewalk has not been defined, the council must, as a legislative body, determine the question for itself—it can not delegate the power to the city engineer.

D. M. Rodman for appellant; Lane & Burnett for appellee.

BIRCH v. POWELL & LORD.

Filed November 29, 1893. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Barbour, affirming.

Principal and agent—One who was employed by appellees as their agent to purchase railroad ties for them did not have, by virtue of that employment, power to employ the appellant as a subagent to make purchases for them, and to bind them to pay the compensation agreed upon between him and the appellant for the latter's services. If appellees had authorized their agent to employ subagents for them, or knew that he was so employing agents and suffered him to hold himself out as having such authority, they would be liable.

Blue & Blue for appellant; Nunn & Cruce for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. WOODWARD.

Filed November 29, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Evidence—In this action against a railroad company to recover damages for personal injuries alleged to have been caused by defendant's negligence in allowing ties to project to an unusual and dangerous length beyond the rails, it was competent for the plaintiff to prove that the ties were sawed off after the accident. While such evidence may have been inadmissible as an implied admission of negligence, it was competent to show that the defect complained of existed at the time of the injury, the testimony for defendant tending to show that the ties had been sawed off before the accident.

2. Instructions to jury—Where instructions are otherwise unobjectionable, their extreme length affords no ground for setting aside the verdict of the jury.

Dulayney & Mitchell for appellant; B. F. Proctor and Edward W. Hines for appellee.

LOUISVILLE, &c., R. R. CO. v. BOURNE & EMBRY.

Filed November 29, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

1. Carriers—Liability for loss occurring on connecting line—While a common carrier has power to make a contract to carry to a place beyond the terminus of his line and to render himself liable as such for the whole distance, still the law does not require him to carry beyond his own route, and he may, therefore, contract that he shall not be liable for any loss or damage except such as occurs on his own line.

2. Same—Presumptions—When goods in the custody of a common carrier are damaged, the presumption of the law is that it was occasioned by his default and the burden is upon him to show that it was from a cause for which he was not responsible.

3. Same—Under a contract by a railroad company to ship cattle from Owensboro to Louisville, to be there delivered at the Kentucky and Indiana Stock Yards, to reach which it was necessary that the cars in which the cattle were shipped should, after being carried to defendant's terminal point in Louisville, be delivered to a connecting line on its receiving track, and by it transported to the stock yards, the fact that the train on which the cattle were shipped left Owensboro three hours late and reached Louisville that much behind time, did not make it the duty of the defendant to notify the connecting line in advance as to when the cattle would arrive, or that the train was late, a notice to the connecting line in a few minutes after the cattle arrived that the cars in which they were shipped had been placed on its receiving tracks was sufficient.

4. Same—Even if the defendant's failure to inform the connecting line that the train was late can be regarded as negligence, yet as the connecting line failed, after being notified that the cattle had arrived, to send an engine to move the cars, there is nothing to show that the negligence of the defendant in failing to give notice in advance that the train was late caused the delay in moving the cattle after they reached Louisville, and, therefore, the defendant is not liable for injury to the cattle resulting from such delay, it being expressly provided by the contract of shipment that the company should not be liable for any injuries caused by the delay of the connecting line in receiving the cattle after notice by the company.

Helm & Bruce for appellant; O'Neal, Phelps & Pryor for appellees.

KELLY AX MFG. CO. v. COMMONWEALTH.

Filed November 29, 1893. Appeal from Jefferson Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Towns and cities—Obstructions of streets—Any unreasonable obstruction of a public highway or street of a city is a public nuisance, indictable and punishable as such; and every actual encroachment upon either of them by the erection of a fence or any other permanent obstruction thereon is a nuisance, even though it does not actually obstruct public travel.

2. Same—The general council of the city of Louisville, not only by the general laws governing municipalities, but by the charter of the city as well, has full and complete control of all the streets and avenues of that city, with power to protect them, and, by the passage of proper ordinances, with penalties annexed, provide a punishment for encroachments thereon.

3. Same—City ordinance is a "statute"—An ordinance of a city, passed in conformity with its charter granted by the State, is a "statute," in the meaning of section 3, article 1, chapter 29 of the General Statutes, which provides that a common law offense for which punishment is prescribed by "statute" shall be punished only in the mode so prescribed. Therefore, as there is an ordinance of the city of Louisville which prescribes a punishment for the offense of obstructing any street or public way of the city, one who thus offends can not be prosecuted for the common law offense of maintaining a public nuisance, but must be prosecuted for a violation of the ordinance.

4. Jurisdiction—As the Louisville City Court is given by statute "exclusive jurisdiction" to try and determine all cases for the violation of the ordinances of the city, and also the final trial of all misdemeanors in which

the punishment fixed by law may not exceed a fine of $100 or imprisonment for fifty days, the Jefferson Circuit Court had no jurisdiction of a prosecution for the violation of an ordinance, the punishment for which could not exceed a fine of $20.

Abbott & Rutledge for appellant; W. J. Hendrick for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. BOLES.

Filed November 29, 1893. Appeal from Larue Circuit Court. Opinion of the court by Judge Yost, reversing.

Contributory negligence—Willful negligence—In this action to recover damages for personal injuries not resulting in death it was error to instruct the jury that the plaintiff could recover, notwithstanding his contributory negligence, if the injuries were caused by defendant's "willful negligence." And this is true, although the court held upon a former appeal in the same case that the defendant could not rely upon plaintiff's contributory negligence as a defense if his injuries were "willfully caused" by its employes or could have been prevented by them by the use of proper care after they discovered his peril, there being a wide difference between an act willfully and intentionally done and one done through "willful negligence," as it is termed.

I. W. Twyman and P. H. Darby for appellant; Smith & Hubbard for appellee.

LOUISVILLE, &c., R. R. CO. v. BLANTON'S ADM'R.

Filed December 6, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Election—In this action against a railroad company to recover damages for breach of its contract to fence on both sides of its right of way across the land of plaintiff, the petition alleging that the grant of the right of way was in consideration of such agreement, the defendant relied upon the deed to the right of way, which contained no such agreement, and in avoidance of the deed plaintiff alleged that the agreement was omitted by fraud or mistake of the draftsman, who was defendant's agent in the procurement of the deed. The defendant then moved the court to require plaintiff to elect whether he would rely upon the allegation of fraud or the allegation of mistake, which the court refused to do. Held—That the action of court was proper.

Helm & Bruce for appellant; Sweeney, Ellis & Sweeney for appellee.

JOHNSON v. FOX, &c.

Filed December 13, 1893. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

The trustees of a public school are not personally liable upon a contract made by them with a teacher, whereby they designated themselves as "trustee" and expressly provided that they were not to be responsible in any way for the amount agreed upon as the salary of the teacher "farther than the payment of the tax and public money," it being also agreed that if the tax and public money should not amount to that much "the school shall run at that rate and not for ten months." And to a petition seeking to hold the trustees personally liable on the contract a demurrer was properly sustained, there being no allegation of extraneous facts bearing on the question as to whether the defendants bound themselves personally or only as trustees.

E. L. Worthington and L. W. Galbreath for appellant; Cochran & Son for appellees.

JARVIS v. PORTER.

Filed December 13, 1893. Appeal from McLean Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. For the killing of a dog the owner may maintain an action without showing that he has complied with the terms of the act of May 17, 1886, a dog being property in this State independent of that act.

2. A special demurrer is an objection to a pleading on grounds other than that it does not state facts sufficient to constitute a cause of action or a defense, as that the court has no jurisdiction of the subject-matter or that the plaintiff has no legal capacity to sue. It is not a particular objection to a specified part of a pleading which is properly raised by motion to strike out.

G. T. Cary for appellant; Janson, Tanner & Higdon for appellee.

BRYAN, &c. v. MAYSVILLE, &c., R. CO.

Filed December 13, 1893. Appeal from Nicholas Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Turnpike roads—Location of gates—Under the charter of a turnpike road company which provides that "no gate shall be erected within less than two-thirds of a mile of any town through which said road shall pass," in determining whether a gate is within the prohibited distance the measurement should be made over the road and not by an air line.

2. Same—In measuring distances on a road the center must be taken as the proper line.

3. Same—Under the charter of a turnpike road company authorizing the company to erect a tollgate upon the completion of five miles of the road, and an additional gate for each additional five miles of road, it is not necessary that the gates shall be precisely five miles apart, though the toll must be always proportioned according to distance. Therefore, the chancellor did right in this case in dissolving an injunction requiring the company to discontinue a new gate which it had erected within five miles of each of two other gates.

John P. Norvell and Ross & Owens for appellants; Kennedy & Son for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. JANUARY 15, 1894. No. 14

KENTUCKY COURT OF APPEALS.

COMMONWEALTH v. OWENSBORO, F. OF R. &.G. R.R. R. CO.

SAME v. L. & N. R. R. CO.

SAME v. ELKTON & GUTHRIE R. R. CO., &c.

SAME v. MAMMOTH CAVE R. R. CO., &c.

SAME v. BURNSIDE & CUMBERLAND RIVER R. R. CO., &c.

SAME v. HODGENVILLE & ELIZABETHTOWN RY. CO., &c.

SAME v. LOUISVILLE SOUTHERN R. R. CO.

SAME v. L., H. & W. R. R. CO., &c.

SAME v. OHIO VALLEY RY. CO., &c.

SAME v. LOU., ST. L. & T. RY. CO.

SAME v. LOUISVILLE SOUTHERN R. R. CO., &c.

SAME v. K. & I. BRIDGE CO.

SAME v. KY. MIDLAND RY. CO.

SAME v. KENSEE COAL CO.

SAME v. O. & N. R. R. CO., &c.

(Filed October 26, 1893.)

1. Taxation of railroads—Repeal of exemption privileges—The Hewitt revenue bill, which took effect September 14, 1886, was intended as a complete general revenue system in itself, and by its terms repeals all acts inconsistent with itself or not in conformity to itself. The act of May 5, 1884, exempting railroads from taxation for a period of five years from the date of their beginning or construction, is inconsistent with and repugnant to the Hewitt bill, and was, therefore, repealed by it.

2. Same—The intent to repeal the act of 1884 as inconsistent with the Hewitt revenue bill being manifest, the contention that, as the latter bill makes no

reference to the former, its repeal will be one by implication is not well founded.

3. Same—Legislative construction of acts—The legislature did not construct the Hewitt act so as not to repeal the act of 1884 by adopting in 1888 a compilation of the acts of the Kentucky legislature in which were contained all acts regarded by the compilers as in force and effect, and which contains both the act of 1884 and the Hewitt law.

4. Same—Contemporaneous construction of an act is resorted to in aid of its interpretation only where its meaning is doubtful or uncertain, and the intent of the Hewitt law to repeal the act of 1884 being manifest and certain, contemporaneous construction given the Hewitt law will not be considered by the court in construing it.

5. Same—Impairment of contracts—All railroads constructed in this State after the repeal of the exempting act of 1884 are liable to State taxation from the date of construction, although at the time their construction was commenced the administrative officers of the State did not construe the Hewitt bill as a repeal of the act of 1884.

6. Same—But where the construction of a railroad was commenced before the act exempting it from taxation for five years from the date of its construction was repealed, it may still claim such exemption for the five years. The State can not withdraw immunity from taxation so offered to those about to build railroads in the State, and who have accepted the offer and constructed their roads.

7. Same—Right of legislature to repeal act exempting from taxation—The act of 1856, reserving to the legislature the right to repeal or amend charter privileges thereafter granted by the legislature to particular persons, has no application to the act of 1884, which was a general law, giving exemption from taxation to all railroads for five years after their construction.

8. Same—Practice—On the trial below of these cases the decisive question was one of law, and although evidence was offered by the Commonwealth on certain issues of facts, after law questions precluding a recovery by it had been decided against it, no motion for a new trial or separation of conclusions of law and fact was necessary in order to enable this court to consider such questions of law on this appeal.

9. Taxes due and unpaid do not bear interest unless the statute expressly so directs.

Wm. J. Hendrick, Reid Rogers and Thomas H. Hines for appellant.

Holmes Cummins, E. F. Trabue, Helm & Bruce, John W. & Harry G. Rodman, Dulaney & Mitchell and Wm. Lindsay for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The principal questions involved on the foregoing appeals are common to all of them, and for that reason the cases are heard together. On May 5, 1884, the general assembly of the State adopted the following act: "An act to encourage the building of railroads in the Commonwealth of Kentucky, and to exempt from taxation all railroads which may be hereafter built under existing charters, or under charters which may be hereafter granted, for a period of five years from the date of the beginning or the construction of such new roads:

"Sec. 1. That all railroads which may hereafter be built within this Commonwealth under existing charters, or under charters which may be hereafter granted, shall be exempt from all taxation under the laws of this Commonwealth for a period of five (5) years from the date of the beginning of the construction of such new roads.

"Sec. 2. Be it further enacted, That this act take effect from and after its passage."

The appellees are railroad companies which began the construction of their respective roads after the adoption of this act, and on the faith of which act they are claiming an exemption from State taxation for five years from the time of such beginning.

The appellant, by these suits instituted in the Franklin Circuit Court, is seeking to collect taxes from the appellees, in spite of the act aforesaid, on the ground that in May, 1886, by an act taking effect September 14, 1886, the legislature repealed the act relied on by the appellees.

This latter act is known as the "Hewitt Revenue Bill." It is entitled "An act to amend the revenue laws of the Commonwealth of Kentucky." It is an elaborate general revenue statute, providing, under separate articles, (1) the rate of taxation; (2) stocks in banks and other institutions; (3) railroads; (4) turnpike roads and other corporations; (5) license tax; (6) the assessor and his duties; (7) board of supervisors; (8) duties of clerks; (9) collection of the revenue, etc.

Section 1 of article 1 provides that an annual tax of forty-seven cents upon each one hundred dollars of value of all the real and personal estate directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or persons assessed.

By section 3 it is provided that all property, real and personal, within the State, "not herein expressly exempt by law," shall be assessed, as nearly as practicable, according to a uniform rate and in the manner provided in detail by the act, and a succeeding section provides what property shall be exempt from taxation, namely: Property of the United States; property of the Commonwealth; cattle of certain value, etc.

Article 2 provides for the taxation of "stocks in banks and other institutions."

Section 1 of article 3 provides that "the president or chief officer of each railroad company, or other corporation owning a railroad lying in whole or in part in this State, shall, on or before the 1st of September in each year, return to the auditor of public accounts of the State, under oath, the total length of such railroad, * * * with the average value per mile thereof;" and by a succeeding section it is provided that the same rate of taxation for State purposes, which is or may be in any year levied on other real estate, shall be levied upon the value so reported and found of the railroad, rolling stock and real estate of each company.

After providing for the taxation of turnpike roads and other corporations, imposing license taxes and regulating the duties of assessors, boards of supervisors, clerks and sheriffs in relation to the revenue, the act concludes (section 5, article 12) as follows: "Chapter 92 of the General Statutes: The act of March 28, 1872, entitled An act to amend chapter 83 of the Reivsed Statutes, titled 'Revenue and Taxation;' the amendment to said act of March 28, 1872, entitled 'An act to amend an act approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax,' approved April 19, 1873; the act approved April 2, 1878, title 'An act to amend section 6, article 6, chapter 92, General Statutes;' An act to amend article 2 of chapter 92 of the General Statutes, title 'Revenue and Taxation,' approved May 8, 1884, and all other acts, general and special, and parts of acts inconsistent herewith, or not in conformity herewith, are repealed; but nothing in this act shall interfere with any existing local option or any special or prohibition law in any county, nor with

any local or general law for creating or collecting county levy, or with chapter 1315 of the Acts of 1879-80—Agricultural and Mechanical College tax—or with an act, entitled 'An act for the benefit of the Branch Penitentiary at Eddyville, approved April 7, 1886.' ''

"Sec. 6. Nothing in this act shall be held to repeal or in any way impair the force and effect of any local or special act, or any general law in force, or that may hereafter be passed, providing for the appointment of collectors of State revenue or county levy and poll tax, in any county of the State; nor shall anything herein be construed to repeal or impair the force of any special or local law giving to counties or towns, for road or street purposes, the fines collected for violations of the road or bridge laws of said county."

In determining the force and effect of this latter act on prior legislation, general or special, regulating taxation in the Commonwealth, it is evident that its general purposes and intent should be given much weight.

Manifestly the act of 1886 is intended to compass and reform the entire revenue law of the State; to constitute in itself a general and complete revenue system. As argued by counsel, "it singles out no special defects here and there, but is aimed broadcast at the whole structure. Else why should it have re-enacted, as it does, many old laws in identical and equivalent terms?"

This general purpose, to be made effective and uniform, must sweep away a mass of special and class legislation, adopted in pursuance of the system theretofore in practice.

We notice, first, that all property, real and personal, shall be assessed for taxation, save that expressly exempted in the act itself. Not content with this, the act proceeds to repeal all acts and parts of acts, general and special, inconsistent with itself, or not in conformity to itself.

Can it be said that the act of 1884, providing by a general law for a tax exemption for a specified time of the property of all newly-built railroads in the State, the force of which was to continue the exemption forever or indefinitely, is not inconsistent with an act intended to embrace the whole tax law of the State, demanding the equal and uniform taxation of all property within the State, save the property of the United States, the Commonwealth of Kentucky, etc., and demanding specifically, and without exception or exemption, the taxation of all the property of each railroad company within the State? We think not.

Manifestly there is the most positive repugnancy between the two acts, and upon abundant authority, if any were needed to sustain so evident a proposition, the latter act supersedes and repeals the former. "An intention to supersede local and special acts (Endlich, section 231) may be gathered from the design of the act to regulate by one general system or provision the entire subject-matter thereof and to substitute for a number of detached and varying enactments one universal and uniform rule, applicable throughout the State."

"Ordinarily," says Mr. Bishop in his work on Written Laws, section 152, "if there is a general statute and one local or special on the same subject in conflicting terms, neither abrogates the other, but both stand together, the former furnishing the rule for the particular locality or case, the latter for the unexcepted places and instances; and it is immaterial which is of the later date. But where, from anything cognizable by the judges, they are satisfied the general law was meant by the legislature to supersede the local or special one, they will give it that effect."

Here the repeal is gathered, not merely because the acts are

inconsistent, but because the latter in express terms repeals all acts and parts of acts, general and special, inconsistent therewith or not in conformity thereto.

Sutherland on Stat. Cons., page 214, says that when a general act is passed, "and repeals all inconsistent legislation, it will have the effect to repeal all special acts which are in conflict with it;" and Endlich, section 206, says that such a clause removes the chief objection to repeals by implication.

We may notice in this connection that the act of 1884, strictly speaking, is not a local one. Its operation is uniform and general in the class to be affected. As said by counsel, "it was passed for no local purpose, nor with any individual instance in view, but as a general law, of whose benefits corporate persons not yet in being might avail themselves."

It was engrafted into the General Statutes of the State, and formed a part of the general revenue law of the State in existence when the general revenue act of 1886 was adopted, and the latter must be held to repeal the former.

In Louisville Water Co. v. Clark, 143 U. S., 1, the Supreme Court held that the act of 1886 was a general revenue act, and considering the purpose of its enactment, and the fact that it required the taxation of all property in the State, unless expressly exempted by its provisions, and repealed all inconsistent acts, general and special, it was held to repeal the special act of that company exempting it from taxation. Much stronger, we think, is the argument that it repeals the quasi general act exempting newly-built railroads.

On the other hand it is contended that as there is no reference to the act of 1884 in the alleged repealing act, its repeal would be one by implication, which is not favored.

We have seen, however, that, considering the general purpose of the act of 1886, and its express repeal of inconsistent acts, the legislature must have intended the latter act to constitute in itself a complete system of taxation.

It is urged that there has been a legislative construction of this act of 1884 conclusive of the question.

In 1887 Messrs. Bullitt & Feland collated and published the acts of the Kentucky legislature, regarded as in force and effect; and in 1888 the general assembly, by an act of April of that year, adopted the edition of the General Statutes, as thus prepared, from chapter 1 to 113a, inclusive. The act of 1884, relied on by the appellees as exempting them from taxation, is found embodied in the edition of the statute named. So, however, is found later on in the same edition the act of 1886, repealing, as appellant contends, the former act. We are left, therefore, where we started—with the solution of the question depending at last on the terms and provisions of the acts themselves, and the circumstances and the purposes of their enactment.

It is insisted that there has been a contemporaneous interpretation of the statutes, by the officers whose duties were to enforce them, favorable to the contention that the one was not intended to repeal the other. Thus the auditor, after 1886, continued to report these roads as "nontaxable roads."

The railroad commissioners, in some of their reports, incorporate the act of 1884, as if in full force and effect, and make report of the length and valuation merely for statistical purposes.

The governor, in his message of December 30, 1887, says: "Taxes were paid, however, on only $34,174,272 valuation of

property, as the residue, amounting to $10,516,631, is at present exempt from taxation by the terms of their charters."

"So," say counsel for appellees, "we have this act construed by the legislature, the governor, the railroad commissioners and the auditor, and without the commissioners and the auditor it was impossible to execute the law."

It may be admitted that the interpretation given the statute by these officers might be persuasive evidence of its meaning if the repealing act was uncertain, doubtful or ambiguous.

In U. S. v. Graham, 110 U. S., 221, it is said of a law considered unambiguous: "Such being the case, it matters not what the practice of the department may have been, or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effects."

So this court, in Collins v. Henderson, 11 Bush, 92, says: "When the words of an act are obscure or doubtful, and where the sense of the legislature can not with certainty be collected by interpreting the language of the statute according to reason and grammatical correctness, considerable stress is laid upon the light in which it was received and held by contemporary members of the profession."

If the language of an act be certain, its object can never be frustrated by any amount of contemporaneous interpretation, no matter how consistent or how widely adopted it may have been. A construction against the plain meaning of the law, as expressed by its terms, even in aid of justice or right or to avoid an absurdity, is never permissible. (Endlich, page 506.)

Considering, therefore, the question of repeal disposed of, the inquiry remains, what effect does the repeal of the act of 1884 have upon the rights of the appellees, some of whom began the construction of their roads prior to the repeal, and some of them subsequently thereto?

It results, of course, without further argument, that the property is subject to taxation of such of the appellees as commenced the construction of their roads after the repeal of the act on which they rely for exemption. Without this exemption act of 1884 their property is upon the same footing as other property in the State. They can not say, after September, 1886, we relied on this exemption act, expended our money in the construction of these roads on the strength of the act of 1884, and, therefore, have acquired certain rights which the legislature can not take away. The exemption had been withdrawn before they began the work or expended their money. Certainly the State takes away none of their property and circumscribes none of their property rights. It simply treats their property as it does that of others, because subject to the same general law of taxation.

The State, however, contends that the same is true of the property of those of the appellees who began the construction of their roads while the law of 1884 was in force, that is, at a time prior to September 14, 1886.

It is contended that the exemption act is a mere bounty, which the State may withdraw at pleasure, and, more than that, that even if the act to encourage the appellees to construct their roads be regarded as forming a contract with the State of an obligatory character, yet the power reserved to the State by the law of 1856 authorized any change in the contract desirable by the State or even its entire revocation.

Quoting from Tomlinson v. Jessup, 15 Wallace, 454, a leading case on the subject under consideration, counsel contend that "immunity from taxation, constituting in these cases a part of the contract with the government, is by the reservation of the power, such as is contained in the law of 1841 (here 1856), subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interest that the revocation shall be made."

It is sufficient to say of this proposition, which even at first blush strikes one as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law and affected alike all who accepted its provisions or acted on the strength of them. No contract was made with any person, natural or artificial, upon the adoption of this act, though by accepting its terms certain rights might be secured thereunder of the nature of contract rights. But no reservation, express or implied, can be said to have been made therein, by virtue of the act of 1856. Being a general law, it was revocable at pleasure, but it does not follow that it might be revoked so as to injuriously affect the citizen accepting its provisions in violation of the pledge of the State and the common principles of justice.

The State, to promote the ends of development, to afford greater facilities for transportation, and to bring into its borders an increased volume of property, shortly to help bear the common tax burden, says to the railroad people: Build up your enterprises and expend your capital in our midst, and in consideration of the premises we will grant you a brief respite from the tax gatherer. We think the State can not withdraw its pledge of immunity from those who acted upon the assurances of the act, and that the property of the appellees, beginning their work prior to the repealing act of September 14, 1886, and thus accepting the provisions of the act of 1884 while it was in force, can not be subjected to the taxation sought to be imposed in these actions.

The private exemption acts, pleaded by some of the appellees, came clearly within the principle decided in Louisville Water Co. v. Clark, supra. The immunity claimed was withdrawn by the act of 1886. A question of practice only remains for settlement.

The plaintiff alleged the facts with reference to each road constituting its cause of action thus: That annual reports of the railroad authorities to the auditor of the length and valuation of their respective roads within the State had been made; that these were annually, and before September 1st, laid before the railroad commissioners, who proceeded to value and assess the property set forth in these reports; that a statement of such was thereupon returned to the auditor, who notified the defendants of the amount of the assessment and the tax due, etc.

The defendants denied these allegations in detail, explaining as to the reports of their officers when made that they were furnished for statistical purposes merely. In a separate paragraph the act of May, 1884, was pleaded as affording them immunity from the taxation sought to be imposed. A demurrer to this paragraph was overruled. This defense constituted a complete bar to recovery, and no matter what proof might be adduced by the State in support of the issues otherwise made by

the answers, the end necessarily resulting from the ruling of the court in sustaining this plea of exemption was bound to be a dismissal of the petitions.

The State, looking, perhaps, to the contemplated appeal and with a view of having all the controverted facts established by proof, and having the cases ready for a final judgment should the legal question be determined in its favor in the appellate court, inroduced the secretary of the state, the railroad commissioners and the auditor's clerk, who proved facts conducing to establish the allegations in the petitions. The defendants introduced no witness, but had these witnesses to file certain additional reports or records. The court on final hearing dismissed the petitions, and the State appealed without having made a motion either for a new trial or for a separation of the law and facts. We do not think either was necessary. The petition seems to have presented a good cause of action. When the plea of exemption was erroneously sustained it really ended the case, or at least put an end to the possibility of recovery by the plaintiff. The facts shown in proof appear to sustain the State's right to recover. There was no contrariety of testimony. A few pamphlets and reports of officers only were filed, and when the case was finally dismissed there was in fact nothing before the court save questions of law. There was no disagreement as to what was shown in the books, though the legal effect of the facts so shown was a subject of difference of opinion. The court passed on nothing save legal questions, and these this court may review in the absence of the motions for a new trial and a separation of the law and facts. Upon a return of the cases, or such of them as will be indicated, the demurrer to the plea of exemption will be sustained, and then the facts of the alleged assessments, notices, etc., may be fully inquired into.

From the records before us the following appellees appear to have commenced the construction of their roads after September 14, 1886: Owensboro & Falls of Rough & Green River R. R. Co.; Louisville & Nashville R. R. Co., &c. (being the Cumberland Valley Branch and Extension; the Middle Division Cumberland & Ohio, known as the Springfield Branch, and the Clarksville and Princeton Division—the last-named division seems exempt for five years after its commencement on October 31, 1884); the Burnside & Cumberland River R. R. Co.; Hodgenville & Elizabethtown R. R. Co.; Louisville, Hardinsburg & Western R. R. Co., &c.; Louisville, St. Louis & Texas Ry. Co. (No. 178), and Ky. Midland, and the judgments therein are, therefore, reversed.

The following appellees commenced the construction of their roads while the act was in force and are, therefore, entitled to the five years' exemption from the date of said commencement; but from the record it appears that the exemption expired and the State appears entitled to recover for a part of the time. The petitions were dismissed and the judgments are reversed for that reason: Ohio Valley R. R. Co.; Louisville Southern R. R. Co., &c. (No. 180); Kentucky & Indiana Bridge Co.; Kensee Coal Co.

The following appellees commenced their roads while the act was in force and are not sued for any year for which they are not exempt, and for that reason the judgments are affirmed as to them: Elkton & Guthrie R. R. Co.; Mammoth Cave R. R. Co.; Louisville Southern, &c. (No. 175), and Owensboro & Nashville and L. & N. (No. 184).

The judgments in the cases indicated are erroneous, and are reversed, with instructions to proceed as herein indicated.

Judge Hazelrigg delivered the following modified opinion in response to a petition for rehearing in the case of the Elkton & Guthrie Railroad:

Our attention has been called to the fact that the judgment of the lower court in the case of the Elkton & Guthrie Railroad was rendered for interest on the taxes due on October 10, 1890. The construction of this road began in August, 1884, and under the opinion of this court heretofore delivered it was exempt from taxation for five years after that date. It has been held repeatedly by this court that taxes, though due and payable at a time certain, do not bear interest unless the statute says so, and we have no statute to that effect, penalites being imposed in lieu thereof, hence the judgment is erroneous to that extent.

The cross appeal of the appellee company was overlooked.

COMMONWEALTH v. LEXINGTON PASSENGER & BELT RY. CO.

(Filed November 1, 1893—Not to be reported.)

The appellee's road, having been constructed after the act of 1884, exempting it from taxation for five years after its construction, was repealed, is not entitled to any exemption from taxation for any period.

W. J. Hendrick and Reid Rogers for appellant.

Humphrey & Davie and Wm. Lindsay for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee began the construction of its road in 1889. The act of 1884, by virtue of which the company claims an exemption from taxation for five years, was repealed by the Hewitt act which took effect September 14, 1886. It is, therefore, not entitled to any exemption under the act relied on.

Full discussion of the question was had in Commonwealth v. Owensboro, Falls of Rough & Green River R. R. Co. and others, decided October, 1893 (ante, 449).

The judgment dismissing the plaintiff's petition is reversed, with directions to sustain the demurrer of plaintiff to so much of the answer as relied on the exemption act of 1884, and for further proceedings in accordance herewith.

FIRST NAT. BANK OF COVINGTON v. THE D. KIEFER MILLING CO., &c.

(Filed October 31, 1893.)

1. Assignment by corporation for benefit of creditors—Fraud—The evidence shows that the president of the appellee corporation was duly elected at a meeting of the stockholders and authorized to execute a deed of assignment for the purpose of securing an equal division of the assets of the corporation among its creditors. There is no evidence of a fraudulent purpose in the execution of the deed, and it must be treated as valid.

2. Attachments—Grounds for—To sustain his attachment the plaintiff must prove not only that defendant has no property in this State subject to execution, or not enough thereof to satisfy plaintiff's demand, but the additional fact that the collection of the demand would be endangered by delay in obtaining a judgment, or a return of no property found; and the last-mentioned fact does not follow as a necessary consequence from proof of the first.

3. Priorities between attaching creditor and assignee for creditors—Unrecorded deed of assignment—Where a deed of assignment for the benefit of creditors is executed, acknowledged and delivered by the debtor to his assignee, the assignee thus acquires an equitable interest in the assigned estate, even before he lodges the deed of assignment for record, which is prior and superior to the equity acquired by a creditor whose attachment is issued and levied after the delivery of the deed, but before it is lodged for record.

A deed of assignment was executed, acknowledged and delivered to the assignee at 9 o'clock a. m. A creditor of the assignor sued out an attachment against his estate, which was placed in the hands of the sheriff for execution at 1.15 p. m. of the same day; the deed of assignment was lodged for record at 2.45 p. m. of the same day. Held—That the equity of the assignee in the estate is prior and, therefore, superior to that of the attaching creditor.

4. Creditor must take notice of articles of incorporation of corporation—A person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation. In a contest between the assignee of an insolvent corporation and a bank that has loaned the corporation money, a provision of the recorded articles of incorporation of the corporation not allowing it to incur any liability or indebtedness in excess of one-half of its capital stock, which was $60,000, will be enforced against the bank, and it will be allowed judgment for only $30,000 of the $77,000 loaned by it to the corporation.

J. F. & C. H. Fish for appellant.

Jas. P. Tarvin and Cleary & Hamilton for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

Prior to December 18, 1888, "The D. Kiefer Milling Co.," incorporated under chapter 56, General Statutes, of which D. Kiefer was president and principal stockholder, had done a large and apparently profitable business; but by reason of the fraudulent conduct of Geo. M. Kiefer, son of the president and secretary of the company, in discounting and receiving from the First National Bank proceeds, amounting to a large sum, of drafts purporting to have been drawn by the company, with which he fled the State, it was rendered insolvent, and, December 31, 1888, a meeting of its directors and stockholders was held, when a deed of assignment was directed made and was executed by D. Kiefer, the president; but without delivering the deed to the assignee, D. Kiefer, with the hope and purpose of continuing the business, proposed an arrangement with "the First National Bank of Covington," whereby his wife was to furnish a large sum of money to enable the company to eventually pay its debts, and the bank was to advance a considerable sum to aid in carrying on the business in the meantime, about $14,000 of which was actually paid.

That arrangement was not, however, fully carried out because D. Kiefer died January 5, 1889; and January 7, 1889, the First National Bank of Covington brought an action against the D. Kiefer Milling Co. for judgment on numerous demands, aggregat-

ing about $77,000, seeking and obtaining at the same time an attachment for the second class provided in section 194, Civil Code.

It appears plaintiff's petition was filed in the clerk's office and the attachment issued and placed in the hands of the sheriff at 1:15 o'clock p. m.; but the evidence shows that there was on the same day a meeting of stockholders of the D. Kiefer Milling Co., by whom W. S. Kiefer was elected president in place of D. Kiefer, deceased, and a resolution passed for execution of a deed of assignment for benefit of creditors; and in pursuance thereof a second deed was executed and acknowledged by W. S. Kiefer, president, and the secretary of the company, and delivered to the assignee about 9 o'clock a. m.; but the assignee, B. F. Graziani, did not lodge the deed for record until 2:45 o'clock p. m. of the same day, withholding it to await the result of a meeting with the president and directors of the First National Bank of Covington, which it appears was on January 5th, day of D. Kiefer's death, agreed to be held on January 7th.

Subsequently a second action was instituted by the bank and another attachment obtained, which was consolidated and tried with the first; but upon final hearing both of the attachments were discharged, the deed of assignment judged valid and effectual, and proceeds of property conveyed, amounting to about $30,000, directed to be distributed and paid pro rata to creditors of the D. Kiefer Milling Co., only the amount of $30,000 of the $77,000 claimed by the First National Bank being, however, adjudged to be thus ratably paid.

The first question naturally arising is whether the deed of assignment is effectual for any purpose.

There is no evidence it was executed with any other intention, on part of the grantors, than to thereby secure a fair, legal and just distribution of the estate of the D. Kiefer Milling Co., then insolvent, among all its creditors. Nor do we think, as counsel argues, the deed is invalid by reason of the want of authority in W. S. Kiefer to make it as president, for the evidence shows there was a regular election by the stockholders and he was duly chosen.

Moreover, the summons on plaintiff's petition was served on, and a copy of the order of attachment was delivered by, the sheriff to W. S. Kiefer, as president of the defendant, which it is to be presumed was done by the direction of the plaintiff.

As the second action was not commenced until after the deed was lodged for record, clearly the attachment in that case can not prevail.

The reason stated by the lower court for discharging the attachment issued in the first action is that, although defendant did not, as stated in the petition, have property in this State subject to execution, or not enough thereof to satisfy the plaintiff's demand, the collection of it would not, as alleged, have been, in meaning of section 194, Civil Code, endangered by delay in obtaining judgment for a return of no property found.

According to the language there used the single fact a defendant has no property in this State subject to execution, or not enough thereof to satisfy plaintiff's demand, is not sufficient to authorize an attachment; but the additional and independent fact that the collection of the demand will be endangered by delay in obtaining judgment, or a return of no property found, must also be alleged and shown.

It was, it is true, held in Burdett v. Phillip, 78 Ky., 246, that the two facts are concomitant, and the latter followed as a consequence of the former; but in Francis v. Burnett, 84 Ky., 30,

the ruling in which is adhered to, it was held the legislature evidently intended the latter to have an independent meaning, and that it did not always or necessarily follow that because the defendant did not have property enough subject to execution to satisfy plaintiff's demand, the collection of it would be endangered by delay in obtaining judgment or a return of no property found; but whether the plaintiff in this case did actually show existence of both facts we need not consider, because the judgment appealed from can and ought to be affirmed upon another ground.

The deed of assignment having, as we think, been clearly executed with no fraudulent intent, the contest is between the First National Bank of Covington, seeking, in virtue of attachment, to absorb the entire estate of the insolvent company, and other creditors claiming under the deed a pro rata distribution as provided by statute.

Section 10, chapter 24, General Statutes, is as follows: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until such deed shall be acknowledged or proved according to law and lodged for record."

The evidence shows the deed of assignment was duly executed, acknowledged and delivered to the assignee, and he thus acquired an equitable title to the estate before plaintiff commenced its action, or the order of attachment was issued; and as, according to repeated decisions of this court, a creditor acquires by attachment only a lien upon or an equitable right to property levied on, it necessarily follows that we have in this case simply a contest between equities, and applying the doctrine that in such state of case the equity which is prior in time must prevail, there is no other alternative but to decide that the deed of assignment in this case prevails against the attachment. Such has been the construction and application so often given by this court to the statute quoted that it is needless to even cite the cases.

It appears that there was in the articles incorporating "The D. Kiefer Milling Co." a provision that the company should not in any event incur any liability or indebtedness in the aggregate in excess of one-half its capital stock bona fide subscribed, which was $60,000.

The articles of incorporation were, as required by statute, recorded, and, independent of presumed notice by First National Bank of Covington of the provision in regard to the limit of indebtedness the D. Kiefer Milling Co. was empowered to contract, it is a well-settled rule that a person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation. (Morawitz on Private Corporations, volume 2, sections 591-2.)

Whether, if this was simply a contest between the bank and milling company, violation and disregard by the latter of the provision of the articles of incorporation would be a sufficient defense we need not determine; but the enforcement of that provision is demanded by the assignee for benefit of other creditors who have been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and in such a case a participant in the fraudulent transaction, not other innocent creditors, should suffer.

The judgment is affirmed.

FERGUSON v. CRICK.

(Filed October 31, 1893—Not to be reported.)

1. Boundary—Evidence—The evidence showed that appellant and appellee's ancestor agreed upon and located a disputed and uncertain division line between their lands in 1876, and that appellant had processioners to fix upon and report to the court the boundary so agreed upon. Therefore, appellant is concluded by such report and agreement, and must be confined to such boundary.

2. Same—Statute of frauds—A verbal agreement locating a disputed division line between adjacent land owners, which has been executed, is not within the statute of fraud and is binding on the parties to it.

J. I. Landes and Harry Ferguson for appellant.

Petrie & Downer for appellee.

Appeal from Christian Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

Whether the 200-acre survey of Wristen, made in 1816 and under which the appellant asserted title, covered the 50 acres of land claimed by the appellee was the question submitted to the jury on the first trial of this case.

Upon that issue the jury failed to agree. Thereupon the appellee set up by an amended answer that the appellant had procured this old patent to be processioned in 1876, and that while the lines were being located, and in compromise and settlement of certain differences between the appellant and one James Crick, under whom the appellee claims title, the appellant and said Crick agreed upon the southern boundary line as fixed by the processioners, by which the appellant took the land north of this agreed line, and Crick the part south of it.

The appellant denied making such an arrangement. The issues thus presented were transferred to the equity docket, and upon final hearing were decided for the appellee.

There is abundant proof sustaining appellee's contention. The report of the processioners shows the establishment of this southern line as contended for by the appellee, and reports its location as having been made by the consent of the parties, Ferguson and Crick. The same fact is shown by a number of witnesses, while the appellant's testimony to the contrary is substantially unsupported; but it is contended that even if this be true the alleged arrangement being in effect a sale of land by Ferguson to Crick was not in writing, and hence is within the statute of frauds. We are of a different opinion.

In Grigsby, &c v. Combs, 14 Ky. Law Rep., 651, this court said that such amicable arrangements between disputing claimants of co-terminous boundaries have been sanctioned by repeated adjudications.

Here Crick, who had entitled himself to certain equities in the land by the erection of buildings on it and otherwise clearing it up and improving it, agreed to surrender all further claim if the line, as fixed by the processioners, should be marked and returned as the true line by consent of the parties. This was done. The processioners' report is conclusive of that fact.

The agreement merely fixed the southern boundary line of the appellant's survey. The appellant is concluded by the report and by his agreement.

Judgment affirmed.

BURCHETT v. DAILEY.

(Filed November 2, 1893—Not to be reported.)

Vendor and vendee—Pleadings—Where a vendor sues to enforce his vendor's lien on land, and alleges ability and willingness to make a deed conveying title and tenders a deed, an answer denying that the vendor is able to make a good and sufficient deed, without alleging any defect in his title, is defective, and constitutes no defense.

J. R. Botts and J. H. Burchett for appellant.

J. D. Jones for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Pryor.

This action below was to subject the land in the possession of the appellant to the payment of the purchase money, tendering a deed and alleging ability and readiness on the part of the vendor to make title. The answer of the appellant denies the appellee is able to make a good and sufficient deed.

No defect in the title is pointed out by the defendant, or any averment made requiring an exhibition of title on the part of his vendor. The answer was defective, and constituted no defense.

Judgment affirmed.

(Logan v. Bull, 78 Ky., 607.)

PIPER v. GUNTHER & SONS.

(Filed November 4, 1893.)

1. Constitutional law—Practice acts regulating proceedings in civil cases—Although the circuit courts of this State, "as constituted and organized" under the Constitution of 1850, no longer exists because new courts were created by the new Constitution and the acts in pursuance thereof, yet local acts, enacted prior to the adoption of the new Constitution to regulate proceedings in civil cases in certain counties are not repealed by the new Constitution unless inconsistent with it. Such acts were not a part of the "old courts," and survive them and are still in effect.

2. Same—The act requiring the clerk of the Daviess Circuit Court to keep an equity trial docket, and providing that no case should stand for trial or judgment unless set down on such trial docket before the first day of the term at which trial or judgment is sought, is not inconsistent with section 59 of the new Constitution, forbidding the passage of local acts "to regulate the jurisdiction or the practice of the circuits of courts of justice, etc.

Lucius P. Little and L. Freeman Little for appellant.

Weir & Weir for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

By the provisions of an act of the general assembly, entitled "An act to regulate civil proceedings in actions in Daviess Circuit Court," the clerk of the court was required to keep an equity trial docket in addition to the equity docket provided for

by general law. It was also provided "that no case should stand for trial or judgment unless set down on the trial docket before the first day of the term at which trial or judgment was sought. The clerk was to so set the cause at the instance of any party to the action or his attorney."

The appellees brought this suit in the Daviess Circuit Court to recover judgment on a purchase-money note for a town lot, and to enforce their lien thereon. At the January term, 1893, the case was called, and the plaintiffs moved for judgment. The defendant (appellant) objected upon the ground that "the case did not stand for trial."

It was conceded that the action had not been placed on the equity trial docket, as provided by the special act. The court rendered a judgment in behalf of the appellees over the objection of the appellant, and also overruled his motion to set the same aside, made on the ground that its rendition was a clerical misprision. The appellant brings the case up, insisting that, by reason of the special act mentioned, the case did not stand for trial or judgment, and that the judgment complained of was rendered prematurely. The appellees contend that by virtue of the present Constitution the special act affecting the practice in the Daviess Circuit Court is no longer in force, and hence the judgment was properly rendered.

The learned circuit court judge has supported this contention —that the special act has been repealed—by an elaborate and somewhat plausible opinion, the purport of which is, first, that the court to which the act alone applied was created by virtue of the Constitution of 1850. This old Constitution has been superceded by the new, which, by its 125th section, creates a new circuit court in each county. The Daviess Circuit Court, to regulate the practice in which the special act in question was passed, is not the Daviess Circuit Court now in existence under the new Constitution. Moreover, the third provision of the schedule is to the effect that circuit courts, as now constituted and organized by law, shall continue with their respective jurisdiction until the judges of the circuit courts, provided for in this Constitution, shall have been elected and qualified, and shall then cease and determine, and the causes then pending in the first-named courts, which are discontinued by this Constitution, shall be transferred, etc.

The fallacy of this argument, it seems to us, lies in the assumption that because the old court, as constituted and organized, is discontinued, the law, whether special or general, regulating the practice is also discontinued. These "practice acts," so to speak, do not form a part of the old courts "as constituted and organized," in the meaning of the Constitution, and are not, therefore, discontinued simply because the old courts are discontinued.

On the contrary, "that no inconvenience may arise from the alterations and amendments made in this Constitution," the first clause of the schedule provides "that all laws of this Commonwealth, in force at the time of the adoption of this Constitution, not inconsistent herewith, shall remain in full force until altered or repealed by the general assembly," etc.

These various acts regulating practice are "laws of the Commonwealth." They are not repealed simply because the courts to which they relate are discontinued, as constituted and organize theretofore, but their repeal is made to depend on whether they are inconsistent with the new Constitution, and whether inconsistent or not is a question not involved in the argument at hand. This phase of the question will be considered further along.

The various acts are laws of the Commonwealth regulating

practice in civil and criminal cases are independent of the organization or make up of the courts created either by the new or old Constitutions.

If it were otherwise, then the laws regulating the subject of practice, whether general or special, would die with the old courts. The Civil and Criminal Codes are but acts regulating practice in civil and criminal cases.

"The provisions of this Code (Civil Code, section 838) shall regulate pleadings and practice in civil cases commenced hereafter in courts which now exist, or which may hereafter be created"—created of course under the Constitution then in force. Special acts, therefore, regulating practice in the courts under the old Constitution are no more repealed than is the Code of Practice.

We think that all these acts survive the old Constitution, except such as are inconsistent with it, and, further, that when they are inconsistent with the Constitution they still survive, provided the provisions of the Consititution making them inconsistent require legislation to enforce them.

The only question is, therefore, is the special act under consideration inconsistent with any provision of the Constitution which is in force of itself, or is operative without legislation to enjoin it? The only provision on the subject relied on to show this inconsistency is that of section 59, providing that the general assembly shall not pass local or special acts "to regulate the jurisdiction of the practice of the circuits of courts of justice, or the rights, power, duties or compensation of the officers thereof; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice of circuit courts held in terms."

This is a direction to future legislatures, and a limitation on future special legislation. It contemplates that the practice in circuit courts having stated sessions, as well as those having continuous session, shall be made uniform by general law, though the latter may differ from the former, after which it shall not be within the legislative competency to pass special or local acts regulating the practice, jurisdiction, etc., of the circuit courts.

The legislature has provided the course of procedure in circuit courts having continuous sessions (chapter 124, Acts 91-2-3, page 419); but no general law has as yet been provided for the other circuit courts. Until this shall be done we think the special acts regulating the practice in these courts, as well as the general laws on the subject, stand unrepealed, and are in fact expressly continued in force by the first clause of the schedule.

The judgment below was prematurely rendered; it is reversed, with directions to set it aside and for proceedings consistent herewith.

CRUTCHLOW v. BEATTY.

(Filed November 18, 1893—Not to be reported.)

1. Boundary—Evidence—The evidence shows that those owning and in possession of adjoining tracts of land agreed upon and located a disputed division line three-quarters of a century ago, and the lands were surveyed twenty years ago, and the agreed line recognized by owners or those in possession at that time, therefore, the lower court properly fixed upon such agreed line as the true division line between the lands, although it does not coincide with the calls of the patent under which the parties claim.

2. Same—Adverse possession—Where one is claiming land by actual, adverse possession, evidence of his declaration made to third parties, that he claimed only to a certain designated line, and that when surveyed he intended to move his fence back, is competent to show that his alleged possession was friendly and not adverse.

J. S. Wortham for appellant.

Wm. H. Holt and G. W. Stone for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Pryor.

This was a law and fact case, submitted to the court without the intervention of a jury, and while the weight of the evidence may be on the side of the appellant, we are not disposed to disturb the finding, when satisfied there is evidence to support it.

The litigation originated from a dispute between neighbors as to the real boundary lines between their adjoining places. As is usual in such cases bad feeling on the part of the one neighbor toward the other is sought to be gratified, and the mere right of property a secondary question.

As an original proposition a court or jury might well establish from the proof the line between the Toole tract and the Kerr tract as beginning at the white oak and ending at the (2) black oaks, known as the Webb corner; but a different line, although made after the original survey, may be adopted and established as the real line by the original owners, or by those who at the time were in the possession and the owners.

It is shown by Dunn and others that very many years before this trouble originated Kerr and Mercer, who then owned the respective tracts of land, recognized the line fixed by the court as the true boundary. They were then talking on the subject.

That there was a marked line, plain and distinct, made more than three-quarters of a century ago, including the boundary and claim of those under whom the plaintiff claims, is shown by a number of witnesses; and while this line differs from the original patent and is junior in date, or does not run to what is established as the Webb corner, it was evidently made by some arrangement between the owners of the two tracts, and with the admission and recognition of this line as the boundary by those from or through whom these parties derived title, it seems to us the court acted properly in establishing the line recognized as such by the owners.

These lands were surveyed twenty or more years back by them or at the instance of those living on the lands, and the line established or recognized as the line of those in possession; and while the surveyor now thinks there was a mistake in the survey, or that it failed to call for the real corner or follow the true line, it is too late now to correct it.

As to another line of this Toole tract it is conceded, and if not the proof shows it, that the line fixed by the court is the true boundary; but it is maintained that the appellant has held a part of the land adversely and within his inclosure for more than fifteen years, and thus acquires title.

If there was no evidence in this case but that of the possession on the part of the appellant of the small strip, it might be held that this being within his inclosure would establish an adverse holding; but the proof shows that the appellant claimed to own

to the line as fixed, or known as the Leitch line, and that when surveyed he said more than once that he intended to move his fence back.

While the statement to those who are not interested in the litigation as to the nature of one's claim to land did not work an estoppel, yet it is evidence as to the manner in which the title is held, and may be introduced to show the absence of any claim of right. This evidence the court had before it, and in applying the law to the facts we can not say erred in the finding.

Upon the facts of this case the judge below refused to change a marked line, recognized by the owners of the respective tracts (and from whom these litigants derived title) for many years as the true boundary.

In the second place, refused to establish a line upon a possession claimed to be adverse, when there was evidence showing that the holding was friendly and not adverse, and when, by establishing an adverse holding, a part of appellee's survey would have been left within appellant's inclosure.

We must concur in the finding below, or at least can not say the judgment was flagrantly wrong.

Judgment affirmed.

COMMONWEALTH v. DAY.

(Filed November 16, 1893.)

1. Intoxicating liquors—Constitutional law—The Fleming county local option law prohibits the gift, loan or traffic of intoxicating liquors in any quantity by any person except as to the use of wine for sacramental purposes and to a regular practicing physican, who in good faith prescribes it as a medicine to his patient, and to a sale by a distiller on certain conditions, and to a furnishing or gift of liquors by one to members of his family or to invited guests at his own household. Held—That the act is not unconstitutional and does not impose different penalties on different classes of people where it prescribes one penalty for all those who sell, give, etc., such liquor, and another penalty to physicians who prescribe whisky other than as a medicine; the act denounces two different offenses in this respect and imposes a penalty for each offense.

2. Same—The sixth section of the act forbidding the procuring for or delivery to one person of liquors by another "to be drank as a beverage" is not a limitation of the preceding sections and does not so define them as too make a sale, gift, etc., of liquors a crime only when sold, given away, etc., "to be drank as a beverage."

3. Same—The act must be construed according to its plain intent, therefore, a druggist under it may fill a prescription of a regular resident physician who in good faith prescribed same to a patient as a medicine, although, according to the letter of the act, the physician must furnish as well as prescribe such liquors.

But the distiller or the grocer or any other person can not fill such prescriptions of a physician for whisky.

Each sale of liquor by a druggist must be made on a separate prescription and one prescription can not be filled an indefinite number of times.

W. J. Hendrick and James H. Sallee for appellant.

W. G. Dearing, A. E. Cole and G. A. Cassidy for appellee.

Appeal from Fleming Circuit Court.

Extended opinion of the court by Judge Hazelrigg.

We are asked by the learned attorney general to extend the opinion in this case (ante, 385), and, by a construction of the act in question to settle the law regulating the sale of liquors in Fleming county. The act provides:

First: That it shall be unlawful for any person to sell, barter, give, loan or traffic in spirituous, vinous or malt liquors in any quantity whatever, within the county of Fleming, except as hereinafter provided.

Second. This act shall not apply to the procuring or use of wine for sacramental purposes, or to a regular resident practicing physician, who in good faith prescribes the same as a medicine to his patient or patients, or to a sale from a distillery in the county by the owner thereof or his agent, at any one time in a quantity not less than ten gallons, and then not to be drank on the premises where sold or premises adjacent thereto.

Third. Nor shall this act or its provisions apply to those who give or furnish spirituous, vinous or malt liquors to a member or members of their own family or their invited guests at there own household.

Fourth. Any person violating the provisions of the first section of this act shall be fined not less than $100 nor exceeding $300, etc.

Fifth. Any physician who shall furnish spirituous, vinous or malt liquors to any person or persons except as a medicine shall be fined $100 for each offense, to be recovered, etc.

Sixth. The procuring for or the delivery by one person of liquors to another, unless a member of the same family, or their invited guests at their own homestead, to be drank as a beverage, shall be deemed a sale under the provisions of the first section of this act and subject the party procuring or delivering the same to the penalties annexed for a violation of said section.

Then follow other sections providing for a vote and the enforcement of the provisions of the act by the county officers, etc.

It is contened by the appellee (first) that the act is unconstitutional because it imposes a different penalty on physicians for furnishing liquors than on other persons. But we think that different penalties for the same offense are not intended to be imposed. The letter of the act, it is true, imposes the penalty of $100 on the physician who shall "furnish" such liquors, and of from $100 to $800 on other persons furnishing the same.

But it is evident that the offense attempted to be provided against in the fifth section as to physicians is that of prescribing liquors save as a medicine. We do not doubt that if a physician furnishes such liquors to another to be drank as a beverage he would be punishable under the fourth section as other persons. He is excepted from the act only when he "in good faith prescribes the same as a medicine."

If he prescribes it to be used otherwise than as a medicine, he is punishable under the fifth section.

Second. The appellee insists that the sixth section is a limitation on the first section; that "the procuring for or the delivery by one person of liquors to another, * * * to be drank as a beverage," constitutes the selling, bartering, giving and loaning, as designated in the first section, and such liquors must be sold, bartered, given, loaned; that is, procured for and delivered to another to be drank as a beverage before there can be an infraction of the law. This contention is not without plausibility, and if the sixth section is to be regarded as a limitation on the first, and "the procuring for or delivery by one person of liquors to

another" is to be regarded as constituting the sale, barter, gift, and loan mentioned in the first section, then, as a chain can not be stronger than at its weakest point, the important modification found in the sixth section, "to be drank as a beverage," must be regarded as qualifying the act of furnishing such liquors as denounced in both the first and sixth sections. Not the distiller alone, therefore, or the merchant or the grocer or the druggist may furnish such liquors, but any person may do so, provided they are not furnished "to be drank as a beverage."

Of course, if this be the proper construction of the act, it should not argue against its adoption by us that sales of liquors for medicinal purposes and not to be drank as a beverage would increase rapidly in that hitherto healthy locality, although it must be admitted that if the patient may diagnose his own ailment and the liquor dealer prescribe the remedy, the act would soon permanently fall into a state of "innocuous desuetude."

But we are convinced such is not the meaning of the language of the act, nor is it in accord with its spirit.

The first section stands without modification or limitation. Whoever sells, barters, gives, loans or traffics in spirituous, vinous or malt liquors in any quantity in Fleming county does an unlawful act, unless he is a physician and prescribes such liquors as a medicine, or a distiller and sells in the quantity designated by the act, or unless he gives them to his family or to his invited guest, or furnishes wine for sacramental purposes, or as a druggist fills the prescription of a physician.

But more than this, in addition to and independent of such selling, giving, etc., whoever, though he may not sell such liquors or barter, give, loan or traffic in them, yet whoever procures such liquors for or delivers them to another to be drank as a beverage, whether he be the accommodating stage driver, who, without selling, giving, loaning or trafficing in such liquors, yet loads his coach down with the "irrepressible jug," the unvarying accompaniment of stringent liquor laws, or be the special messenger sent in his carryall with "orders" to the nearest "wet" town, is guilty under the sixth section of this act. He is the go-between who sells not or gives or loans or traffics in such liquors, yet he procures them for and delivers them to another to be used, not as a medicine but as a beverage, and he it is that the sixth section was aimed at. The ambitious purpose of the act as indicated in its sixth section particularly was to prevent absolutely the importation of spirituous, vinous or malt liquors into the county for use as a beverage.

While the act does not make it unlawful for a man to take a drink of such liquors in the county, and indeed graciously allows him to give them to his family and even to his guest, if at his household by his invitation, yet the law provides that no one may procure such liquors for him or deliver them to him unless the distiller does so by the quantity.

They can not otherwise be procured for or delivered to him to be used "as a beverage." This seeming restraint on the personal liberty of the citizen is self-imposed, and its constitutionality is maintainable on abundant authority in this and other courts of the country.

It is noticeable that while the act permits the physician to prescribe such liquors as a medicine, it nowhere authorizes any one to fill the prescription; but in the Reynold case (89 Ky., 147) this court, looking to the reasonable intent and not the letter of this act, held that a druggist might fill the prescription of the physician. It was there said that "the settled policy of the

State in the effort to control the liquor traffic has been to confine the sale in small quantities to druggists and physicians, to be used as a medicine," which is a sufficient answer to the question asked by counsel in this case: "If a druggist may fill a prescription, why may not any other person do so?"

It is not the policy of the law, and certainly not in accord with common reason, that the unskilled and unprofessional, "oi polloi," may decipher the enigmatical prescription of the erudite doctor! And certainly is he not to be entrusted with such enticing responsibility when it comes to filling a prescription for spirituous, vinous and malt liquors!

When we speak of the intent or spirit of the act we must be understood as meaning the legislative intent. The intention of the zealous framers of this act was, no doubt, to confine the furnishing of liquors as well as its prescription to the physician. They do not use the term "druggist" in the act or affect to know even of the existence of the art of the pharmacologist; but to render its arbitrary features tolerable, and to remove constitutional objections, the court must construe liberally the act as a whole, though we can not extend its meaning beyond legitimate and reasonable limits.

Therefore, first, the distiller can not fill the physicians' prescription, much less could he sell without it, or dispose of his product otherwise than as permitted by the act.

Second. No other person than the physician or druggist can sell, barter, give, loan or traffic in such liquors in any quantity whatever with or without a prescription.

Third. Nor can a person, by importation or otherwise, as agent or servant or as a "go-between," procure for or deliver to another such liquors to be used as a beverage, though such person may, with a prescription prescribed in good faith by a physician, procure such liquors from the physician or druggist to be used as a medicine. The sick man need not go after the liquor in person.

Fourth. Each sale or procurement must be accompanied by a distinct prescription, and a person can not obtain such liquors from the druggist or physician on a prescription indefinite as to quantity, or so general as to cover future deliveries.

We think these views substantially cover the case at hand and the points raised by learned counsel.

If some of the features of this act seem harsh or arbitrary, it is to be remembered that "the way to kill a bad law is to enforce it."

This construction is directed to be certified as the law of the case.

AMERICAN ACCIDENT CO. v. REIGART.

(Filed September 16, 1893.)

1. A policy of insurance against injury or death, through external, violent and accidental means, should be liberally construed in favor of the insured, so as to carry out the intention of both parties to it; and when the language of the policy is susceptible of two interpretations, that which will sustain and cover the loss must be adopted.

2. Where the policy provides that the liability shall arise when the death or injury "is through external, violent and accidental means," it was not intended to cover only injuries resulting from external force or violence. The language requires that the means through which the accident occurred should be external, but not the injury itself should be external. Therefore,

the liability arises when the death of the insured resulted from the accidental lodgment of a piece of beefsteak in his windpipe when he was attempting to swallow it.

3. Such accident is the result of violent means when it results from unnatural and distinguished from natural causes.

4. Pleading—Burden of proof—When the answer traversed plaintiff's allegation that the death of the insured was caused by external, violent and accidental means, the burden was on plaintiff, although the traverse was made in such terms as to be of questionable validity. The defendant will not be heard to say that its own traverse was insufficient, and that, therefore, the burden of proof was not on plaintiff.

Thomas H. Hines and Whittaker & Robertson for appellant.

Cochran & Sons, John F. Lacey and Edward W. Hines for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, Julia J. Reigart, the widow of Thomas I. Reigart, instituted this action in the Mason Circuit Court to recover $5,000 upon an accident policy issued by the American Accident Co., of Louisville, Ky., to said Reigart, and made payable to his wife, if she survived him.

Her husband lost his life by eating a piece of beefsteak that, in the attempt to swallow, accidently passed into his windpipe, choking him to death in a few moments.

By the terms of the policy the insurance was made payable for injury or death received through external, violent and accidental means. That the death of the insured was accidental is conceded, but it is contended that the contract of insurance only embraces accidental injury, caused by external violence or accidents, brought about by means externally violent.

It is argued that the act of chewing or eating food is natural and harmless, and if in eating a part of the food passes into the windpipe, causing death, it can not be said that death was produced by means of external violence or force. In other words, that the plain meaning of the language of the policy, "through external, violent and accidental means," is that the accident causing death must have been caused by an external force.

The court below said, in effect, to the jury, placing a different construction on the contract, if the death was accidental, and caused by the passing of the steak into the windpipe, they should find for the plaintiff.

The rule laid down by Mr. May in his work on Insurance (3d edition), section 175, is as follows: "No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity which, in making the insurance, it was his object to secure, when the words are without violence, susceptible of two interpretations, that which will sustain and cover the loss must in preference be adopted;" and he might add that no construction should be placed upon such contracts as would defeat the intention of both parties, as it is manifest, if the interpretation given the language of this policy by counsel for the defense is adopted, it would defeat the intention of both the contracting parties.

The doctrine of this court, as announced in Hutchcraft's Ex'or v. Travelers Insurance Co., 87 Ky., 300, where the authorities

were reviewed on the question there presented, recognizes fully this rule of construction, and that regard must be had to the pupose sought to be accomplished by both the parties.

This appellant is an accident insurance company, and its policies are termed accidental policies, and the very object of insuring in such companies is to obtain indemnity where an injury or death results from accident.

While the policy provides that the liability arises where the injury "is through external, violent and accidental means, independent of all other causes," it was not designed that there should be such external violence as a fall, a kick or a blow on the flesh as would cause death or an injury, before the liability of the company could arise.

This language was inserted in the contract to protect the company against hidden or secret diseases, resulting in injury where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accident, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes and that were liable to occur at any time from natural causes.

If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion or to completely stay the operations of nature in such a manner as to produce disease, no one would contend that the pain or the disease was the result of accident or that the terms of this policy embraced such a case; but where the substance causing the death is visible and placed in the mouth of the assured, lodging by accident in the windpipe instead of the stomach, producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine.

There is no external force or violence from the poison, and the injury internal in its character, and yet the authorities hold that the insurance company is liable in such a case. (Healy v. Mutual Accident Co., 133 Ill., 556.)

It is plain, we think, that the means, or that which caused the injury, should be external, and not that the injury should have been external.

It is said, however, that if the injury is not to be external, that the death must have resulted from "violent and accidental means." It is universally understood, when it is said "that one died a violent death," that it was unnatural—a death not occurring in the ordinary way—and in fact the definition of the word violent is unnatural, and in using this word the insurance company was attempting to prevent the insured from asserting a claim where the injury or death was the result of some natural cause.

In the case of Paul v. Travelers Ins. Co., 112 N. Y., 472, on a similar policy, it was held "that a death unnatural, the result of accident, imports an external and violent agency as the cause."

This same view was taken by the Illinois Supreme Court in the case of Healy v. Mutual Accident Association, already cited.

A similar construction to the verbiage of like policies has been heretofore given by courts of last resort, and if companies, organized as this is, intended that actual external force, causing the accident, must be shown before a recovery could be had, it would be easy to so frame the language of the policy as to leave no doubt as to its meaning. The instructions below were proper, and, in our opinion, the widow is entitled to recover.

Another ground of reversal is the refusal of the court below to give to appellant's counsel the concluding argument.

A demurrer had been overruled to the petition, which in effect was a decision for the plaintiff, if the accident occurred as alleged. The legal question was, therefore, settled, but there were two defenses to the claim: First, a denial that the accident causing the death happened as alleged by the plaintiff; second, that the deceased was under the influence of intoxicating drinks when the accident occurred, and that by an express provision of the policy this exempted the appellant from liability.

The proof failed to sustain the second ground of defense, and the denial that the accident was caused as alleged was the only issue of fact that the appellee was required to establish.

The overruling of the demurrer did not dispense with the necessity of the plaintiff's showing that the death of the intestate was caused by the accident as alleged, and while the sufficiency of the answer may be questioned, by reason of the manner in which the denial is made, still it was the appellant's defense, and it attemped by it to place the burden on the plaintiff, and will not be allowed now to say that because its pleading was bad, the burden was not on the plaintiff.

The judgment below must be affirmed.

GREER'S ADM'R v. GREER'S ADM'R.

(Filed November 4, 1893—Not to be reported.)

Partnership—Evidence—The evidence shows that two brothers were, in 1841 and subsequently, interested jointly or as partners in buying and selling certain real estate. One brother or his representative is asserting, fifteen or twenty years after the close of the transactions, that the other is largely indebted to him. The plaintiff's intestate was bookkeeper in the ventures, and an expert accountant, and it was his duty to so keep the books as to show the exact state of the accounts. The books offered by plaintiff do not clearly show whether they were the joint books of the firm or the individual books of plaintiff's intestate. Entries made in these books fifteen years after the close of the transaction, and which are based alone on the memory of one of the brothers, are relied on as a basis of plaintiff's claim. Held—That the books offered are not of such a character as to be evidence against defendant, and the subsequent conduct of the brothers after the close of the joint ventures showed that the one was indebted to the other.

W. H. Mackoy and A. G. Simrall for appellant.

Simmons & Simmons and W. W. Cleary for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

The administrator of A. L. Greer is seeking to recover a balance of $15,000 from the personal representative of his brother, Thomas Greer, alleged to be due on a settlement of the partnership accounts between them.

The court below refused the judgment, and A. L. Greer, administrator, has appealed.

The two brothers were partners in the sale of merchandise for a number of years, the partnership beginning in the year 1841, and, it is claimed, engaged in the buying, selling and improving real estate as partners, and that the partnership books show an

indebtedness by Thomas Greer to A. L. Greer of the amount claimed by the appellant. That the two brothers were engaged jointly or as partners in purchasing and selling real estate does not admit of doubt, but whether there is any evidence showing the true state of the accounts between them originating from these transactions is the question here.

They were either partners or joint dealers and owners of this real estate purchased and sold, and it is not important, in view of the conclusion reached by this court, whether they occupied the one relation or the other.

They were brothers, and upon the most intimate terms, and their accounts, as is usual in such cases, were carelessly kept and difficult to understand. A. L. Greer, whose administrator is the appellant here, seems to have been fully competent as a bookkeeper, and whose duty it was, as is contended by the appellee, to keep the books, and a correct statement of the accounts between them. In June, 1881, I. W. Long, an expert accountant, was employed by A. L. Greer to post what is called, in this record, journal and ledger I, in order to a settlement between the two brothers, and it may be assumed that this employment was made with the approbation of Thomas L. Greer. He seems to have been present when the work began, and made no objection until ascertaining the manner in which the entries were being made.

There is no proof, however, that the appellee's intestate ever examined the books, or that they were the recognized books of the firm; but, considering that they were, and A. L. Greer the bookkeeper, what knowledge could or would Thomas Greer have of their correctness, kept in the manner as this testimony shows they were kept by A. L. Greer? He was a skillful bookkeeper, or at least competent for that purpose, and the duty devolved upon him to make such a statement of accounts as could be understood, and to make entries of the transactions as they occurred; but as the books stood when Long took charge of them the character of the entries, or rather the mode in which the books were kept, conduce strongly to show that they were the individual books of A. L. Greer, and, if not, were properly excluded as testimony showing the accuracy of the accounts.

The entries made by Long were made from memoranda that A. L. Greer had and from the latter's memory. This was in the year 1881 these entries were made, and of transactions purporting to have taken place in the years 1858, 1860 and 1863, some of them twenty and others more than fifteen years after the business transactions. When such entries were being made Thos. L Greer denied their correctness and refused to settle by them.

The settlement then stopped, and after that other entries seem to have been made, and by whom does not appear.

The court very properly, we think, excluded the books as testimony in the absence of other proof showing the entries to have been proper, as it was the duty of the appellant's intestate, if these were the books of the firm, to have kept them in a proper manner and not to rely on his memory of what transpired fifteen or twenty years before the entry was made, and doubtless had been long prior thereto settled by the parties. This testimony shows that Thomas Greer was sound financally and ready always to meet his engagements, while the appellant's intestate was much involved, a borrower of large sums of money, and in fact, while this indebtedness to him existed, as is maintained, he executed a mortgage to Thomas Greer to indemnify him as his surety for a less sum than he or his representative is now claiming against Thomas Greer's estate. If not a mortgage,

each had contributed to the purchase of real estate, and the deed was made to Thomas Greer to indemnify him as surety of his brother. This was in the year 1878, and, at the death of A. L. Greer, Thomas Greer was his surety for $13,124.00, and A. L. Greer was indebted near $70,000.

Besides, it appears that, not long before the death of Thomas Greer, A. L. Greer made oath, in a proceeding where a bond was necessary, that Thomas Greer owed nothing, and after Thomas Greer's death made a like statement.

It is argued that these statements were made under the belief that the partnership assets would pay all the indebtedness, and while this may have been the case when these statements are connected with the other facts and circumstances in this case as to pecuniary condition of both, it raised a strong presumption that A. L. Greer believed he had no claim against his brother.

If he was the bookkeeper he ought to have known the liability of his brother to him. He was involved in debt, mortgaging his property to one he now claims to have been his debtor, his brother, with ample means and able to pay, and it is remarkable that he should have overlooked this large indebtedness when his brother could have readily secured him instead of his securing the brother. The books are not evidence of any indebtedness. Long testifies there was no book from which the entries by him were made, and to admit such evidence in this case would be in effect allowing one party to testify and refuse the same right to the other. The entries were not made in the regular course of business, and the manner in which they were kept made them worthless as testimony.

The judgment below must be affirmed.

REID, &c. v. LILLY'S EX'ORS, &c.

(Filed November 16, 1893—Not to be reported.)

1. Wills—Testamentary capacity—Evidence—Where the issue involved is the testamentary capacity of the testator, it may be shown in a general way by the contestants that the amounts charged in the will as advancements against the devisees is not the true amount thereof; but the evidence on this subject should not be allowed to descend to such minute details as will draw the minds of the jurors from the real issue as to the testamentary capacity.

2 Same—Where the court refuses to permit a witness to answer a question, the ruling, if erroneous, can not be taken advantage of on appeal without there was an avowal of the answer expected of the witness.

3. Same—The exclusion of what the testator's wife related to his grandchild in his presence, as to his having been lost in his own parlor one morning before his death, even if erroneous, was not so material as to prejudice appellants on the trial of this case.

4. Same—While the propounders, in order to establish sufficient testamentary capacity, must prove that the testator had ability to know his heirs at law and relatives, and their claims on his bounty; and to know the extent and value of his estate, and to take a general view of it and be able to rationally dispose of it according to a fixed purpose of his own, yet they are not required to establish all these facts by any one witness, or to inquire of each witness as to all of them; therefore, questions to each witness, embracing only a part of the foregoing facts, were competent.

Simrall, Bodley & Doolan for appellants.

Francis J. Hagan for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

Dr. I. B. Lilly made his last will, now in contest, in 1886, and died some three years thereafter, at the age of about 75 years.

It is said in the briefs of counsel that the testator provided for an equal distribution of his estate among his only heirs—three children and two grandchildren. No copy of the instrument is on file, although it seems to have been read to the jury.

The contest is made by the grandchildren, and is on the ground that the testator was not mentally competent to make a will.

It grows out of the fact that a large sum is charged in the will as an advancement to their mother. Frank Lilly appears to be charged with $4,000 advanced to him; Guy Lilly with $7,000; Martin Lilly with nothing; and the children of Alice Reid, deceased, with $16,000 advanced to their father and mother. The verdict of the jury was for the will. The contestants do not complain of the instructions, which appear to have been entirely correct, but insist that the court erred in not allowing them sufficient latitude in the proof offered by them assailing the correctness of the advancements as charged. They say that Guy was in fact advanced very much more than he is charged with, and that their father and mother were advanced substantially nothing, and, therefore, that the charge of $16,000 against them in the will is false. That testimony, showing in a general way the correctness or incorrectness of these alleged charges, was competent must be admitted, but the inquiry could not be allowed to descend into minute details to the evident crowding out of the real question in the case, namely, the capacity of the testator to make a testamentary disposition of his estate. There is no instance in the record where proof competent for the purpose of showing the inaccuracy of these charges was excluded from the jury. The first alleged instance is where Guy Lilly was not allowed to answer the question of the contestants, whether or not he paid his father any rent for the drugstore property.

Having occupied this property of his father's for some time, it was probably the effort of the contestants to show he paid no rent for it, and, upon the presumption that he should have done so, establish that his advance account was too small by the amount of rent he should have paid.

This, it must be confessed, is a long way off from the issue of competency or incompetency—will or no will; but if its relevancy be admitted, we are left in the dark as to what the contestants expected the witness to prove by his answer; and it depends entirely on that answer whether or not its exclusion was prejudicial to the contestants. There should have been an avowal of what was expected to be testified to by the witness.

This is true also of the complaint that Frank Lilly was not permitted to state whether or not he knew of Guy or his family or his mother doing anything to prevent people from seeing the testator. In view of the great number of people who did see the old gentleman, at his house and on the street, in 1886, we might readily presume that the witness would have answered that he knew of no such thing as intimated in the question; but we can not speculate as to what answer he might have made. Certainly we can not order another trial to ascertain what his answer might be.

The contestants insist that the exclusion of Celina Reid's testimony, relating to testator being lost in his parlor, was erroneous and prejudicial to them.

The occurrence was about a year and a half before the witness went to Anchorage to school. She testified that "the testator was always in the habit of coming down early in the morning and reading the paper. He went in the parlor and shut the door behind him, and he read the paper quite awhile. At the time for breakfast he got up to go out, but could not find the way out of the parlor, and had to wait until some one came to his rescue."

On cross-examination she said that all she knew of this incident was what her grandmother had told her in her grandfather's presence, and the court thereupon excluded what she had said about the testator being in the parlor.

It does not appear what the doctor had to say when his wife told this story on him. We know that the witness was then only some 13 years of age, and we can hardly suppose that the grandmother, in her husband's presence, was seriously detailing to this child evidences of the grandfather's weak-mindedness or mental imbecility. The incident was doubtless tinged with some ludicrous aspect, in noway seriously connected with the doctor's mental condition, and was told, doubtless, as a joke to amuse the child. At any rate we can not regard its exclusion as prejudicially affecting the substantial rights of the contestants.

It is contended by the contestants that the propounders were improperly allowed to ask various witnesses such questions as these: "Did he have mental capacity to know his children and his wife?" "What was his mental condition at the time he came to church last?" "Did he have sufficient mental capacity to know his wife and children and friends or not?" "Do you know whether he was of sound mind?"

The objection urged is that these questions are not sufficiently comprehensive; that a man might know his wife and his children, or have sufficient capacity to know them and his friends and not have the "ability to know his heirs at law and relatives and the claims they have on his bounty; to know his estate, its extent and value, and to be able to take a general survey thereof and make a rational disposition of the same according to a fixed purpose of his own;" and that these latter conditions are the ones prescribed by law as indicative of a testator's competency to make a will, and were in fact prescribed in the instructions in this case.

This is all true; but it does not follow that because the propounders did not choose to ask each witness the general question, comprehending all the necessary qualifications on the part of the testator to a valid testamentary disposition of his estate, that, therefore, a question embracing only a part of those qualifications may not be asked.

If those offering the paper fail to show all the legal requisites of testamentary capacity, they fail to make out their case; but they do not have to show all the qualifications by all the witnesses, or all the qualifications by any one witness. By getting the parts separately and putting them together, they may get the whole.

From this record it appears that from thirty-five to forty of the neighbors and friends of the testator, men who had known him for years—priests, doctors, officers of the law, members of his family, merchants and lawyers—testify to his soundness of mind and many of them detail facts showing undoubted competency at and about the time the will was made. Only a few testify otherwise, and they give us scant reasons for their opinions. The record is free from any prejudicial error.

The judgment is right, and must be affirmed.

GAMBILL v. COMMONWEALTH.

(Filed November 18, 1893—Not to be reported.)

1. The verdict convicting appellant of manslaughter was authorized by the evidence.
2. On appeal in a criminal case, a refusal of a new trial because of newly-discovered evidence, even if erroneous, will not authorize a reversal, since only errors of law occurring on the trial can be considered.

Alex. Lackey for appellant.

W. J. Hendrick for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was indicted and tried for the murder of Hugh Sparkes.

His trial resulted in convicting him of the crime of manslaughter and fixing his confinement in the penitentiary at two years. The court instructed the jury fully and correctly upon the law of murder, manslaughter, and self-defense, and the jury found the appellant guilty of manslaughter.

The jury were the sole judges of the facts, and we can not disturb their judgment in reference to that matter if there was any evidence at all authorizing their judgment.

We think the evidence authorized their verdict. One of the grounds for a new trial is the discovery of new evidence tending to contradict the evidence of the witness for the Commonwealth. It is only necessary to state that the lower court having passed upon that matter, its judgment thereon can not be reversed here, for this court is confined in its review of criminal appeals to errors of law occurring on the trial.

The judgment is affirmed.

JOHNSON, &c. v. STEVENS, &c.

(Filed November 18, 1893.)

1. Wills—The burden of proof is on the propounders of a will to show testamentary capacity, and on the contestants to show that the will was executed by reason of coercion or undue influence.
2. Same—The evidence is sufficient to authorize the verdict sustaining the will in this case.
3. Same—The newly-discovered evidence was not of a decisive or controlling character, and was not sufficient to require the granting of a new trial
4. The Jefferson Court of Common Pleas is given the same control over its judgments for sixty days that a circuit court has during the term at which it renders a judgment, therefore, the period of sixty days from the rendition of a judgment by said court is regarded as a term as to such judgment; and since time beyond the succeeding term at which a judgment is rendered can not be given a party to prepare his bill of exceptions, it follows that the Jefferson Court of Common Pleas can not allow more than 120 days after the rendition of a judgment for the filing of a bill of exceptions. On appeal such a bill, filed more than 120 days after the judgment was rendered, can not be considered.

Abbott & Rutledge and W. J. Hendrick for appellants.

Humphrey & Davie for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

By the verdict of a jury in the Jefferson Court of Common Pleas the paper in contest on this appeal was established as the last will and testament of Mrs. Sarah C. Stevens. The motion of the contestants for a new trial having been overruled, they bring the case here for review, alleging that the court erred in admitting incompetent testimony, and in instructing the jury. They also allege that the verdict is contrary to the law and the evidence, and that they ought to have been granted a new trial because of newly-discovered evidence.

Without reviewing the evidence in detail or discussing the instructions at length it is sufficient to say, first, that the evidence complained of was competent. The letters of the testatrix were competent to show her feelings toward Mrs. Stivers and her intimacy with her. In a general way they bear on her mental capacity and disposition. (Fuller v. Fuller, 83 Ky., 351; 1 Greenleaf on Evidence, section 108.)

Second. The instructions of the court properly present the law of the case. The burden was on the propounders to show by a preponderance of evidence that the testatrix was of testamentary capacity, and on the contestants to show by a preponderance of testimony that she was unduly influenced or coerced, as defined in other instructions. (Fee v. Taylor, 83 Ky., 259; Porchet v. Porchet, 82 Ky., 93.) The other instructions conform to the law as laid down in Wise, &c. v. Foote, &c., 81 Ky., 15; Sherley, &c. v. Sherley, &c., 81 Ky., 240, and in Bush v. Lisle, 89 Ky., 401.

Third. There is abundant evidence to sustain the finding of the jury. The verdict is not palpably or flagrantly against the weight of the testimony, though there is conflict between that offered by the one side and that offered by the other. (Broadus v. Broadus, 10 Bush, 300; Fuller v. Fuller, supra.)

Fourth. The alleged newly-discovered evidence is not of a decisive or controlling character. It is doubtful whether it would have had any preponderating influence upon another trial. (Mercer v. Mercer, 87 Ky., 21.)

Nor is at all certain that by the exercise of reasonable diligence the contestants could not have learned of the existence of this alleged new testimony before the trial. However, without regard to the errors alleged, the judgment must be affirmed.

The motion for a new trial was overruled on June 24, 1889. By appropriate orders time was given the contestants, until September 30th, to prepare and tender a bill of exceptions. On that day no bill was tendered, but over the objection of the propounders (appellees) the time was extended to October 14th. Then, on the contestants' motion, time was given them until October 28th, then it was extended to November 11th, and finally to November 18th, on which day the contestants for the first time tendered a bill of exceptions.

Time was then given them until November 25th to "complete" the bill, and on their motion this was extended until December 4th, when they "tendered to the court a bill of exceptions, which, being signed and sealed, was filed and made part of the record."

We think a brief examination of the law controlling the practice in this court will show that this bill can not be regarded as

part of the record. The Jefferson Court of Common Pleas has no appearance terms, but it is provided that it "shall be always open."

It is further provided that "it shall have the same power, and for the same length of time, over its judgments as the chancellor of the Louisville Chancery Court has over its judgments." And the latter court has "such control over its judgments for sixty days as circuit courts have over their judgments during the term in which they are rendered." (Civil Code, section 792.)

As to any given order or decree, therefore, the period of sixty days from its entry or rendition is to be regarded as a "term" in these courts. At the expiration of sixty days from the entry of the order or decree the term of court, so to speak, as applicable to this order or decree, ceases, because the court loses control over it just as the judge of a court having stated terms loses control over his orders after the term ceases.

The beginning of the second sixty days, therefore, after the entry of a given order, is the beginning of the succeeding term or the next term with reference to that order. Now the law of governing the subject of exceptions and applicable to all the courts is found in the Civil Code, section 334.

It provides that "the party objecting must except when the decision is made, and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the court."

An amendment to this section provides that if the judge of said court for any cause does not preside, or no court is held, then time until the next term shall be had to perfect and prepare the bill. If the first sixty days after the order overruling the motion of the contestants for a new trial is to be regarded as the term at which such order was entered, and the second sixty days is to be regarded as the succeeding term, then the first term would end sixty days after June 24th, which would be on August 23d, and the second sixty days, or the succeeding term, would end on October 22d. Therefore, the bill, tendered for the first time on November 18th, was tendered beyond the succeeding term or beyond the limit as fixed by law, and hence too late to be considered. We think it will be found that this construction of the acts regulating the practice in these courts has been followed both by this court and the Superior Court.

In Cavanaugh v. Cochran, &c., 11 Ky. Law Rep., 855, the bill was tendered seventy-five days after the motion for a new trial was overruled. It was contended that such bill must be tendered within sixty days from the final order. But the Superior Court, through Judge Ward, held that "the reason and analogies of the law require that a second sixty days should be allowed so that the court may, by proper orders, extend the time for filing bills of exceptions for 120 days after the motion for a new trial has been overruled."

In Shrader v. Wilhite, 11 Ky. Law Rep., 954, the bill was not signed or filed until 148 days after the new trial was refused. The same court held that "in the Jefferson Court of Common Pleas and the Louisville Law and Equity Court time for filing bills of exceptions may be extended for 120 days after the order overruling the motion for a new trial, but not beyond that time."

Precisely to the same effect was the opinion (Judge Young) in Cain, Adm'r, &c. v. Cain, Adm'r, &c., 12 Ky. Law Rep., 635, and in Bannon v. Moran, 12 Ky. Law Rep., 989-90, the court holding in each case that the time for filing a bill of exceptions in the Jefferson Court of Common Pleas or in the Louisville Law and Equity Court can not be extended, no excuse for the delay appear-

ing in the record, beyond 120 days after the order overruling a motion for a new trial.

In the case under consideration some 147 days elapsed from the time of making the order overruling the motion for a new trial until the bill was first tendered.

The cases of Bailey v. Villier, 6 Bush, 27, and of Downing v. Bacon, 7 Bush, 680, recognize the period of sixty days as equivalent to a term of these courts.

In Longest v. Tyler, MS. opinion of this court December 22, 1876, it was held that by leave of the court upon proper extensions a party would have "from two to four months in which to file his bill of exceptions, and certainly no longer time should be demanded or required."

The appellants rely on the amendment to section 334 of the Civil Code, providing still further time for filing bills of exceptions if the judge who can properly sign the bill does not preside or no courts held, and say that the summer vacation, consuming some 84 days of the time, should not be counted against them, but court was in session from September 30th, and there yet remained nearly a month of the second sixty days or "succeeding term" during which the judge did preside and there was a court held, so that the amendment does not aid the appellants. Its provisions are not applicable to their case.

We think the true rule is laid down in the cases decided by the Superior Court quoted above. The bill of exceptions must be disregarded. And with the bill out—even if inclined to a different conclusion with the bill in—the judgment below must be affirmed.

LAPE'S ADM'R v. TAYLOR'S TRUSTEE.

(Filed November 18, 1893—Not to be reported.)

1. A trustee, who faithfully discharged his duties and was removed only on account of ill health, is entitled to a settlement of his accounts by a court at the expense of the trust estate.
2. But the trustee must personally pay costs incurred in an unsuccessful resistance to an attempt to remove him on account of such ill health.

John S. Ducker for appellant.

Geo. Washington for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

In this case a question of jurisdiction was raised on the motion of appellee's counsel, on the ground that the attorney's fee had been settled, and, therefore, this court had no jurisdiction over the question of costs.

A counter affidavit was also filed, to the effect that no such compromise had been made, and the court must adjudge that the question raised as to the value of the services rendered the trustee of Taylor is the subject of inquiry here, and after reading the statements of the witnesses in this regard we must hold that the amount allowed is reasonable.

As to the question of costs, it is apparent the trustee has acted in the best of faith. He managed the trust well; is not in de-

fault in any matter, and only resisted his removal on the ground that his health would soon be restored, and this (his bad health) was the cause for the appointment of another trustee.

His resistance to the action of the appellee, in the effort to remove him, subjected him to the payment of certain costs attaching to that branch of the case, and this he should pay, and will not exceed, when properly taxed, $50. All the other costs, after charging the trustee with the $50, must be paid from the trust fund.

The appellant was entitled to a settlement of his accounts, whether retained or removed, and the trust must be made to pay the expenses of the settlement. If in default, the case would be different.

The judgment is reversed on the question of costs and affirmed as to all other exceptions.

Remanded, with directions to charge the trustee with $50 of the costs and no more.

GOODIN v. TRUSTEES COMMON SCHOOL DISTRICT, &c.

(Filed November 21, 1893—Not to be reported.)

Contracts—Liability of school trustees—Where one of a board of school trustees, becoming apprehensive that a contractor who had agreed to build a schoolhouse would fail to build the house and that he and his sureties would become liable on his bond, promised to pay a third party $20 to assist such contractor, payable when collected from the school district, such promise does not raise a personal obligation on the trustees to pay said $20.

K. D. Perkins for appellant.

Crawford Mason for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellant contends that the appellees, as trustees of the Common School District No. 94, employed him and Pennington to build a schoolhouse for said district, and that appellant was to furnish the lumber to build the house, for which the appellees were to pay him, and also $20 extra.

The trustees deny that they contracted with the appellant as alleged, or that they made any agreement with him to furnish the lumber. They say that they had a written contract with Pennington to build said house and to furnish the lumber, and that he did build it, and for which they paid him.

One of the trustees says that they became apprehensive that Pennington was using the money that they were advancing him on the contract, not for the purpose of building the house, and, in consequence, he would fail to complete the building and his sureties would have to pay damages in consequence of the failure, and in order to avoid trouble of that kind he agreed to give appellant $20 to render some assistance, payable when collected from the district.

From what the trustee says there was no personal liability for this $20 outside of this agreement. We concur with the court below that there was no agreement to pay appellant for timber or service, nor does it appear that the appellant has taken any steps to collect the $20 from the district.

The judgment is affirmed.

BRAND, &c. v. COMMONWEALTH, &c.

(Filed November 21, 1893—Not to be reported.)

1. Actions—Parties—The infant plaintiffs by their next friend having filed an amended petition herein, the defect, if any, because their nonresident guardian had no right to institute the action, was cured.
2. Same—Decedent's estate—An administrator appointed in this case can not be allowed anything for sums expended in defending a suit against the estate in another State, when it appears that the suit was against an administrator appointed in the State where such suit was pending and that the administrator of this State was not a party to it.

Sweeney, Ellis & Sweeney for appellants.

Sam E. Hill for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Jugde Hazelrigg.

Whether the nonresident guardian properly instituted this action need not be determined. The wards, by their next friend, joined in it as plaintiffs by an amended petition, which cured any supposed defects in the proceedings in that particular.

On the question of who was the owner of the house and lot in controversy the proof was conflicting, although it seems reasonably clear that it was bought by Nancy J. Dusan for her daughter, N. E. Dusan, or Green, and given to her as an advancement. The chancellor so adjudged, and his finding will not be disturbed in that respect.

The administrator, Brand, complains that he was not allowed credit by certain sums expended in behalf of the estate in a law suit at Madison, Ind. He was not a party to that suit, there being an administrator in that State who was made the defendant to the action.

If he "lost time" in going there, or paid out money for the defendant administrator in a litigation in that State, that is the proper place to present his claim. There was proof that he was at Madison on other business. The chancellor probably found from the proof that he was entitled to nothing in this behalf, and so adjudged.

It seems quite clear from this record that the children and grandchildren of the intestate have received little enough of the estate, and that the judgment below does substantial justice to all the parties concerned.

The judgment is affirmed.

MEIER v. FLINSBACH, &c.

(Filed November 23, 1893.)

1. Assignment by operation of law—A conveyance or mortgage of real estate made by an insolvent debtor to secure money loaned simultaneously with the execution of the deed is not within the purview of the act of 1856, forbidding mortgages, etc., made in contemplation of insolvency and with a design to prefer. That act applies only where the insolvent debtor attempts to prefer a pre-existing creditor by an assignment, etc., of his estate.
2. Same—An insolvent debtor executed a mortgage or deed of conditional sale of certain real estate, to secure repayment of $15,000, loaned simulta-

neously therewith by the grantee. Subsequently the debtor borrowed $7,000 more in cash from the grantee, and executed a mortgage to him on another piece of real estate to secure both loans—the $15,000 and the $7,000—and the creditor released the lien first given him for the $15,000. Held—That neither transaction was a preference of a pre existing debtor under the act of 1856.

3. Same—Although the mortgage first executed to secure the first loan of $15,000 was not recorded or lodged for record within thirty days after its execution, the proviso contained in the first section of the act of 1856 does not vitiate or affect it in any way. The meaning of that proviso is that if a forbidden preference is made by a debtor, which operates as an assignment under the act from its date, one who subsequently, in good faith and before the unlawful act is declared by a court to operate as an assignment, acquired a mortgage on a part of the insolvent debtor's estate, is to be protected to the extent of the lien so acquired, provided he lodges his mortgage for record within thirty days after its execution.

O. A. Wehle for appellant.

Kohn, Baird & Speckert for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hazelrigg.

Theodore Schwartz and Frederick Janssen were members of the late banking house of Theodore Schwartz & Co., of Louisville, Ky. Janssen held the legal title to a block between Twenty-sixth and Twenty-seventh streets and Broadway and Elliott avenue, known as the "west end" property; and Schwartz held the title to the "Christy woods" property, consisting of some thirty-eight acres of land in the suburbs of the city. Both pieces were in fact the property of the firm.

In the cyclone of March, 1890, a tobacco factory of the firm was badly damaged, and in order to rebuild it Janssen sought his friend, the appellant, Meier, a Cincinnati tobacconist of means then temporarily in Louisville, and offered to sell him the "west end" property. After some discussion the trade was consummated at the price of $15,000. Meier went home and Janssen sent him a deed, reciting a consideration of $24,255 cash, giving as a reason that the firm owned other property in the neighborhood, and that the recitation of a lower consideration would depreciate that property.

During the trade Meier proposed that if he should resell the property at a higher price he would pay Janssen the profit, and it was agreed that the deed was not to be recorded, the reason assigned being that if they found a purchaser soon as was expected, this arrangement would dispense with the necessity for an extra deed.

Meier sent the money by checks on the Merchants National Bank of Cincinnati, payable to Janssen, who endorsed them to the firm. At the time of this transaction, and indeed for years before, Schwartz & Co. were hopelessly insolvent, but this was wholly unknown and wholly unsuspected until the spring of 1891. None stood higher than the members of this firm in the social or business circles of Louisville and elsewhere.

As conceded by counsel for the appellees, "they had the absolute confidence of the public because of their supposed conservative methods." Their assets were showy—consisting of valuable real estate; their liabilities were unknown, and supposed to be insignificant.

In December following this alleged sale Schwartz wrote Meier

at Cincinnati that they were again in need of money, and that he wanted to sell him the "Christy woods" property.

Meier was in Louisville shortly afterwards. and at first declined to buy any more real estate, but to accommodate Schwartz finally agreed to take that property at $22,000, provided he would take in the "west end" property at the price he had paid Janssen for it. This Schwartz agreed to do. The unrecorded deed to the west end property was then surrendered, and the sum of $7,000 paid in cash.

On December 19, 1890, a deed was made to Meier by Schwartz and wife, which was at once recorded in the proper office. The recited consideration was $28,000, as it was said that it would be easier to sell the property at its real worth if the price was so fixed.

It was also agreed in writing that Schwartz was to effect a sale of this property within two years. and Meier was not to sell it in the meantime unless at a profit, which was to be divided between the parties to the transaction. Meier was to deed back the property to Schwartz, or to any one whom he might designate within the two years, upon being repaid the $22,000 and interest, less any rent received by him.

On March 19, 1891, Schwartz & Co. made a deed of assignment of their property for the benefit of all their creditors, and on the following day the appellees, Flinsback and others, brought this suit to set aside a number of conveyances of real estate made by the firm and its members to sundry persons, upon the ground that they were made in contemplation of insolvency and with the design to prefer certain creditors to the exclusion of others.

Among the conveyances so attacked was that of Schwartz and wife to the appellant, Meier, of December 19, 1890, and with this only we have to do on this appeal.

The chancellor, in an interesting opinion, held that the grantors were, on December 19th, and indeed long before, hopelessly insolvent and knew it; that the pre-existing debt, satisfied by the conveyance of December 19th, was created in March, 1890; that both these conveyances were mortgages in fact, though conditional sales in form; that the mortgage in March, while good between these parties without being recorded was not good under the act of 1856 against creditors because not recorded within thirty days after its execution; that Meier occupied, therefore, the position of an unsecured creditor, "and hence a payment to him of a pre-existing debt thus not secured must be considered as the payment of an antecedent, unsecured debt, and hence within the statute."

In this conclusion we have not been able to agree with the learned chancellor. A careful reading of the statute, we think, will show that it can not be applied either to the mortgage of March or of December. It goes without argument that the purpose of the act was to inhibit a debtor—thus assuming the existence of a debt—from preferring one creditor over another.

The relation of debtor and creditor is assumed in the statute itself, and the relation must exist before the statute can be applied. The debt which the insolvent debtor can not give preference to by a sale, mortgage, assignment, etc., is a pre-existing debt.

The preference of the debtor to pay or secure a pre-existing creditor, in contemplation of his impending insolvency, is the act denounced by the statute. This can not occur when the creation of the debt and the execution of the instrument securing that debt are cotemporaneous or simultaneous acts.

The act of Schwartz & Co., or of Jannsen for them, in mortgaging the west end property in March, and simultaneously get-

ting the sum of $15,000, is not an act either preferring a pre-existing creditor or paying or securing a pre-existing debt.

The act of Schwartz in mortgaging the Christy woods property, it is true, secured a pre-existing debt to the extent of $15,000, but the act of preference, or the intent to prefer, is wholly lacking. The creditor got nothing he did not have before, and was, therefore, not preferred. Certainly not to the exclusion, in whole or in part, of other creditors.

The chancellor seems to have found his trouble in an attempt to apply the latter part of the statute under consideration to the case at hand, and it is in this attempt that he, as well as counsel for the appellees, fall, as we think, into error.

After providing in the body of the section that every sale, mortgage, etc., made by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion of others, shall operate as an assignment for the benefit of the grantor's creditors, the section concludes with this proviso: "But nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution."

Now certainly it would seem self-evident that before trying to apply this proviso we should first find a case to which the body of the section can be applied.

In order to apply this proviso you must first find a case in which an insolvent debtor, or one in contemplation of insolvency, has made a mortgage or sale, etc., with the design to prefer one creditor to another.

If a given case has not the elements called for in the body of the act, we may rest assured that an attempt to apply the proviso will be a misfit. With the essential conditions of the statute in question ascertained to be inapplicable to the mortgages now under investigation we could safely stop short of discussing the state of case which the statute or its proviso is said not to vitiate or affect. It is enough to know that the statute does not apply to the state of case under investigation; that the act of Schwartz in making the December mortgage was not a preferential act in the meaning of the statute, nor was the act of Janssen such an act in making the mortgage of March, 1890; but, if we may so divert, let us see what is meant by the latter part of this section. We think it is simple and easy of application.

First, we must know that the mortgage mentioned in the body of the section, that is, the one denounced as a preferential act, is not the mortgage mentioned in the proviso, which is created simultaneously with the debt secured by it. The one is exactly what the other is not. The one is a preference, the other not. How, then, was it thought necessary to say the former shall not affect or vitiate the latter, if recorded within thirty days, which is the same thing as saying that the former shall vitiate or affect the latter unless so recorded?

Under the operation of the statute, by the execution of the prohibited mortgage or sale, a transfer of all the property and effects of the debtor is made to his creditors, and for the benefit of all alike, provided, however, that notwithstanding such legal assignment, the transfer is not to overreach a mortgage made in good faith to secure a debt created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution.

The preferential act or, so to speak, the act of bankruptcy oper-

ates necessarily not backward, but instantly and forward. After committing such an act a man may still sell his property, and if the purchaser buys it in good faith he is protected, and the bankrupt may still mortgage his property in good faith for a consideration simultaneously received; and this transaction is protected if the mortgagee puts his mortgage to record within the time prescribed; but if he pockets his mortgage, then the equity of the legal assignees—the creditors—to whom the effects of the bankrupt have been transferred under the statute by virtue of the preferential act of the debtor, overreaches the equity of the negligent mortgagee.

Not only is the often-given mortgage thus overreached unless recorded, but a mortgage which is given to secure even in part only a pre-existing debt sets the statute into operation. Although it may also secure a debt simultaneously created therewith, it must be recorded within the time prescribed, else the mortgagee is not protected or secured as to any part of his debt. If such a mortgage be recorded in time, the mortgagee's equity is prior to that of the general creditor to the extent of his simultaneously created debt.

In the case under consideration we have a negligent mortgagee, who failed to put his mortgage on the record after getting it in March, 1890; but where is the antecedent preferential act of the debtor which is to sweep his estate into hotch-potch for the benefit of his creditors?

So far as is shown by the record the first act of the insolvent firm, or any of its members, coming within the condemnatory provisions of the statute was on March 12, 1891. Then, for the first time, was the statute against preferences set in motion, and the rights of the appellant, secured in good faith long before that date, are not to be affected by it.

He is entitled to have his debt paid in full, and the judgment is reversed, with instructions to enter an order to that effect.

ALVEY, &c. v. LOGSDEN.

(Filed November 23, 1893—Not to be reported.)

1. Vendor and vendee—Sales—Evidence—The evidence of three credible witnesses is that the appellants sold the land involved in this action to appellee by the boundary set out in the deed of conveyance and not by the acre, and the judgment finding that there was a deficit in the land conveyed is contrary to the evidence and must be reversed.

2. Same—Parties—The land involved was inherited by two brothers and their sister from their father, but had been allotted to the two brothers and was their property at the date of the sale to the appellee. The brothers received the whole of the consideration paid by appellee. The deed of conveyance was made by the two brothers and also by their sister and L., her husband, who united in the conveyance to pass the naked legal title. The chancellor found that the brothers had represented to appellee that the land conveyed included a certain spring which was in fact on land owned by L., the husband of their sister, and compelled L. to convey this land to appellee. Held—That even if there was a deficit in the number of acres conveyed, it was error to compel L. to convey his land to appellee to make good such deficit since he united in the original conveyance to appellee merely as a nominal party and did not make any representations to him as to the number of acres or the objects included in the boundary conveyed.

John Donan and T. N. Lindsey for appellants.

Wm. H. Holt and H. C. Martin for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Pryor.

James and Benjamin Alvey sold to the appellee, Logsden, a tract of land lying in Hart county for the sum of $375 in hand paid. The title of the land was in the heirs of Alvey, deceased, and the appellant, Lusk, having married a daughter of the decedent, united in the conveyance to Logsden. The land, in fact, belonged to James and Ben Alvey, who sold it to Logsden, and Lusk and wife, who received no part of the consideration, only united in the conveyance to perfect the title.

The conveyance recites that in consideration of $375 the grantors convey to Logsden a certain boundary of land (defining it) containing 99¾ acres, closing with the usual warranty as to title.

The appellee, Logsden, filed his petition below, making all of the grantors in the conveyance defendants and alleging what is termed a breach of warranty, but really claiming a deficit in the land, averring that the tract contains only 84 acres; and further, that the defendants represented to him that a valuable spring was included within the boundary when it was not, and that this spring gave to the land its chief value. The answer made an issue as to all the material averments, the defendants asserting that the boundary of land was sold for the consideration mentioned in the deed and not by the acre, and the appellee knew when he purchased that the sale and conveyance did not include the spring.

On the hearing of the case the appellee testified as to the nature of his purchase and the representations made to him by one of the Alveys as to the location of the spring as an inducement to the purchaser. The appellee is the only witness who testified as to the representations made, while on the other hand three witnesses testify that the appellee was told the spring was not included in the survey, and the boundary of the land when run shows that it is on the land of Lusk and not embraced by the conveyance. The chancellor seems to have rejected the testimony of the witnesses or that of the appellants, and by a judgment has taken a part of the land owned by Lusk and required it to be conveyed to the appellee so as to include the spring.

It is not pretended that Lusk made any representation in regard to the spring, and it further appears that he had no interest in the proceeds of sale, but only signed the conveyance that his title or that of his wife might pass to the appellee for the land within the boundary of the conveyance. The land had been previously assigned to the two Alveys. It belonged to them, and because Lusk and wife parted with the mere naked title the latter's land has been taken to supply the deficit caused by the alleged fraudulent representations of the two Alveys.

This was error, and if not, here is a deed with a definite boundary of land executed to the appellee and the latter placed in the possession, with the testimony of three credible witnesses that the deed embraces the land that was really sold and intended to be conveyed; that it was a sale of the boundary for so much money, and opposed to this is the sole statement of the appellee that is made to change the calls of the deed and refute the statements of the appellants. We think the facts are conclusive that the appellee obtained all he purchased, and that neither a deficit exists that should be accounted for or any false representations established.

Judgment reversed and remanded, with directions to dismiss the petition.

BANGER v. PETTY'S EX'ORS.

(Filed November 23, 1893—Not to be reported.)

Right of executors to pay to a wife alone her distributable share of her father's estate—Although the law permits a husband to reduce to his possession, by a settlement with the executors, money coming to his wife as her distributable share of her father's estate, yet if the husband is largely in debt and the wife demands it for her own protection, such executors may pay such distributable share to the wife and take her receipt for it, even though the husband protests against such payment; and where the husband brings an action against the executors to recover such distributable share of his wife, the payment of it to the wife and the exhibition of her receipt is a good defense to the action, it appearing that the condition of the parties was such that a court of equity, if applied to, would have secured such distributable shares, so as to afford the wife her maintenance and support out of it.

Jas. Montgomery for appellant.

D. H. Smith for appellees.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Pryor.

The action below was brought by P. G. Banger against John Petty's executors to recover the distributable share of his wife, Mary Jane Banger, who was a daughter of the testator, and to surcharge the settlement made by the executors with the Larue County Court.

The items of the settlement of which any complaint can be made, if any error exists, are so small, not exceeding $20 or $30, as would not authorize a reversal if patent upon the record.

The main question involved, and the one upon which counsel for the appellant relies for a reversal, is, as he insists, the wrongful payment by the executors to the wife of her distributable share instead of paying it to the husband.

The executors had paid to the husband $2,000, obtaining the receipt of both husband and wife, and when ready to pay the balance, a much larger sum, they were notified by the wife not to pay the money to the husband, and required payment made to her, claiming it as her property and the right to hold it as against the husband, who was then insolvent or much involved in debt.

The executors notified the husband of their purpose to pay the money to his wife, and did pay it to her against his protest and obtained her individual receipt. He now sues for this money, and claims that the executors failed to account for all the moneys they received or to make an accurate settlement of their accounts, and particularly to account for interest collected on demands due the estate.

The executors show a fair accounting for the interest, and there is no evidence authorizing this court, or any other court, to say that they received money for which they had not accounted. The wife seems satisfied with the acts of the executors, and is in this case claiming that the money was her property and sustaining the acts of the executors, and while it is urged that the confidence of the wife in the husband has been destroyed by the acts of the executors and others, we perceive nothing in this case showing bad faith by these personal representatives, and only the desire on their part to protect the wife in the enjoyment of the patrimony left by her father.

It was not the husband's property or money, but belonged to

the wife, and while the law permitted him to reduce this money to his possession by a settlement with the executors, the wife had the right to intervene for her own protection and prevent the husband from becoming the absolute owner of her property.

It was a case in which the chancellor, if applied to, would have directed this money paid to the wife or secured to her in some way for her support and maintenance. It is not pretended that the wife was not competent to manage the fund or that she would waste it, to the detriment of herself and husband, but the only complaint is that it was not paid to the husband on his demand, regardless of the claims of the wife.

It appears that after this money had been paid to the wife the husband obtained from her several thousand dollars of it, but afterwards refunded it, or handed it back to the wife, and, as he says, because she was so much grieved about his having it he feared, if he refused to hand it back to her, it would injure her health, and says if the executors had paid it to him in the first instance no such scene would have been enacted between himself and his wife.

It does not matter whether the husband has or not committed acts of estoppel as against the appellees, as it is apparent the wife was entitled to this money. It was hers, and when reaching the hands of her husband would doubtless have been seized by creditors, when no credit that had been given the wife for his debts or the credit of the husband, based upon his right to this property upon the death of the wife's father.

It was a payment of the money to the real owner, and although a feme covert, the circumstances justify the payment, and the wife should be allowed to retain the money and the executors relieved from all liability to the husband.

Judgment below affirmed.

WILSON, &c. v. CALVERT, &c.

(Filed November 25, 1893—Not to be reported.)

A voluntary conveyance of his homestead by a debtor is not a fraud upon his creditors; but if the land conveyed exceeds in value $1,000, the voluntary conveyance is fraudulent as to the excess above $1,000, and the creditors may have the entire tract sold, if indivisible, so as to subject the balance remaining after setting aside the value of the homestead.

W. G. Dearing and Wm. H. Holt for appellants.

Reuben Gudgell & Son for appellees.

Appeal from Bath Court of Common Pleas.

Opinion of the court by Judge Pryor.

While the court below held the deed fraudulent, its effect was, and that he intended evidently to adjudge that if the land conveyed exceeded in value $1,000 the creditors could subject it and sell the entire tract if indivisible or allot the homestead, of the value of $1,000, and subject the balance.

The aged grantor had the right to convey his homestead. He made no secret of his purpose, and his attorney, who prepared the deed, makes a full statement of what transpired, and says the object of the conveyance was to secure this land to his family.

It is doubtful whether the land exceeded in value $1,000, but if the creditor is willing to give more for it, and will pay into court the $1,000 for the grantees, he should be allowed to do so; or if the allotment can be made without impairing the value of the homestead, that is, lessen its value below $1,000, this should be done, and such we understand to be the judgment below.

Affirmed on original and cross appeal.

MAUK v. HARPER'S ADM'R.

(Filed November 28, 1893—Not to be reported.)

Appeals—Jurisdiction—Appellant's land was sold and the proceeds applied first to satisfy a valid mortgage lien thereon, as to which there is no controversy, and the balance, $20, was applied to appellee's debt. Appellant claims he was entitled to the $20 because his homestead right in the land existed against appellee's debt. Held—Even if appellant was entitled to the $20 this court has no jurisdiction of an appeal involving only the right to the sum of $20.

Botts & Powers for appellant.

J. D. Jones and Wm. H. Holt for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Lewis.

Appellee having a personal judgment against appellant, upon which an execution was issued and returned "no property found," sought by action in equity to subject to satisfaction of it a tract of 117 acres of land; but one Bennett had and asserted in that action a mortgage and prior lien on the land, and in the judgment rendered for sale of it the proceeds were directed to be first applied to pay his debt, so that there was left of sale money, to be applied to satisfy appellee's debt, about $20 only.

Validity of the judgment, so far as it affects Bennett, is not disputed, nor is he made a party to this appeal, therefore, even if appellant had a homestead right in the land, which we think was not the case, and was, consequently, entitled to the $20 left after paying off Bennett's debt, this court could not take jurisdiction of the single question involved on this appeal, whether the lower court properly or erroneously adjudged that sum to appellee.

The appeal is, therefore, dismissed.

RAFFERTY v. BUCKLER.

(Filed November 28, 1893—Not to be reported.)

Pleading—Res adjudicata—The appellant's petition shows that the right to a credit claimed by a mortgagor was litigated and determined in an action by the mortgagee against the mortgagor to enforce the lien. Appellant is concluded by the judgment in that action, therefore, his petition was properly dismissed.

Hanson Kennedy and Kennedy & Son for appellee.

Appeal from Nicholas Chancery Court.

Opinion of the court by Judge Pryor.

The averments of the appellant's petition show that this controversy was ended by a former litigation.

Rafferty and wife mortgaged the land in controversy to Buckler to secure a large sum of money, and it is claimed that this sum, for which the mortgage was given, was entitled to a credit that would reduce the principal, so as to leave the appellants, who are the children of Rafferty, with a homestead in the mortgaged property.

Buckler insisted that this credit was applied to removing or satisfying a lien on this land due one Minor. He filed a petition in equity to foreclose his mortgage, and obtained a judgment for the sale of the property to satisfy his debt without this credit.

Rafferty and wife came in and had the judgment set aside, claiming that this credit should be allowed.

The judgment was set aside and the matter litigated, resulting in the exclusion of the credit and the rendition of another judgment for Buckler's debt and interest. This was a final disposition of the case, and ended the claim as to the homestead.

The mortgage was signed and acknowledged by Rafferty and wife, and passed the homestead right, and when sold under the mortgage vested the purchaser with title.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH v. FLEMING.

(Filed December 13, 1893.)

In a proceeding upon a forfeited bail bond a response by the sureties alleging that the accused was, prior to the forfeiture, tried in this State upon a charge of lunacy, duly adjudged a lunatic and ordered to be sent to an asylum, and, while being conducted to the asylum in the custody of an officer appointed by the court, escaped and was at large when the bond was forfeited, presented a good defense.

W. J. Hendrick and S. R. Crewdson for appellant.

Selden Y. Trimble for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Barbour.

These two cases present the same facts and have been heard together.

Lewis McBride, being indicted in the Logan Circuit Court in two cases, was admitted to bail, the appellees becoming his sureties in each case for his appearance for trial at the January term, 1892. Having failed to appear at the January term the

bonds were forfeited and the sureties, having been summoned at the July term following, responded, averring that in December, shortly before the commencement of the January term, the accused was regularly tried by the Muhlenberg County Court upon the charge of lunacy and was, after due investigation, adjudged a lunatic, and ordered to be sent to an asylum, and while being conducted to the asylum in the custody of an officer appointed by the court, escaped and was at large when the bonds were, at the January term of the court, forfeited; that afterwards, in June, 1892, he was recaptured and confined in the asylum, but had again escaped and was at large when the appellee's response was filed. That the Muhlenberg County Court had jurisdiction to try the charge of lunacy is admitted, and the regularity of the proceedings of the court as they appear by its record, a full transcript of which is copied in the bill of exceptions, is not questioned. It is, though, charged that there was collusion upon the part of the accused and the appellees to thus prevent his trial under the indictments. Upon the issue of fact thus presented we deem it sufficient to say that the court below has passed upon it, and as the evidence for the respondents show that they acted in good faith, and were not parties to any fraud or improper conduct, the judgment can not be disturbed on that ground.

The question then is, did the response present a defense? The appellate court has uniformly held that the arrest and confinement of the principal for crime in another State does not relieve his bail.

In Alguire v. Commonwealth, 3. B. M., 349, though not necessary to a decision, the court argued that, where the principal was in the custody of the Commonwealth in another county of the State under another charge, it would present no defense in a proceeding against the sureties upon a forfeiture of the bail bond; that the court in which the sureties had obligated themselves that the accused should appear should have been informed of the facts before the forfeiture so that it might have been able to take steps to secure his attendance upon his discharge from imprisonment.

But in the later cases the Court of Appeals has intimated very strongly that where the Commonwealth has taken the principal into its custody for another offense, and thereby prevented his appearance in discharge of his recognizance, it presents a good defense for the sureties when proceeded against upon the forfeiture, and this would seem the better rule, for it is not intended or expected that the sureties shall exercise a constant personal surveillance over the accused. They, as his bondsmen, are not liable for his failure to keep the peace or for his good behavior; and, therefore, when the Commonwealth takes charge of him for some other violation of its laws the control of the sureties ceases without their fault. They have no power to enforce his attendance before the tribunal which they obligated themselves he should appear.

A case presenting the question here presented has never before been passed upon by this or the appellate court, nor have we been able to find any case in point decided by the courts of the other States.

In Adler v. State, 35 Ark., 517, Am. Rep., 48, it was held that in an action on a bail bond it was no defense to the sureties that the principal at the time fixed for his appearance "was and still is insane and confined in an insane asylum in another State."

But that decision seems to have been based upon the same reasons which controlled our courts in their decisions when the principal was confined in another State for some offense com-

mitted there, and the editor in his notes to the case in the American Reports, page 52, says: "This case is clearly distinguishable from the case of a principal arrested and imprisoned in another State. That is not the act of God or the obligee. But this is the act of God, with which the absence of the principal from the State has nothing to do. His failure to respond was caused by his insanity, not by his absence from the State. In the case before us the principal's appearance was prevented by the act of the Commonwealth, superinduced by the act of God. In the interest of its citizens the Commonwealth saw fit to have the accused confined in an asylum. This was, perhaps, as much for the security of other citizens of the State as it was for the safe keeping of the lunatic himself. When the accused was thus confined he was beyond the reach or the supervision of his sureties. They were powerless to take his body and present it to the court. He was, to use an old legal phrase, civilly dead. His responsibilities as a man had for the time being ceased.

This court, in Long v. Bowen, 14 Ky. Law Rep., 205, followed by the Court of Appeals in the same case, in an opinion delivered September 14, 1893, held that when a public officer has been adjudged a lunatic that he is civilly dead—that there is a vacancy in the office and that such vacancy may be filled, though it aftewards turns out that he was only temporarily insane.

It seems to us that the response presented a good defense, and as there was evidence to sustain it, the judgment must be and is now affirmed and in each case.

SUPERIOR COURT ABSTRACTS.

PORTER v. COMMONWEALTH.

Filed December 6, 1893. Appeal from Louisville City Court. Opinion of the court by Judge Barbour, affirming.

Power of examining court to change charge in warrant—Appellant having been arrested under a warrant issued by the clerk of the Louisville Police Court charging him with the offense of "shooting with intent to kill," and brought before that court for an examination of the charge the court, after proceeding as an examining court to investigate the charge as originally made, had the right to change the charge to that of "carrying concealed a deadly weapon" and try the case as a trial court and render final judgment. (Criminal Code, section 66.) And, while the court had no right to change the charge and then go into trial of it without affording the defendant an opportunity of preparing his defense, yet as it does not appear that he asked for time to prepare his defense the court will assume that he announced himself ready for trial when the trial was entered upon.

O'Neal, Phelps & Pryor for appellant; W. J. Hendrick for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. NOEL, &c.

Filed December 6, 1893. Appeal from Franklin Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Validity of execution—The fact that an execution on a judgment upon the verdict of a jury was issued upon the payment of the jury fee by the sheriff instead of by the successful party did not affect the validity of the writ.

2. Property of railroad company subject to sale under execution—Where coal in the yards of a railroad company was levied on and sold under execution against the company, in an action by the company to enjoin the purchaser from removing the coal upon the ground that it was necessary and indispensable for the use of the company "in and about running its trains and the ordinary operations of the road," an answer alleging that after a sufficient quantity of coal had been sold to satisfy the execution "there was left in the coal yards an abundant amount of coal necessary to keep the company's trains running and supply all demands for the operation of the road until a sufficient supply could be elsewhere obtained," presented a good defense, and the allegation of the answer not being controverted, the court properly dissolved the injunction.

John W. Rodman and Harry G. Rodman for appellant; James A. Scott for appellees.

CURRY v. FETTER.

Filed December 6, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Yost, reversing.

1. Where a new trial has been improperly awarded and a second trial has resulted in favor of the party obtaining the new trial, an appellate court will order the second verdict to be set aside and judgment to be entered on the first.

2. Verdict not against evidence—The court should not interfere with the verdict of a jury upon the ground that it is against the evidence unless it is palpably so, or is obviously the result of passion or prejudice.

As the settlement of the issue in this case depeneded solely upon the evidence of the parties litigant, and the testimony of the plaintiff made out his case, it was error to set aside a verdict for him upon the ground that it was against the eivdence, although his testimony was contradicted by that of the defendant. And a second trial having resulted in a verdict for defendant, that verdict should be set aside and judgment rendered for plaintiff upon the first verdict.

3. Commission of real estate broker—One employed to find a purchaser for the property at a certain price is entitled to his commission, although the principal sells to the customer so found at a lower price, for the rule is that a real estate agent has earned his commission when he procures a party with whom his principal is satisfied, and who contracts for the property at a price accepted by the owner.

Wm. McKee Duncan for appellant; George B. Eastin for appellee.

CLAY, &c. v. MYERS, &c.

Filed December 6, 1893. Appeal from Nicholas Chancery Court. Opinion of the court by Judge Barbour, reversing.

Vendor and vendee—Rescission—Rents—Where by a contract for the sale of land the vendors obligated themselves to execute a conveyance upon the payment of the purchase money, which was paid as agreed, the contract having been rescinded after near twenty years from that time because of the failure or inability of the vendors to make a good title, it was error to charge the purchaser with rents exceeding the interest. The rents and interests should have been offset one against the other.

Wm. Lindsay, Kennedy & Son and Edward W. Hines for appellants; John P. Norvell and Ross & Owens for appellees.

BOARD OF TRUSTEES OF LEBANON v. AVRITT, &c.

Filed December 13, 1893. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Street improvements—Husband and wife—When a town charter provides by one section that a copy of an ordinance directing the paving of a

sidewalk must be delivered to the owner of the property in front of which the improvement is to be made, and by another section that where the owner is a married woman a copy must be delivered to her husband, the latter section can not be regarded as authorizing service upon the husband alone, but must be held to require service upon both husband and wife in order to charge the wife's property with cost the of the improvement, the provision being of doubtful validity if construed so as to authorize the taking of the wife's property by a proceeding against the husband alone.

2. Same—While the board of trustees of the town might by ordinance direct the owners of property fronting on a named street to make pavements without in the ordinance naming specifically the owners of the several lots, yet where the board does undertake to name them other persons can not be presumed to take notice of the ordinance, and can not be affected by it, therefore, where the board has caused a pavement to be laid in front of a married woman's lot under an ordinance describing the lot as the husband's and directing him to have the pavement laid, the property can not be charged with the cost of the improvement, the ordinance being a nullity as to the wife.

Knott & Edelen and John McChord for appellants; Samuel Avritt for appellees.

WOOTEN v. COMMONWEALTH.

Filed December 13, 1893. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Barbour, reversing.

Local option—Tippling house—Persons can not be prosecuted under the general law for the offense of keeping a tippling house in localities where either the general or a special local option law is in force, as persons who sell liquor violate that law, and if proceeded against at all it must be under that law.

F. W. Darby for appellant; W. J. Hendrick for appellee.

JOHNSON v. NELSON, &c.

Filed December 13, 1893. Appeal from Clark Circuit Court. Opinion of the court by Judge Yost, reversing.

Mortgage to secure another's debt—Limitation—Where one who has assumed no personal liability on a promissory note executes a mortgage on his property as a security for its payment, the fifteen years' statute of limitation applies to an action to enforce the lien. The mortgagor is not a surety within the meaning of the seven years' statute.

W. M. Beckner for appellant; Haggard & Benton for appellees.

RAGSDALE v. EZELL, &c.

Filed December 13, 1893. Appeal from Trigg Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Instructions to jury—In this action to recover damages for an assault it was error to instruct the jury that while the burden of proof was on the plaintiff, yet it was not necessary that she should have two witnesses to the wrongful acts charged. And as the parties themselves were the only witnesses who testified to the facts material to the issue, the error was prejudicial to defendant. While the instruction was good as the statement of an abstract principle of law, it should not have been given.

2. Same—It is never proper to instruct the jury that the burden of proof rests upon the plaintiff or the defendant, as the case may be, but that alone will not authorize a reversal.

C. H. Bush, Fenton Sims and Wood & Bell for appellant; J. E. Kelley for appellees.

ALLEN'S EX'OR v. ALLEN, &c.

Filed December 18, 1893. Appeal from Fleming Circuit Court. Opinion of the court by Judge Yost, reversing.

Failure to file exhibit—If an exhibit referred tc in the pleadings, either at law or in equity, be not filed it is not a ground of demurrer, but only of a refusal to answer until it is filed or of a rule upon the party to produce and file it; and then upon his failure to do so without sufficient excuse the action may be dismissed.

In this action, in which the executor of the plaintiff, who died after the action was instituted, filed his petition seeking to have the action revived in his name, the executor failing to file the order of the county court showing his qualification, of which he had made profert in his pleading, the proper practice would have been for defendant to move the court for a rule against plaintiff to file the exhibit, and upon his failure to do this his action might have been dismissed. But it was error to dismiss the action without first ruling the plaintiff to file the exhibit.

G. A. Cassidy and Cassidy & McCarthy for appellant; Stone & Sudduth for appellees.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. FEBRUARY 1, 1894. No. 15

KENTUCKY COURT OF APPEALS.

CARDER & VALLANDINGHAM v. WEISENBURGH.

(Filed November 28, 1893.)

1. The Constitution guarantees a right of trial by jury according to the course of the common law in cases where a jury trial was customarily used at common law, and the right thus secured can not be abridged or taken away at the discretion of a chancellor by converting a legal issue into an equitable one. But in cases of purely equitable cognizance, a trial by jury can not be demanded as a matter of right.

2. Same—Issue out of chancery—Where the issue involved in an action in equity is purely a legal one and the equitable right depends upon the decision of such issue, the case, on motion, must be transferred to the common law docket to be tried by a jury, and the court has no discretion in the matter or right to refuse such transfer. But if the case is purely equitable the court may, or may not, in its discretion, obtain the advisory aid of a jury as to issues of fact.

Where an action to recover the value of repairs put upon a house is brought in equity solely because a lien on the house for the value of the work is asserted, and issue is made only as to the value of such repairs, that issue is purely a legal one, concerning which a right to a trial by jury exists, and a motion being made for a transfer to the common law docket for a jury trial of the issue, the court must sustain the motion. It has no discretion in the matter.

Collins & Fenley, W. T. Willis and C. C. Cram for appellants.

Geo. C. Drane for appellee.

Appeal from Grant Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellee sued the appellants on their contract for the price of repairing and remodeling their flouring mill, and asked that a lien be declared and enforced on the mill for the price, hence the suit was brought in equity.

The appellants admitted the contract to repair and remodel the mill, but claimed that the work was not done in a workmanlike manner, and alleged a breach of warranty as to quality of the work and asked damages in consequence.

The appellants, before the trial in equity, moved the court to transfer the legal issues thus formed to the common law docket, to be tried by jury. The motion was overruled and the case tried by the court. From that judgment this appeal was taken.

Did the lower court have a discretion to grant the motion or not? Or should it have been granted as a matter of right? It is to be observed that the issues formed were legal issues and triable by jury, and that the only thing that gave a court of equity jurisdiction of the case is that a lien was sought to be enforced on the mill property for the price of the repairs. No lien could be enforced on the mill property except to satisfy the unpaid price of the repairs, the right to which was put in issue; that issue was a legal issue, triable by jury.

Section 12 of the Civil Code provides in substance that either party to an equitable action, properly brought in equity, may, by motion, have the case transferred to the ordinary docket for the trial of any issue, concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer.

Here the matter that gave the court jurisdiction was the enforcement of a lien on the mill property to satisfy the price of the improvements, and if there was nothing due on account of the improvements, of course there was nothing for a court of equity to enforce, hence whether or not there was any sum due for repairing the mill was the legal issue to be tried.

This court, in the cases of Meek v. McCall, 80 Ky., 375, and Hill v. Phillips, &c., 87 Ky., 133, has construed the 12th and other similar sections of the Civil Code as follows: That if the equitable right depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case on motion should be transferred, as matter of right, to the common law docket to be tried by jury. The court has no right to refuse such transfer unless the case be purely equitable, in which case it has discretionary power as to the transfer, and may, at its discretion, obtain the advisory aid of a jury in coming to a correct conclusion upon any question of fact involved in the issues to be tried.

The Constitution of this State guarantees the right of jury trial. This means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law; but in cases of purely equitably cognizance a trial by jury is not a matter of right, but it is addressed to the discretion of the chancellor.

The right of trial by jury, as secured to the citizen by the Constitution of the State, can not be taken away or placed at the discretion of the chancellor by converting a legal right into an equitable one, or by giving the chancellor an exclusive right to try legal issues, because there is some equitable right that arises out of the establishment of the legal issue, so as to infringe upon the right of trial by jury. That right must remain inviolate as a sacred constitutional right of the citizen in all trials which, according to the course of the common law, the right to a trial by jury exists.

The judgment is reversed and cause remanded, with directions to award to the appellants a trial by jury.

BOWLING'S HEIRS v. ROARK.

(Filed November 25, 1898—Not to be reported.)

1. The purchase of a senior patent by plaintiffs, after the institution of their suit, who discover that the junior patent under which they had previously claimed was void because covering lands previously patented, did not cure or perfect the right or title under which they originally claimed, but ony conferred on them a new and independent right that took effect, as to the defendant in the action, from the date of their purchase.

2. Same—Adverse possession—Champerty—Where the defendant to such an action was, at the time the action was instituted and during the pendency of the action, in actual, adverse possession of a part of the land in dispute, claiming adversely to well defined boundaries of the entire tract, the purchase by plaintiff of the senior patent to the land during the pendency of the action was, as to defendant, champertous and, therefore, void.

Jones & Theobald and Thos. G. Poore for appellants.

R. D. Davis for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Bennett.

The action of the appellants against the appellee for trespassing on their land resulted in a controversy as to the title. The appellants claim under a patent that issued from the Commonwealth in 1869. It turned out that the same land had been previously patented by the Commonwealth to other persons, hence the patent under which the appellants claim was void. The appellants, upon discovering the existence of the elder patent, purchased the title of the elder patentees, in order to perfect their right and title. But as the patent of 1869 was void, the purchase of the elder patent did not perfect any right under the patent of 1869, inasmuch as that patent was void, but conferred a new and independent right that took effect from the date of the purchase as far as the rights of the appellee are concerned, therefore, if he or those under whom he claims was in the actual, adverse possession of the land at the time of appellants' purchase, the law of champerty protects him. It is clear from the evidence that at the time of said purchase about twenty acres of the land was cleared and under fence and in the actual possession of the appellee or those under whom he claims. It also appears that said cleared land was claimed adversely by the appellee and those under whom he claims. It also appears that they so claimed and held the land in controversy to a fixed and definite boundary. The boundary to said land is the boundaries to two other tracts of land, and all the witnesses speak of the boundary to said land as though it was an undisputed fact that the land had a fixed and known boundary, and that being the case, it is well settled that an actual, adverse possession of a part of the land, claiming to a fixed and certain boundary at the time of the purchase by a third party, is such an actual, adverse possession as renders the purchase champertous and void.

The judgment is affirmed.

FRYE, &c. v. JONES, &c.

(Filed November 25, 1898.)

1. Wills—Undue influence—The question as to the existence and exercise of a controlling, undue influence over a testator is one that is peculiarly within the province of a jury to determine, and where a jury has determined that a testator was subjected to such influence this court will hesitate long before determining that there was no evidence to authorize the finding.

2. Same—In this case the evidence shows that the testator's oldest daughter was cut off with an insignificant bequest; was his favorite child when he was in good health; that after the father suffered a stroke of paralysis he was constantly under the care of a younger daughter and her husband, who were very unfriendly to the oldest daughter, and that the testator made his will at the suggestion of the younger daughter. From all the circumstances of the case the jury were authorized to infer that the testator was controlled by undue influence, exercised by those around him, and that the will in contest was not his will.

J. W. Alcorn and J. B. Paxton for appellants.

Miller & Owsley for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hazelrigg.

From the verdict of a properly instructed jury, finding the paper in contest not to be the last will and testament of Joseph Page, Sr., the propounders have appealed to this court, complaining that such verdict is not sustained by the testimony, and is in fact flagrantly against it.

The testator died at the age of seventy-five years, the owner of a few hundred dollars' worth of personal property, and a small farm in Lincoln county. He left as his only heirs three daughters and one son.

To one of his daughters, Mrs. Mary Jones, his first born and for years his favorite child, he gave only the sum of $150, and devised the balance of his estate to the other three children in equal portions, save that to one of the three, Mrs. Jennie Adams, he gave $150 extra to compensate her for lack of educational advantages in her youth. Mrs. Jones contests the paper upon the ground of the testator's mental incapacity, and by reason of undue influence exercised over him.

It may be said of the testimony that it sufficienlty establishes the mental ability of the testator to make the will, and unless the proof discloses a state of fact from which the jury could legitimately infer the existence and the exercise of an improper influence over him, the verdict must be set aside.

It must be admitted that the rules by which may be ascertained the existence of a mental force or power so subtle and intangible as that denominated as "influence," or "undue influence," are not clearly defined or perhaps definable. Certainly no general rule may be laid down by which this obnoxious force may be detected. We can easily say that the force must be such as to control the mental operations of the testator, and amount to a substitution of the will of dominant over the weaker mind; but this is merely a statement of the effects of the inhibited influence. The question is, how shall we detect the presence?

Manifestly this may best be done by that tribunal to which is afforded the opportunity of meeting the witnesses face to face,

and hearing them testify in any given case. Before such the general bearing and conduct of all the witnesses, and especially the mental characteristics of those who are charged with having controlled another, become matters of personal observation and oversight.

To a jury of the vicinage, therefore, must be left in a large measure the detection of this refined and subtle, though reprehensible power. They may not determine its presence without evidence of it; but we may well hesitate to determine the absence of such evidence when, in their wisdom, it is found to be present.

In the present case the testator had announced that "he would equalize his children in his estate." This was in the days of his physical and mental strength. In July, 1889, he was stricken with paralysis—a warning, however, which caused no change in his intentions. In August following he had a second and severe stroke. No one lived with him at that time save his son-in-law, Frye and wife, the daughter of the testator.

When the physician left the room on the occasion of this second stroke, starting home, this daughter, whom we shall presently see she was hostile to her sister, Mrs. Jones, following him out to the yard gate, and asked him to suggest the making of a will to her father. He returned, made the suggestion and, at the request of the testator, who said he had intended for some time to have one Cook to write his will, he came back next morning and wrote the instrument.

This same daughter testified that her father, before this occasion, "had frequently talked to her about making a will, and always said he didn't intend for Mary to have any more than she had already gotten." The solicitude of this daughter, that her father should be reminded of the alleged intention to cut off Mary, which he appears to have been about to forget, is worthy of notice, and especially as the proof is undisputed that Mary had only secured from her father a cow and three sheep. The paralytic is left to rest under the delusion, however, that he had already provided for Mary.

It appears that Mary, the contestant and appellee, had, some years before the death of her father, married her co-appellee Jones, and did so with her father's approbation, but Jones became dissipated, and on several occasions, perhaps as many as three times, she left him and went to her father's.

This troubled the old man greatly, and he advised her never to go back to live with her husband. He, at least, was willing enough to afford her a home; but her brother Joe was running the farm, and refused to let her boy have a home on the old place. She, therefore, left, and again went back to her husband.

She testifies that her father met her at Hustonville a month or so before his death, and stopped her daughter and herself and talked to them kindly; that at no time did he ever speak an unkind word to her, and yet at his home, and when surrounded by the influence there, he is proven to have said that when he died he didn't want this daughter to come to his burial; that he was done with her forever.

When she went to see her brother Joe, whom she had learned was about to die, her father came out and met her in her buggy. This was away from the house, but when she went to the house she was refused by this same sister the right to see her brother, then "dying and unconscious."

There was no remonstrance from the old man at such conduct. His kindness of heart and love for the daughter who had, as a barefooted child, played in his blacksmith shop in the days of

his poverty, shows forth when out from under the influence of those living with him and controlling him. In their presence he was dumb and unable to protect her from insult, or provide a home for her children.

The cruel hostility of Frye and wife supplying the motive for the suggestion to the physician, that the will be written which was to cut off Mary, is shown in their conduct only a few nights before the testator's death. The appellee, just after this final stroke, had gone with a lady friend to see her father. She was not admitted to his presence upon the plea that it was against the orders of the physician, and was told by her brother-in-law, Frye, that her father had said if she or "any of her children should die he would not attend the burial, and he did not want her at his;" and the friend calling with her was admitted only on the condition that she did not tell the old man that his daughter had come to see him. When this friend expressed her regret to Mrs. Frye that she and her sister did not speak, she was told that "she was not sorry; that Mary was no sister of hers."

This bitter and open hatred on the part of those surrounding this enfeebled and diseased old man toward the appellee, whose sole offense consisted in cleaving to her husband, it may be inferred, was a potent influence, ever present and operating to control the testator's action.

In the frequent talks on the subject of his will had by Mrs. Frye with her father, the reiteration of such harsh and prejudicial language to him in his dependent and helpless condition, would readily create an unnatural aversion toward the absent daughter and destroy the equilibrium of his mind.

That this hostile influence was exercised we can hardly doubt. The disposition to exercise it is shown by the proof; the opportunity was afforded, and the effects are apparent.

We can not say, in the face of the finding of the jury to the contrary, that the proof does not disclose the existence and the exercise of undue influence on the mind of this dependent paralytic, causing him to change the fixed purpose he formerly had of equalizing his children.

The judgment must be affirmed.

POLLY v. COMMONWEALTH.

(Filed November 28, 1893—Not to be reported.)

1. One may be convicted for manslaughter who aids and abets another to commit manslaughter.
2. The statements of deceased were admissible as dying declarations in this case, it being clear that they were made under a sense of impending death, and without any hope of recovery on the part of deceased.

Dishman & Dishman for appellant.

W. J. Hendrick for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Chief Justice Bennett.

The indictment charges the appellant and one Williams with the crime of murdering one Asher. They are also charged with aiding and abetting each other in the commission of the crime.

Williams was heretofore tried and convicted of the crime of manslaughter. The appellant was afterward tried and convicted of the crime of manslaughter. He appeals.

The evidence clearly authorized the verdict. The instructions were full, clear and correct; but the appellant contends that inasmuch as Williams did the killing, and as he was only convicted of the crime of manslaughter, he can not be convicted of aiding and abetting that crime, but we think that one may aid and abet the crime of manslaughter.

It is also contended that the court erred in admitting the statements of Asher as a dying declaration; but we think not. The doctor that was called in to see him, in a few hours after he was shot, informed him that he could not save him, and he died the second night after he was shot, and when he made the declaration he said that he could not live, it was proper to let the declaration go to the jury. The court committed no error in admitting or rejecting evidence.

The judgment is affirmed.

ROBERTSON & CO. v. McDOWELL, &c.

(Filed November 28, 1893—Not to be reported.)

Discontinuance of public road—Evidence—While twenty witnesses in this case give evidence conducing to show that the road in question is useless to the public and ought to be discontinued, yet seventeen other witnesses state that the road is absolutely necessary to many people living near it, and a great convenience to many others, therefore, this court will not reverse the judgment below refusing to discontinue the road.

Guffy & Ringo for appellants.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Bennett.

The county court of Ohio county, Ky., discontinued a public road leading to the town of Rockport, in said county, and situated on the bank of Green river.

The action of the county court discontinuing said road was reversed by the circuit court.

This appeal is prosecuted to reverse the judgment of the circuit court. About twenty witnesses testify that said road is in low river bottom land, and that ten or twelve foot rise in the Green river will overflow the road so as to make it impassible; that by reason of the overflows and the nature of the soil the road is impassible for the greater part of the year; that the road, for the reasons indicated, is of no practical convenience.

On the other hand, about seventeen witnesses testify that the road is an absolute necessity to some and a great convenience to many; that the coal from a coal mine must be hauled over that road to Rockport; that the road is as good and as free from overflow as any road that leads to Rockport; that it is not overflowed, and is in good condition for travel, the greater part of the year, and that it can be leveled and bridged at a small cost.

The judgemnt is not against the weight of evidence.

Judgment affirmed.

LUNSFORD v. CULTON.

(Filed November 28, 1893—Not to be reported.)

1. Contested elections—Failure of officers of election to take oath as such—Officers of election, before acting as such, should be sworn as required by law; but where there has been a fair election legally qualified voters should not be deprived of their votes, and the candidate elected by a majority of such voters should not be denied his office because of a failure of the election officers to take the oath required by law before entering upon a discharge of their duties.

2. Same—Notice of contest—A notice of contest because of alleged illegal votes cast for one candidate ought to be so definite as to apprise all parties as to the names of the alleged illegal voters and the grounds for alleging that such votes are illegal.

3. Same—Waiver of defects in notice of contest—A notice by a contestant to the party declared elected to a certain office that he would contest the election because "a number of illegal votes had been polled for the incumbent against the contestant" in certain designated precincts is defective for indefiniteness, in that it fails to give the names of such illegal voters or the reason why they are illegal. But where the incumbent sets out in his answer grounds for contesting the legality of votes cast for his opponent equally as indefinite, and both parties go to trial before the contesting board without objecting to the sufficiency of the notice of contest or moving to make it more definite, it is too late after a judgment in favor of the contestant and an appeal to the common pleas court by the incumbent for the latter to move in that court, for the first time, to quash the notice of contest. Objection thereto must be considered as waived by the conduct of the parties before the contesting board.

4. Same—Weight of judgment of chancellor—Where there is any evidence to support the findings of fact by the chancellor in a contested election case, his judgment ought not to be disturbed on appeal, especially where it agrees with that of the contesting board.

T. J. Coyle and Wm. H. Holt for appellant.

John L. Scott & Son for appellee.

Appeal from Jackson Court of Common Pleas.

Opinion of the court by Judge Pryor.

This controversy is over the office of county judge for the county of Jackson. The appellant, Lunsford, was elected by 1 vote, as the returns show, having received 660 votes, and his opponent, Culton, the appellee, 659 votes.

Culton gave to the appellant, Lunsford, notice that he would contest the election upon the ground that many illegal votes had been cast for him, and when excluded would leave him, Culton, with a majority of the legal votes cast.

The contesting board having assembled, after hearing all the testimony pro and con, adjudged that Culton was elected by a majority of fifteen votes. Lunsford then appealed to the common pleas court, and that court held that Culton had been elected by a majority of six votes, so we have two tribunals of the same county, with the parties and their witnesses before them, or the depositions of those living in the county, with all or the most of whom and their past history both tribunals were doubtless familiar, as well as a knowledge of those whose votes were being contested, deciding in favor of appellee, and with testimony conflicting in its character, this court would scarcely undertake to say that the two findings were not warranted from the law and the testimony.

If the vote of the idiot, who was acting and voting through his committee, is excluded, and the vote of Sparks changed from Culton to Lunsford, still it would leave a majority for Culton; and when you read the testimony it is perfectly manifest that Culton is entitled to the office.

In Cowen v. Prowse, 14 Ky. Law Rep., 273, in a case like this, the court said: "As there is evidence conducing to support the finding of facts, we think it should not be disturbed by this court, especially as the finding by the circuit court agrees with that of the contesting board."

Take the testimony as to the vote of Coyle, and we think the court acted properly in excluding it from the list of legal voters, and so of others on both sides who voted illegally, it will be seen that the testimony warranted the finding, and particularly when that finding is the result of an investigation by two tribunals of the county, over which each of these parties propose to preside as county judge.

They knew the voters and those entitled to the exercise of this right, and when confronted by the witnesses adduced by each party, were fully competent to determine the place of residence of the person whose vote had been challenged, and the respective ages of those whose votes had been challenged on account of infancy.

The failure to reside in the county, or in certain precincts of the county, and the want of the requisite age to vote, constituted the principal complaints made by the appellee, and objections to votes cast for the appellee were made on the same grounds by the appellant; and these tribunals having heard the proof and made a judgment warranted, and in fact required, by the testimony, this court will not disturb it.

The only objection necessary to be considered is as to the sufficiency of the notice of contest.

One of the grounds was that the officers of the election, at a named precinct, had not been sworn as the law required. This seems to have been abandoned.

The second ground: "That a number of illegal votes had been polled for Lunsford against Culton by those not entitled to vote; said votes were in the town of McKee; in the Horse Lick precinct; in the Coyle precinct; at Cavanaugh and in the Pond Creek precinct."

The names of the illegal voters are not given or the reasons why these votes were illegal; and it would seem that this statement would scarcely apprise the appellant of the grounds of contest, so that he might be prepared to meet them.

The appellant, in his reply to the causes of contest, sets up similar charges, and as indefinite as those made by the appellee. They both go to the country on these issues, and by their testimony, in a very short time, make the issues sharply defined by disclosing the names of those who were illegal voters and the precincts they voted in.

The testimony before the contesting board was not objected to, nor any motion made asking that the notice be made more certain and definite, and it was not until the case reached the circuit court that a motion to quash the notice was made; and no motion in fact made in that court to make the statement more definite.

The proof was all in, or such as made a case for the appellee, and to hold that the notice should be quashed after an issue had been made and the case prepared, would be trifling with the contesting board that had passed without objection on the merits of the controversy.

Nor do we understand that a notice of the purpose to contest

an election should contain such averments as would be necessary in an action at law; and where a case has been tried on its merits, with both parties before the tribunal empowered to determine the question, this court ought not to inquire as to whether or not the notice was as certain and definite as required in ordinary pleadings, and so the circuit court acted properly in trying the same issue that had been tried by the contesting board.

The law requires that the officers of an election should be sworn; yet where there has been a fair election the voter will not be deprived of his vote, or the candidate for the office of his election, if the legally qualified voters have voted for him.

A notice of a contest, because of illegal votes being cast for the one party or the other, while it should be required to be made more definite, if objection is made in proper time, is sufficient if parties see proper to make an issue without objection, and proceed to investigate the case.

The appellee having received a majority of the legal votes cast, was properly adjudged the right to hold the office of county judge.

Judgment affirmed.

CITY OF OWENSBORO v. WEIR, WEIR & WALKER.

(Filed November 28, 1893.)

1. Persons contracting with corporations or their officers must, at their peril, inquire concerning the authority of the contracting agents or officers to bind the corporation by such contract.
2. The mayor of a municipal corporation has no authority to employ counsel for the city to maintain an action to prevent an impending encroachment upon the property of the city unless authorized by the common council, when the city charter gives the common council general control over all the property of the city.
3. Even if the mayor may employ counsel for the city, in case of pressing necessity or emergency, without authority from the common council, no emergency is created, where the county or other person begins the erection of a fence to enclose property of the city, requiring the employment of attorneys to protect the property of the city.
4. The common council did not ratify the employment of attorneys by the mayor, although it may be inferred from their proceedings that a majority of the council wished to pay the attorneys something for their services.
5. There is no necessity for a separation of conclusions of law and fact where an agreed state of facts is submitted to the court. In such case there has been no trial of facts, and only questions of law are considered as decided by the court.

J. A. Dean for appellant.

C. S. Walker for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

The question involved on this appeal is the liability of the appellant, the city of Owensboro, for the fee of the appellees, attorneys at law, for services rendered by them at the employment of the mayor of the appellant, acting without authority of the city council.

The circumstances of the employment are set forth in an "agreed case" and in the record in which the services were rendered.

The county judge of Daviess county, under an order of the county court to that effect, was proceeding to have enclosed under fence certain outlying grounds adjacent to the courthouse square in the city of Owensboro.

It may be presumed that this was being done with the view of obtaining permanent possession of the grounds about to be enclosed, and of depriving the city of them; but it is not intimated that any act was about to be done which would injuriously affect the property, or that the county was about to commit any waste thereon, or carry off any portion thereof, or even to erect any buildings thereon. It had in fact only placed a number of stones thereon, with the view of erecting a fence.

It may be presumed that the mayor in good faith believed that the grounds about to be enclosed belonged to the city. Upon this state of case the mayor, acting alone, authorized the city attorney to institute proceedings against the county authorities, enjoining them from interfering with the grounds mentioned. This the attorney sought to do by filing a petition in ordinary in the Daviess Circuit Court, on April 11, 1889, but no injunction was granted him because of want of notice.

The mayor then—still acting alone and without the authority of the city council—employed the appellees to assist in the prosecution of the case. Without inquiring as to the source of their employment beyond that obtained from the mayor, they filed an amended petition, praying that the title of the plaintiff city in and to the ground described be quieted, the stones be removed, and the county be prevented from extending its fence around the disputed territory. This was done two days after the original petition had been filed. Before their motion for an injunction was heard, at an informal meeting held by the members of the council, the city attorney was instructed to dismiss the suit, which he did.

While the statement appears in the "agreed case," and is set forward rather prominently in the argument of the appellees, that the appellees were not advised of the fact that the suit had been brought at the instance of the mayor, without the authority of the council, or that the employment of the appellees was without such authority, we do not understand the appellees to contend that their cause of action can be maintained by reason of their ignorance of the authority under which, or by virtue of which, the mayor assumed to act in the premises stated.

We assume it to be conceded that persons contracting with corporations or with its officers must inquire into the power of the contracting body or person to make the impending contract; but it is contended that where the county officials commenced to remove the fence enclosing the courthouse yard, so as to take in ground in the possession of and belonging to the city, and when the city attorney had failed to present his case, so as to obtain he relief sought, then an emergency arose which authorized the mayor to employ counsel, and that there was no time or necessity to convene the city council; but looking at the case from this standpoint—that of the exigency of the occasion—we are not so impressed with the gravity of the alleged emergency as counsel seem to be.

The main object sought to be determined by the litigation set on foot in the Daviess Circuit Court was to quiet the title of the city to the ground in controversy. This was in no way affected

by the proposed erection of the fence. By enclosing, the county did not become the owner of the property.

As expressing our view on this point we quote the ap language of the Superior Court, 14 Ky. Law Rep., 711 (Yost, judge), in determining this case then on appeal there: "A piece of ground, which the mayor claimed was the property of the city, was about to be enclosed. What right had he, the executive of the city government, to act alone in the matter? Why not call together the common council, and let that body act. or refuse to act, at its pleasure? In it, and not in him, was vested the control of the property of the city, and the power to prevent any and all encroachments upon its streets or public squares. Yet with these powers so pointedly and specifically given the legislative branch of the city government, the executive, in the face of the prohibition of the charter, attempted to exercise an authority properly belonging to the other. * * * There was certainly no emergency in this case. The common council could have been at once called together. There was absolutely no reason for the mayor to act alone.

"While the amount charged was small and well earned, yet there is a principle involved important indeed to all municipalities, and we do not think, unless the emergency be serious and the necessity grave and impending, that the mayor should have the power either to authorize litigation in behalf of the city or to control it.

A different rule of law would in effect dangerously enlarge and broaden the power of public officers to bind municipalities by contracts, not only unauthorized but prohibited."

This would seem to leave nothing further to be said under this head.

The common council by the charter of the city (Session Acts, 1881, volume 1, page 817) is given control of the finances and all property, real and personal, belonging to the city; power to prohibit persons from trespassing upon or injuring its public grounds; to appoint all agents necessary to carry into effect its laws and ordinances, and to prevent and remove any and all encroachments into or upon any street, alley, sidewalk, avenue or public square of the city; and to exercise complete and perfect control over all public squares or commons belonging to the city and over all its property, real or personal, within or beyond its limits.

The mayor is empowered to see that the laws of the city are faithfully executed, and shall, from time to time, give to the common council information of the state and condition of the corporation, and recommend to its consideration such measures as he may deem expedient, and for that or any other purpose may at all special meetings of that body whenever it is, in his opinion, necessary to the interest of the city.

But while invoking the aid of the principle that pressing necessity justified the employment, or insisting that an emergency existed, calling into exerc se the power of the mayor to act, counsel yet argue that emergency can not give the power, however great, though it may, and likely ought to, regulate its exercise.

If the power exists it is absolute, independent and inherent in the office itself. If it does not exist no contingency, no emergency, no necessity can create it; that if emergency be taken as the test of power, not the courts but the mayor must be the judge of what constitutes a sufficient emergency; and the conclusion of the argument of the learned counsel is that the mayor has absolute full power to determine (not as we might suppose from the tendency of the argument) the circumstances or emergencies

under which he might properly act, but to determine every question within the province of his office; and to all this we agree.

Within the province of his office the acts of the mayor must be confined. Emergency can not create a power, but when a state of case arises in which the performance of the duties of his office is involved he may lawfully act. This state of case or emergency, if we call it such, calls into exercise this action; but his action must be within the scope of his powers as laid down in the law creating him. The power of the mayor is defined in the law creating the office; not in express terms because there are implied powers, but in all cases the power must be worked out through and under the law creating the office.

The case of the city of Louisville v. Murphy, 86 Ky., 58, is relied on as conclusively sustaining the contention of the appellees. In that case it is said: "While, as a general rule, the mayor of a city has no authority by virtue of his office to employ counsel, the power being conferred by the charter or by the legislature of the city, cases of emergency may arise when the power must necessarily exist. It is made the duty of the mayor to see that the law and ordinances of the city are faithfully executed, and that the official duties of the city officials are faithfully performed. In this case the council had failed to impose any tax. The city was left without means, as the mayor had the right to suppose, of carrying on the city government. The officials were proceeding to collect a tax without any ordinance of the city council. * * * In such an emergency he called on counsel for advice. * * * We think such a power existed. * * * We think the mayor has no general power to authorize litigation in behalf of the city or to control it. If so, he could disregard the legislative will of the municipality, bringing and dismissing suits at his pleasure. It is certainly an exceptional case where it should be allowed, and one that seldom arises; but the emergency in this case justified the act as all the parties acted no doubt in the best of faith."

In that case a state of case arose—called an emergency, in the opinion in which the performance of the official duties of the officers of the city and the power of carrying on the city government were involved. We can not see that it supports the contention of the appellees, and think that it is in accord with the views here expressed. It was an extreme case, and this action to quiet title and to prevent an encroachment on the realty of the city does not approach it in its demand for immediate action.

It is insisted that a ratification of the action of the mayor is shown by the vote of the council on the motion to allow the claim of the appellees. The claim being before the council for action thereon, the proceedings are thus stated: "Whereupon Mr. Decker moved that Mr. Walker be allowed $50 as a fee in the litigation, which was lost by the following vote, viz.: Ayes, Messrs. Decker, Norton, Hill; noes, Messrs. Smith, Gransz, Stirman and Mayor Hickman. Messrs. Stirman and Gransz then moved that Mr. Walker be allowed the full amount of his claim, $150, which was rejected by the following vote, viz.: Ayes, Messrs. Stirman, Gransz; noes, Messrs. Decker, Norton, Hill and Smith."

We are asked to suppose, and it may be so figured out pretty clearly, that those who voted "no" as to the $50, except Smith, did so because they did not consider that sum enough, and that those who voted "no" as to the $150, except Smith, did so because they considered it too much; and that, therefore, no appropriation was made because they disagreed as to the amount.

only; but how this is to be construed into a recognition of the mayor's employment we can not see.

After all the vote shows no ratification, though it might show that a majority of the members were willing to make some appropriation in compromise of the claim of the attorney; but, say the appellees with earnestness, there was no statement by the court of its conclusions of fact found separately from its conclusions of law.

Section 332 of the Civil Code provides that "upon trials of questions of fact by the court it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law."

Now upon an agreed state of fact what could the court do in the way of stating, in writing the conclusions of fact found, separately from the conclusions of law?" Simply copy or restate the agreed state of fact.

Clearly the court's judgment on the law only was asked. There was no trial of questions of fact.

The case of Harris v. Ray, 15 B. M., 629, cited by counsel, simply determined that the provision of the Code regulating applications for a new trial applied to judgments by default. It has no bearing on the section quoted.

Judgment reversed, with directions to proceed in accordance with this opinion.

SEAR'S HEIRS v. SEAR'S HEIRS.

(Filed December 2, 1893.)

1. Warning order—Affidavit—Presumptions—Where a judgment against certain nonresidents was entered in 1877, every reasonable presumption must now be indulged in favor of the validity of the warning order by which the nonresidents were constructively summoned; and where the papers show that the affiant, upon whose oath the warning order was issued, signed the proper affidavit, but the jurat to such affidavit is not signed by the clerk, it will be presumed that the affidavit for the warning order was regularly made, and the clerk merely failed by mistake to sign his name to the jurat.

2. Same—Collateral attack of judgment—The omission of a clerk to sign a jurat to such affidavit for a warning order renders the judgment erroneous as to the nonresidents, but not void, therefore, such judgment can not be attacked collaterally for such error. It is conclusive until vacated or reversed in some direct proceeding.

O. H. Waddle for appellants.

Hill & Denham for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

At the suit of a creditor in December, 1877, the lands of one Geo. Y. Sears, deceased, were sold under a judgment of the Whitley Court. Some of his children were proceeded against as nonresidents, and because the jurat of the affidavit for the warning order is not signed by an officer, it is claimed by the appel-

lants, representatives of these nonresidents who are now suing for the lands, that as to them the sale is void.

The affidavit, or what purports to be one, follows the petition; is signed by the supposed affiant, and the clerk in due form made the order of warning.

The law plainly directs that the clerk shall not make such order "except upon an affidavit of the plaintiff or his agent or attorneys," etc.

Shall we say that the officer flagrantly violated this plain provision of the law and illegally made the order? Or that he merely carelessly omitted to sign his name to the formal certificate of what he had properly done? If the question were one open for presumption, we should readily conclude that the clerk in fact administered the requisite oath, and, if so, the law is satisfied. It may be observed further, as within the legitimate domain of presumption, that because we find attached to the peititon an imperfect affidavit we are not thereby precluded from presuming the existence of another and perfect one on which the clerk acted in making the order.

But, aside from all this, in collateral proceedings attacking the validity of a judgment, the rule is well established that where the record in which the judgment was rendered shows the service of a summons without actual or constructive—and the order of warning is the constructive summons—it imports absolute verity, and the judgment is conclusive until vacated or reversed in some direct proceeding. (Newcomb's Ex'or, &c. v. Newcomb, 13 Bush, 662; Dorsey, &c. v. Kendall, &c., 8 Bush, 294.)

A similar question was determined by this court in Wilson, &c. v. Tague, &c., ante, 414, where the failure of the clerk to write the affidavit for the warning order in the usual form was held to render the judgment erroneous merely and not void.

The appellants also assert title by virtue of certain alleged written contracts with some of the children of Sears, under which, however, even if the writings are sufficiently descriptive, they took no possession or did any other act to put others upon notice of their alleged equity.

The judgment dismissing the petition is affirmed.

KANT v. HALL.

(Filed November 16, 1893—Not to be reported.)

Action to cancel commissioner's deed as a cloud upon title—Evidence—Plaintiffs claim under the will of D., made in 1862, and deeds of record executed by their vendee, which convey a perfect legal title. Defendant claims under one who held a title bond from D. for 350 acres executed in 1857. In 1888, and long after D.'s heirs and devisees had, by deeds of record, parted with their title to the land in controversy, defendant in this action instituted suit against D.'s heirs on said title bond to compel specific performance and secure a deed thereunder. Plaintiffs herein were not parties to that suit, in which a commissioner's deed was made to the present defendant for 3,700 acres of land under claim that this vendee, the original obligee in the bond, had obtained deeds for that quantity of land. The preponderance of the evidence shows that the obligee in said bond never asserted any claim to said 2,700 acres of land. Held—Plaintiffs, whether in possession of the land or not, are entitled to have said commissioner's deed cancelled and their title quieted as to it.

Wm. Lindsay, Thos. H. Hines and J. G. Forrester for appellant.

M. J. Holt and Wm. H. Holt for appellee.

Appeal from Harlan Court of Common Pleas.

Opinion of the court by Judge Pryor.

This controversy is in relation to the title of a tract of land in the county of Harlan containing about twenty-seven hundred acres. The title asserted by both the appellant and the appellees is claimed to have been derived from and through the original patentee, Boyd Dickinson.

The appellees claim under a bond for title executed by one John Dickinson, as the attorney in fact of Boyd Dickinson, to one Absalom Creech, on the 25th day of May, in the year 1857. Appellant claims under the will of Boyd Dickinson, dated in the year 1862, by which he devised his land in Harlan county to one James L. Boyd. Boyd sold to one Reamer in February, 1866, and in August, 1867, Reamer conveyed ten thousand acres of the land to one Goulard, by metes and bounds, and the land in controversy is embraced within this ten thousand acre tract. Boyd Dickinson was the patentee for a much larger body of land, and the ten thousand acre tract is carved out of the original patent. Goulard conveyed the ten thousand acre tract to the Goulard Mining Company in the year 1878, and in the same year the Goulard company conveyed the tract to one John Tucker, and in May, 1887, Tucker conveyed the land to the appellant, N. G. Kant. The conveyance to Reamer was put to record when executed, and to the various vendees, including the appellant, Kant. The conveyances were properly recorded in the county of Harlan. The appellant, Kant, has exhibited a perfect legal title of record, while the appellees are relying on the bond for title executed in the year 1857, and the deed of the commissioner of the Harlan Chancery Court executed in a proceeding instituted in that court by the vendees of the heirs of Absalom Creech (the defendants in this action) against the heirs of Boyd Dickinson, in which they sought a decision for a conveyance in accordance with the bond of May, 1857. The present appellant, Kant, who had a title of record, was not made a party to the action in which the commissioner's deed was obtained. The action to obtain the title by virtue of this bond was not instituted until the year 1888, more than thirty years after its execution, and then against parties (the devisees of Boyd Dickinson) who many years prior thereto had divested themselves of title by conveyances of record in Harlan county, where the land lies. The present appellant, Kant, who holds this record title, is now attempting in the present action to remove the cloud placed upon it by the commissioner's deed to these defendants under the equity action instituted in 1888.

That these parties knew of the appellant's title is manifest from the direct proof in the case, as well as from the record evidence of that fact. The bond for title, if properly executed, can not be deemed or regarded as notice to any purchaser of the claim of Absalom Creech or those holding under him, and if any notice exists it is by reason of the possession of Absalom Creech and his heirs and these vendees.

The bond for title calls for only three hundred and fifty acres of land, more or less, and although this bond was made the basis of recovery against Boyd Dickinson's heirs, a judgment was rendered by which the title is attempted to be passed to twenty-seven hundred acres of this land, under averments that deeds had been obtained from the heirs of Absalom Creech, the original owner, for this quantity of land.

The preponderance of the testimony, and from those living on and near the land, is that Absalom Creech claimed no part of this Dickinson survey, and even his direct descendants, from whom these appellees or some of them purchased, never knew that Absalom Creech owned this land, or that they sold or had any interest in it. They sold their interest in small tracts of land recognized and owned by their father in his lifetime. While the land was not valuable, Absalom Creech's children certainly would have known that he owned this large quantity of land, and have asserted some claim to it. Neither Absalom Creech nor his heirs ever listed or paid the taxes on this land, but, on the contrary, the land was listed and taxes paid by those whose deeds were of record, and in whom the legal title was vested. Absalom Creech, in his lifetime, knew the extent of appellant's claim, or that of those from whom the appellant purchased. The then owners were at his (Creech's) residence for several days making surveys of this land, and after his death, and since these appellees asserted title, some of them pointed out to the appellant the lines and corners of the survey.

The surveyor who made the survey while at Creech's home makes plain statement of what transpired, and leaves no doubt but that Creech was then asserting no claim to this land, and in fact had none. The testimony, or rather the character, of this witness has been impeached, still he makes a consistent statement of the acts of the parties at the time, and in conformity with what are the real facts of this case as disclosed by those who lived near this land and are disinterested, and also by members of Creech's own family.

It is said that this being in the nature of a bill quia timet, possession was necessary to maintain it. We think this action was proper, and, if not, there never was any adverse possession by Creech or by his heirs until this action in the Harlan Circuit Court was instituted, or about that time, and to permit parties to sue the heirs of the original owner who had long since divested themselves of title, and thus acquire a title adverse to those who have deeds of record from those owning the land, and then deny the relief sought in this case, would be to aid the appellees in their efforts of fraud to obtain title to land that rightfully belongs to the appellant.

It is argued the power of attorney did not authorize the sale of this land by Dickinson's brother, conceding the bond passed, if properly executed, the title to this tract of land. We do not deem it necessary to decide this question, as upon the facts the relief should have been given.

Reversed and remanded, with directions to adjudge the plaintiff entitled to the land in controversy, and to cancel the commissioner's deed in so far as it interferes with the boundary of appellant's land.

STUART, TRUSTEE v. COMMONWEALTH.

(Filed September 28, 1893.)

Taxation of title to mineral rights in land—Where the right and title to minerals in certain land has been conveyed to one person, and the title to the surface to another person, two separate estates in the land are created, each of which may be assessed for taxation against its owner as real estate held by him.

C. M. Parsons and J. M. Roberson for appellant.

W. J. Hendrick and Connelly & Connelly for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Bennett.

By this proceeding the estate proposed to be taxed is the mineral estate of the appellant, which he holds by separate title, another holding the surface title.

It is settled by this court that an estate in fee carries with it all metals and minerals thereunder; but the surface and mineral interests may be conveyed to different persons and become separate property, and each interest conveyed, if the minerals are conveyed in place, will be land. In other words, the minerals and the surface interests may, by separate conveyance, become separate pieces of real estate and held by different persons, and each estate may be seized and sold by execution separately, or each may be defeated by the statute of limitations as any other real estate. (Kincaid, &c v. McGowan, &c., 88 Ky., 91, where the matter is fully discussed.)

The mineral estate, when severed by conveyance, being separate real estate, may be taxed as other real estate.

The judgment is affirmed.

BENGE v. BENGE.

(Filed October 31, 1893—Not to be reported.)

1. Statute of frauds—A verbal agreement by a purchaser of land, who paid $650 of the purchase price and to whom the title was conveyed, with another who paid $50 of the purchase money, to convey the land to the latter in case he paid said $650 in two years, with 10 per cent. interest, is within the statute of frauds and void unless reduced to writing.

2. Same—Resulting trusts—Such an agreement would not in equity create a resulting trust in favor of the party paying the $50, even if resulting trusts had not been absolished by statute in this State.

3. Same—Mortgages—Nor can the conveyance to the vendee be treated as a mortgage to secure the $50, since the defendant was not bound to pay the balance of the purchase money and take the land under the verbal agreement; and since it was not mutually binding it is not valid for any purpose.

A. W. Baker and D. Y. Little for appellant.

John L. Scott for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant contends that by a verbal agreement with the appellee she purchased the land in controversy and paid therefor the sum of $650, the appellant paying $50, balance of the purchase money, and that the appellee was to take a deed to the land to herself and was to allow the appellant two years in which to pay her the purchase money that she had paid, and ten per cent. interest per annum thereon, and upon the payment of which she was to convey the land to him; and that before the time allowed for the payment had expired he tendered payment and demanded the deed, which was refused. He asked that the deed to the appellee be treated as a mortgage, and that he be allowed to redeem, etc.

The lower court gave judgment for the appellee for the posses-

sion of the land, deciding that the facts proven did not entitle the deed to be treated as a mortgage; that appellant was a mere lessee, and tortiously holding over.

The facts relied on by the appellant would not, under the former equity practiced by this State, establish a resulting trust because, in order to create such trust, it was necessary that the deed should be made to one person, and that the consideration should be paid by another; but article 1, section 19, chapter 68, General Statutes, expressly abolishes such trusts. (Greenup County v. C. & O. R. R. Co., 14 Ky. Law Rep., 681, and the authorities there cited.)

It was then expressly decided by this court (Fischle v. Dumarsly, 8 Mar., 23) that when the equity of resulting trust does not apply the statute of frauds applies, declaring all agreements, involving the title to land, void unless in writing.

It is equally clear that the said deed can not be treated as a mortgage, because the appellant did not make the deed, and he is not bound by it; for it is well settled that in order to make an alleged agreement binding there must be a mutuality of obligation.

Here the appellant was not bound to accept a deed from the appellee had she tendered it. As to the question of the $50 and improvements there was evidence pro and con, and the court rendered its decision thereon, and we think the evidence sustains it.

Judgment affirmed.

TAYLOR'S TRUSTEE v. ABERT, &c.

(Filed November 23, 1893—Not to be reported.)

Trusts—Right of beneficiaries to final settlement—A father conveyed a very large landed estate in 1882 to a trustee for the purpose of securing its division during his lifetime among his children and grandchildren. The deed charged the lands with the grantor's debts, and among other things directed the trustee to make a settlement of the advancement accounts of the children; and further provided that after such settlement was made, and all costs of the trust discharged, the remainder was to be divided into six equal parts, one-half of each sixth to be paid to each of grantor's children and the other half to be invested for the children of each of grantor's children. Provision was also made as to the disposition of the one sixth going to the widow and infant children of a deceased son of testator; and the trustee was empowered to sell real estate from time to time, etc. Held—

First. After a lapse of twelve years the beneficiaries of the trust are entitled to a final settlement from the trustee, ample time having elapsed for the accomplishment of all the purposes of the trust.

Second. Where it appears that the land conveyed in trust is increasing rapidly in value, the chancellor should partition such land in six equal parts and allot a division to each claimant thereto; or if such claimant and his children insist upon his sixth being sold the chancellor should order such sale.

Geo. Washington, C. J. Helm and Nelson & Desha for appellant.

L. J. Crawford and Follett & Kelley for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

Col. James Taylor, of the city of Newport, executed a deed of trust by which he empowered the trustee, Wm. H. Lape, to sell

and dispose of a large landed estate for the benefit of his (the grantor's) children. Lape has been removed and W. H. Harton appointed in his stead. When the deed was executed the grantor had five children living, some of whom had children, and those children, or some of them, are now infants. His son James died before the grantor, and his (James') widow and child were provided for by this deed. The grantor had previously made a will, but desiring his estate wound up and settled in his lifetime, and with that view executed the deed of trust to Lape, embracing substantially the provisions contained in his will. Two of the grantor's children have died since the deed was executed, leaving infant children.

The value of the lands devised will exceed greatly $1,000.000, and perhaps approximate $2,000,000 in value. The land (all of it) was charged by this trust deed with the payment of the grantor's debts, including debts for which he was liable as a member of the banking house of James Taylor & Sons.

The grantor had made advancements to his children, and the trustee is directed to take this "advance book" and settle the accounts between his children and the children of his son James. When this settlement is made the trust provides that whatever is coming to Harry and my daughters "one-half will be paid them in money and the other half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs forever.

"Whatever is coming to my son John, will be paid him in money, and that which is coming to my son James' children will be paid to their mother, if they are under age, for the use and benefit of all of them, the mother to have an equal amount with the children. When the matter of advance is settled, after paying all costs and expenses incident to the management of the estate under this deed of trust, the surplus, or what remains of the sale of real estate, or what may be coming from any other source, will be divided into six equal parts, and invested for and paid over to my children and to the children of my son James and their mother in the same manner as provided in the accounts of equalization.

"If at the time the equalization takes place any of my children are dead, no investment will be made for their children, but the amounts coming to them will be paid to them in equal proportions. The amount coming to my son James' two children will be paid to their mother until their arrival at age, and she is to be paid one-third of this fund for her own use and benefit."

The grantor also directs his trustee "to lay off lots out of my Belleview tract from time to time as it may be desirable as additions to the city of Newport. The land adjoining Belleview is to be laid as the trustee may think best, including the mill bottoms."

The grantor also provides an annual income out of the fund to be paid his children until the trust is settled.

Mrs. Lucy C. Abert and others of the children of the grantor instituted this action below, asking a division of the trust property, alleging that the trust had been fully executed, the advance accounts settled and that no impediment existed in the way of a final partition of this large estate between the parties in interest.

The claim for partition is resisted because the land has not been sold and no final settlement made by the trustee or all of the debts of the grantor paid.

This deed of trust was executed on the 29th of May, in the year 1882, and while no hasty execution of the trust was expected or intended by the grantor, it is manifest the conveyance of the property in trust was in substitution of the testator's will, and

to enable the grantor to see and know that his estate was being divided and settled during his life; that periodical sales of this large real property became a matter of necessity, and the trustee was invested with ample discretion by the terms of the trust to sell when, in his judgment, it was to the interest of the beneficiaries to do so. In other words, he had a reasonable time to execute this trust, but that he was placed in a position where the trust became perpetual is not warranted by any of its provisions or sanctioned from any intent or purpose on the part of the grantor to be gathered from either his will or the deed under which this power is claimed. While delay in the execution of the trust looking to the location and condition of the lands left by the grantor may have resulted in great benefit to those in interest, still, after the lapse of twelve years and longer, ample time has been given the trustee to wind up his estate. If the lands are constantly increasing in value there is no reason why the beneficiaries can not hold these lands as well as the trustee, and by a continuation of this trust the beneficiaries who are entitled to these interests are the mere pensioners of the trust that may not be fully executed until all are gone and their children left the sole beneficiaries of the grantor's bounty.

It is immaterial whether this trust is executed or executory; it ought to have been settled long before this, and the chancellor took the correct view of the question when he authorized this land to be partitioned with some qualification.

It is argued by the appellants that this land is valuable and becoming more so from day to day, and, if so, why should not the remainder interest be protected by giving the life tenant and the remainderman the land itself instead of selling and reinvesting in other land? To do this a petition becomes necessary and proper.

As to the devise in money, made absolute to the children or the grandchildren, they can sell the land if they desire, or, when petitioned, if they insist upon the land being sold, let the chancellor authorize the trustee to sell their parcel and pay them over the money.

John Taylor, one of the devisees or grantees, is entitled to his in money. Why can not he sell the land allotted to him, or, if not willing to do so, let the chancellor direct the trustee to sell it for him? Those who want the money and not the land let the trustee sell their parcels and pay it over to them if they desire. The infants should have guardians. Before this division is ordered a settlement should be made with the trustee of his accounts, and if the estate is still indebted land should be sold to pay this indebtedness before a partition is had. The substance of the judgment should be to permit those of the heirs who desire it to take the land instead of the money, and, as to the remainder interest created by the grant, there is no reason why they should not take this land instead of directing a sale and investing in other land.

The judgment below must be reversed that settlement may be had before the division is ordered.

Remanded for that purpose.

PADUCAH LAND, COAL & IRON CO. v. HAYES.

(Filed November 28, 1893—Not to be reported.)

1. The president of a corporation has a right to recover his salary, although after his election he promised the stockholders great success for the enterprise, and held out great inducements to others to invest their money in its stock, and the venture turned out unsuccessfully.

2. Same—Interest—Where the president of such corporation voluntarily left his salary in its treasury instead of drawing it, because of the pressing financial needs of the corporation, he will not be allowed interest on such salary from the day it became due, but only from the time he demanded its payment and payment was refused.

3. Corporations—Fraud of directors—The directors of a corporation, who bought land for $100,000, and issued in payment 10,000 shares of the corporation's stock at $10 per share, with a private agreement between such directors and the vendee of the land that 4,500 of the shares were to be paid over to a trustee by the vendor for the benefit of the directors for their own personal use, must give the benefit of such 4,500 shares to the shareholders of the corporation, even though they in good faith believed the land to be worth the price paid.

4. Same—And a president of such corporation, who was elected after such transaction on the part of the directors, and who did not participate in it, will be charged with the value of 823 shares of such stock, which were given him by the directors as part inducement to him to accept the presidency; although he did not participate in the fraudulent transaction, yet it was his duty, as soon as investigation disclosed to him the history of the issual of such stock, to turn over to the corporation his part thereof. He will be charged only with the value of such stock at the date a demand was made on him for its return, and not with what it might have been sold for at a different time.

W. D. Greer and J. W. Bloomfield for appellant.

Thos. E. Moss and Helm & Bruce for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

In the spring of 1887 the appellant company was organized under the provisions of the General Statutes of Kentucky. The purpose of the concern was to deal in mineral lands, notably iron ore lands, on the Cumberland and Tennessee rivers; to build blast furnaces and sell its stock, and take stock in other enterprises, etc. Its authorized capital stock was $3,000,000. It had not, however, a dollar of paid-up capital.

The promoters of the enterprise consisted of a dozen or more prominent business men in and about Paducah, Ky., and in Tennessee. Of these Messrs. Tharpe and three others were the owners of some 5,000 acres of valuable ore lands in the desired locality, which they estimated to be worth $100,000. Indeed they asserted that if capitalists could be induced to locate furnaces at or near Paducah, Ky., they had one bank so inexhaustible in its supply of iron that it alone was worth $500,000. The company eagerly took this land at the first-named estimate.

The stock was then put on the market and sold at the rate of $10 per share, and at that rate was taken by the owners of this land. It develops, however, that of the 10,000 shares thus coming to these owners 4,500 of them, by a private written agreement, were set apart to one Palmer in trust for these owners—themselves directors in the company—and a number of other parties, including a majority of the directory of the company.

Such was the situation in August, 1887, when it was concluded that the one thing needful to make the enterprise a success was to obtain a president other than one of their own number, whose high character and business qualification would make the stock "go," and whose name would draw the attention of capital and induce the erection of furnaces, etc.

The appellee, a resident of Jefferson county, living near Louisville, was selected as the proper man. He was identified with the successful development of the iron interests of Birmingham, Alabama, and had associated in enterprises there with Dr. Standiford, Dr. Caldwell and others—men of worth. He was then engaged in constructing the Elizabethtown & Hodgenville railroad. A committee of the incorporators, including the attorney for the company, was sent to induce him to accept the presidency of the concern. There was some delay in getting a favorable answer, owing to the work appellee had on hand, but he finally agreed to accept the position if paid an annual salary of $5,000. He also asked that he be given a block of stock to place him on an equal footing with the other directors. They agreed to this salary for the company, and after a consultation among themselves agreed that the appellee should have a block of stock out of the 4,500 shares held by Palmer. The appellee supposed he would get about 500 shares. He afterwards got 323 shares. The appellee at once repaired to Paducah, was elected president of the company and entered upon the duties of his office. He was again elected president in the January following, and drew his salary regularly until the spring of 1888, when he voluntarily ceased to draw it, because the company became short of funds or needed all it had on hand to meet its obligations and especially its subscription to the Paducah Iron Company, which had been created by the energy of the appellee. He severed his connection with the company in January, 1889, and upon the refusal of the company to pay him the balance of his salary—which he demanded for the first time on December 31, 1889—he instituted this action therefor.

The refusal of the company is based, first, on the claim that the appellee, in order to induce it to elect him president, agreed to sell 3,500 shares of stock at $35,000, or, if he did not, that he would take them himself, and having sold only an inconsiderable number of shares, owes the company that sum, less the price of the few shares accounted for.

Second. That the appellee caused the company to buy at par 1,000 shares of stock in the Paducah Iron Company, and then induced the appellant company to sell the same stock at 80 cents per share, and he himself having thus bought 10 shares, made a profit of $200 out of his own company, for which he should account.

Third. That the appellee is chargeable with the 323 shares he received, because it was a part of the 4,500 shares issued in fraud of the rights of the stockholders and without a consideration for it; that appellee had notice of this fraud and can not profit by it.

Fourth. That appellee agreed to make the concern a success upon being elected its president, whereas he wrecked it; that his salary was exorbitant and his services worthless, etc.

With respect to all these defenses, save the third, which we will notice further along, we are of opinion that they are not sustained by the proof. The appellee did not agree to pay the company $35,000 for this unsold stock, whether he sold it or not. He took it to sell as other directors took stock to sell, and is accountable for what he sold or does not account for, and is properly charged by the chancellor with the 50 shares at $500, which he let Mulholland have. The purchase of the Paducah Iron Company's stock was in fact at 70 cents. The site and ore land conveyed that company was a bonus to induce their location near the lands of the appellant.

After the election of the appellee as president there is no doubt that he promised the stockholders great success and held

out great inducements before those supposed to have money to invest. That is what he was employed to do. He did not stake his salary on the fulfillment of these prophecies.

The receipt by the appellee of the 328 shares of the 4,500 is of a more serious character. This stock was issued to Tharpe ostensibly in part payment for the ore lands originally put into the concern, but it was immediately, and in pursuance of a prior contract, assigned to one Palmer to hold for certain parties who in the main composed the directory of the company making the purchase of the lands. The appearances would indicate that as directors of the company they were induced to make the purchase at the price of $100,000 by reason of a private arrangement by which they were to get back for their own personal benefit a part of the purchase price paid out by the company. However firm the belief of these directors was that the lands were, in fact, worth the $100,000 paid for them, and it is by reason of that belief that their conduct is rendered less reprehensible, yet we think that good faith required them to give the benefit of the transaction to the stockholders for whom they must be held to be acting. This would result in a return of these 4,500 shares and their cancellation. The appellee, however, was not a party to this arrangement, and was innocent of any wrong in the procurement of the shares obtained by him under his contract at Louisville.

Nevertheless after he became president of the company, and by reasonable inquiry could have ascertained the true history of their issual, he should have surrendered them when they were demanded of him. He had paid nothing for them, and we think the judgment of the chancellor is right in adjudging that he is liable for their value at the date of the demand for their return. He is not liable for the price at which he might have sold them, as his was not a wrongful conversion, and he is not an innocent holder for value, for it is evident they constituted, in fact, no part of his salary. But the chancellor allowed the appellee interest on his salary from January 1, 1889. This was when he quit the employment of the company, but he did not demand or call for his salary, as is averred in his petition, until December 31, 1889. He voluntarily left it in the treasury until the date named. Its payment was then, for the first time, refused; and it seems clear that he is entitled to interest only from the last-named date.

Wherefore, the judgment is reversed on the original appeal and affirmed on the cross appeal and a judgment is directed to be entered in accordance with this opinion.

BOYD COUNTY, &c. v. ROSS.

(Filed December 2, 1893.)

1. It is essential to the validity of a sheriff's bond, as collector of the county levy, that the county court shall pass upon the sufficiency of the sureties and accept the bond. The mere fact that such a bond has been executed by a sheriff and his sureties and delivered to the county clerk and preserved by him does not show approval or acceptance by the county court. Approval and acceptance must appear from the orders of the county court entered of record.

2. Same—Entry of orders nunc pro tunc—A county court, in September, 1889, has no right to enter, nunc pro tunc, an order reciting that on January 23, 1888, an order was made by such county court approving and accepting a certain county levy bond of a sheriff.

The court has power, during a term, to alter or amend any order entered during such term according to the truth of the case; after the term expires such power ceases except as to correction of clerical misprision; and, even as the clerical misprision, there can be no correction or amendment unless there is something in the record to correct or amend by. Where there is no order at all, such order can not subsequently be supplied from the memory of the judge.

8. Same—Right to appeal—The sureties on such bond, executed in January, 1888, have a right to appeal from an order entered in September, 1889, nunc pro tunc, reciting that the bond was accepted and approved in January, 1888.

John F. Hager and W. J. Hendrick for appellants.

Knott & Edelen for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Lewis.

This is an appeal from a judgment of the Circuit Court reversing and setting aside an order made September 23, 1889, by the Boyd County Court, directing entered of record nunc pro tunc the following, alleged to have been made and directed entered of record January 23, 1888, as an order of said county court, viz.: "L. L. Kibbé, sheriff of Boyd county, this day appeared in open court, and, together with G. W. Ross and others named, who are approved and accepted by the court, entered into, signed, acknowledged and delivered bond to the Commonwealth of Kentucky, conditioned according to law for the collection of the county levy of Boyd county for the year 1888, which bond is accepted and approved by the court."

It seems to be conceded no order of court approving and accepting the bond of Kibbe, sheriff, and sureties, was entered of record during term of the Boyd County Court, including January 23, 1888. In fact it appears no such entry was made, from the following recital in the order of September 23, 1889: "The response of G. W. Ross and others, sureties of L. L. Kibbe, to rule awarded herein at April term, 1889, of this court, having been considered, together with the records of this court, including the county levy bond of said Kibbe January 23, 1888, the court finds and adjudges, from the recollection and memory of the judge then and now the court has of the facts connected with the execution, acknowledgment, delivery and acceptance of said bond, that an order of this court was, on said January 23, 1888, made and directed to be entered accepting and approving the bond," etc.

It is no less the right and duty of a county court; under the statute, to pass upon and determine as to sufficiency of sureties in a county levy than in a revenue bond. And it is essential to the validity and force of each that it be not only signed and delivered by sureties, but also accepted and approved by the court. (Commonwealth v. Williams, 14 Bush, 297; Bracken County Commissioners v. Daum, 80 Ky., 388; Commonwealth v. Yarbrough, 84 Ky., 496.)

It thus becomes apparent that execution of the bond, though filed and kept by the clerk, affords no evidence of the other essential and independent fact that the sureties were approved, and the bond was accepted by the court. So that as there was not at the time entered of record an order of court approving and accepting the bond, appellee's sureties can be made liable for default of the sheriff only, if at all, in virtue of the order of September 23, 1889. And, as it appears an action had been brought on the bond against them for that cause, they had a direct interest to resist making such order and clear right of appeal

therefrom to the circuit court. The only question, then, for us to consider is whether the county court had authority to make and have recorded the order of September 28, 1889.

In Commonwealth v. Doyle, 2 Bibb., 248, this court used the following language: "During the term the court has power to alter or amend the record according to truth of the case; but after the term expires the court ceases to have such power, except in cases of clerical misprision, and even then it is an inviolable rule that no amendment can be made unless there is something in the record to amend by. This rule is necessary to preserve that sanctity and verity which, in contemplation of law, the record possesses, for if the record could be altered or amended by anything but itself, it would, in point of verity, be inferior to that by which it is amended."

The general rule thus stated has been repeatedly and uniformly approved and applied by this court, and it has been distinctly held more than once that the mere recollection of the judge of a court of what took place at a former term is not sufficient to authorize an addition to or amendment of the record in regard to any order or judgment.

In Lynch v. Reynolds, 6 Bush, 547, is this expressive and emphatic language: "The proposition is to supply the whole by memory of the judge alone of what took place. The accuracy of memory of the judge as to what he states can not be questioned; but can omissions and failures to enter orders and judgments be thus supplied at a subsequent term? If they can the records of courts must lose their verity and the rights of citizens depend on varying and fading memories of men. The law forbids such a state of things. This question we regard as settled in Vandever v. Griffith, 2 Met., 425."

It seems to us there could be no better illustration than is afforded by this case of the wisdom of adhering to that rule. The statute in force when the alleged bond was executed required each county judge to ascertain and determine the solvency and sufficiency of county levy bonds, and, in case of approval and acceptance, to make and cause an order showing the fact to be entered of record. It was, besides, his duty to examine the order book and see the order was duly entered. But as result of negligence of the county judge of Boyd in failing to have the order accepting the bond entered of record, if it ever was indeed accepted, there was no way to obtain remedy for default of Sheriff Kibbe against his sureties without such an order as was attempted to be made September 28, 1889. So that the county judge had a personal interest in making that order whereby to render sureties of Kibbe not so before then liable and release himself from possible liability.

In our opinion the rule should be strictly applied in this case, and the judgment of the circuit court is, therefore, affirmed.

PAYNE, &c. v. JOHNSON'S EX'ORS, &c.

SAME v. SAME.

(Filed December 7, 1893.)

1. Power of appointment—How exercised—Where one is invested with an estate for life in land, with power of appointment by deed or will as to the remainder, the general rule, where the question is as to whether or not the power was executed, is that an intent to execute the power must appear in express terms or by necessary implication; otherwise it will be held that the donee has not executed it.

2. Same—Case—One who by the will of his mother was given a life estate in certain land, with remainder to his children, and in default of children living at his death, then, with power of appointment by deed or will, to such use as he saw proper, and, in default of appointment by him, then remainder to his heirs at law, executed a mortgage conveying all his right, title, interest and claim in said tract. Held—Since an intention to exercise the donee's power of appointment does not appear in the mortgage, it must be held to embrace only the grantor's life estate in the land described in it.

3. Same—Exercise of power of appointment by will—The general rule as to the exercise of powers of apppointment has been modified in this State by statute as to devisees and bequests so that a devise or bequest extends to property as to which the testator has a power of appointment, to which it would apply if such estate were the testator's own property, unless a contrary intention appeared from the will.

4. Same—A devise by a testator of "what little property I have after payment of my debts," and of "what little remains from the wreck of my property," passes title to a remainder interest in land as to which the testator held a power of appointment, since such terms in the will would have embraced such property if it had been testator's own estate, and an intention not to execute the power by such will does not appear in the will.

5. Same—Devise to creditors—Settlement of estate—Such a will by testator is a devise of the land as to which he held a power of appointment to his creditors. And, while all of the creditors were not necessary parties to a suit by the administrator for a settlement of testator's estate, they were entitled to be heard, and some of them should have been made parties so as to represent the interest of all; and an order of sale entered in the action to which none of the creditors were parties should be set aside.

6. A devise of land to one for life, remainder to his children, and in default of children, to such use as the life tenant might appoint, by deed or will, and in default of appointment, to the heirs at law of the life tenant, does not vest a fee simple in the life tenant on the ground that the life tenant also has power of disposition.

7. Same—One who loans money to such life tenant and takes a mortgage on his interest in such land to secure the loan can not claim a lien on the remainder interest in the land remaining after the life estate of the mortgagor, although the money so loaned was applied to the payment of lien debts against such land created by the testatrix.

8. One who loans money to a life tenant and takes a mortgage to secure same must take notice of the limitations annexed to the mortgagor's title by the will under which he claims.

R. W. Woolley and Fairleigh & Straus for appellant.

J. D. Hunt and Geo. S. Shanklin for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

Mrs. Sally Howard Woolley died in the county of Fayette, leaving a large real and personal estate which she devised to her children.

The present litigation originated from the sixth clause of her will, that reads as follows:

"Sixth. It is my will that my executors and trustees, after the payment of my debts and settlement of my estate, divide, or cause to be divided, all the rest and residue of my estate, real, personal or mixed, into equal portions for the purpose of making just and equal partition among my children and their descendants; and after such division shall have been made, I direct my executors and trustees to convey to each one of my children, or their descendants entitled thereto, one-half of such share or pur-

part, absolutely and in fee simple, and the other half of such share shall be held or invested in good real estate, in the discretion of my trustees and executors, for the use and benefit of my said child for the term of his natural life, and after his death to the use and for the benefit of his children, or in default of children living at the time of his death, to such uses as such child may declare, limit or appoint by deed or will; and in default of such appointment, then such moiety of such share shall pass to and vest in the heirs of such child absolutely and in fee simple. * * * It is my will that this provision shall only apply to the shares of my sons and not to the shares of my daughters, which are hereinafter specially provided for by me."

Under this clause of the will each son had an interest in fee simple in one-half of the share allotted him and a life estate in the other half, with remainder to his children, and in default of children living at the son's death the latter, the son, is given the power of appointment, by deed or will, to such uses as he may see proper; and in default of such appointment then the moiety devised to the son for life shall pass to his heirs in fee simple.

The testatrix was the owner at her death of a large and valuable tract of land near Lexington, called "Howard's Grove."

The executors of the will had the real estate partitioned between the devisees, and Aaron H. Woolley, one of her sons, obtained as his share in the Howard's Grove tract 166 acres that was conveyed to him by the executors as directed by the will, one-half in fee simple and one moiety for life, with remainder over, with the power of appointment, etc.

Before any partition of this land was made Aaron H. Woolley, the son, made an absolute conveyance to John B. Payne of "all his right, title, interest and claim" in and to this Howard Grove tract of land, and also his interest in other realty located in and out of the State. While this conveyance to John B. Payne is absolute on its face, it is apparent that it was not a sale, but executed to Payne to enable the grantor to raise money to pay off his indebtedness, and by a writing executed by John B. Payne, at the date of the deed made to him by Woolley, Payne obligated himself, after he was repaid any moneys he might advance for Woolley, to convey this land in trust to Robert and Frank Woolley to hold for the benefit of the original grantor, in the same manner as provided by the will of his mother, reserving to the grantor, Aaron H. Woolley, the power of appointment by deed or will.

It does not appear that Payne paid any money for Woolley, and the former after this, by a conveyance of record, substituted R. W. Woolley and Frank Woolley as trustees for Aaron H., as provided by the terms of obligation executed by Payne to Aaron H. Woolley at the time Woolley executed the conveyance to Payne.

Prior to the conveyance by Payne to these trustees, Payne and A H. Woolley executed a mortgage to Zerilda R. Hearn on 66 acres of this share of the Howard Grove tract, allotted to A. H. Wolley in the partition, to secure the payment of $3.000, and in the year 1876 the trustees, R. W. Woolley and Frank Woolley, in conjunction with Aaron H., placed another mortgage on the latter's share, 166 acres, to secure a debt to Madison C. Johnson of $1,700, the mortgage purporting to convey all of the first party's "right, title and interest of every kind in the above-described property."

The conveyance from A. H. Woolley to Payne was executed to the latter on September 2, 1873, and reconveyed to R. W. Woolley and Frank Woolley, as trustees of A. H. Woolley, on March 23,

1874, and in each conveyance the limitations and conditions placed upon the share devised to A. H. Woolley are reserved to the devisee, and particularly by the writing executed by John B. Payne to A. H. Woolley at the date of the conveyance by Woolley to Payne; that writing of the same date of the deed authorized Payne to reconvey to Robt. W. Woolley and to Frank Woolley this land in trust, which was done by the deed of March 28, 1874.

The writing further provides that these trustees shall convey the property in such manner as he may by will direct, showing a reservation on the part of A. H. Woolley of the right to exercise this power given him by the will of his mother.

After the execution of these several conveyances, including the mortgages to Mrs. Hearn and to M. C. Johnson, A. H. Woolley died, leaving a last will, by which he devised his estate to his sister, Mrs. Payne, Frank Woolley and Vert Woolley.

The will was admitted to probate in the Fayette County Court, its contents being embraced in a letter written to his sister, Mrs. Payne: "What little property I have, after the payment of my debts, I desire shall be equally divided between Frank, Vertner and yourself. I make no formal will, but the above is the way that I want what little remains from the wreck of my property shall go.

(Signed) "A. H. WOOLLEY."

Madison C. Johnson acquired by purchase, or in some other manner, the note for $3,000 given to Mrs. Hearn, and held the note executed to himself for $1,700. He having died, his executors, John Allen and Henry V. Johnson, instituted this action to enforce the mortgage liens for the two debts, and the chancellor directed the sale of the entire 166 acres upon the ground that the power of appointment had been exercised by the original conveyance of the land from A. H. Woolley to Payne, and the principal question in this case is, was the moiety in which A. H. Woolley had only a life estate subject to the payment of the notes sued on by reason of the mortgages executed to secure them?

It is plain that all the instruments of writing, by which liens were created on this entire share allotted to A. H. Woolley, were in the nature of mortgages, and no attempt was at any time made to pass the absolute fee; but, on the contrary, the intention to do so is negatived by the two writings that, upon their face, create only an equitable right on the part of the two creditors by which a lien is created to pay the grantor's debts.

This lien may be enforced, but only to the extent of the interest of A. H. Woolley in the land devised to him by his mother. This he purported to convey not only by the mortgages to Johnson and Mrs. Hearn, but by the original conveyance to John B. Payne, passing to the latter "all his right, title, interest and claim in and to the estate known as the Howard Grove estate."

What right or title did he then have may be the proper subject of inquiry, and what title was intended to be passed by the conveyance to John B. Payne.

The will of Mrs. Woolley had then been admitted to probate, and under its provisions her son, Aaron H. Woolley, had a fee in one moiety of his share, and a life estate, by express terms, in the other. The parties were attempting to convey only what title the grantor, Aaron H. Woolley, had, and instead of exercising the power of appointment given him by the will, he was reserving it by the writing executed to him by Payne at the same time this absolute deed, intended only as a mortgage, was executed.

It may be argued that the creditor, Mrs. Hearn, had no notice of the writing given by Payne to Woolley, showing that the deed to Payne was only to secure him in his liability for Woolley, and seeing the deed to Payne of record, had the right to assume that it passed the absolute fee.

The right, title and interest of the grantor was intended to be conveyed, and the creditor, parting with his money, could easily have ascertained, by an examination of the will of Mrs. Woolley, the nature and extent of her son's interest.

There was no attempt by any language used in the deed to Payne that would indicate the exercise of the power of appointment or an intention to do so, but only a purpose to pass all the title the grantor had in the land, and nothing more.

The execution of the power must be in express terms or by necessary implication, and following the well-settled rule on the subject it can not be said that the writing or conveyance to Payne was an execution of the power.

In Funk v. Eggleston, 92 Ill., 515, it is said: "The intention to execute the power must be apparent and clear, so that the transaction shall not be fairly susceptible of any other interpretation, for if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power; but it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is enough that it shall appear by words, acts or deeds demonstrating the intention." (Blaggs v. Miles, 1 Story, 426.)

Recognizing this doctrine, it can not be maintained that the incumbrances placed upon the property by the donee of the power was an appointment, or intended as such.

Now was A. H. Woolley invested with a fee by reason of the general power given him to dispose of that part of the devise in which, by express terms, he held an estate for life?

Chancellor Kent says that a devise of an estate generally or indefinitely, with the power of disposition, passes the fee; but that is qualified by saying "unless the testator gives to the first taker an estate for life only, and annexes to it the power of disposition. In such a case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee." (Kent's Com., volume 4, page 320; McCullough's Adm'r v. Anderson, 90 Ky., 126.)

The power of disposition exists in this case because the donee of the power has only a life estate and must exercise the power of appointment, else the estate passes as directed by the will of Mrs. Woolley.

We have referred to the rule by which courts are to be governed in determining whether or not a power of appointment has been exercised, but that rule, with reference to a general devise or bequest, has been changed by our statutes as to wills. It provides: "A devise or bequest shall extend to any real or personal estate over which the testator has the discretionary power of appointment, and to which it would apply if the estate was his own property and shall operate as an execution of the power, unless a contrary intention shall appear by the will." (General Statutes, chapter 113, section 22.)

This provision is taken from the English statute of wills, and, as Judge Story says in a note to Blaggs v. Miles, has dispensed with "the refined and subtle distinctness in relation to the existence of powers."

The will of the testator, A. H. Woolley, is set forth in the peti-

tion to subject this property, as well as the other writings referred to, and the question arises, was this will in execution of the power? It is contended it is not, because it shows upon its face that such was not the intention of the testator, for the reason he only disposes of his estate. "What little property I have, after the payment of my debts, I desire, etc. I make no formed will, but the above is the way I want what little remains from the wreck of my property shall go."

The right to dispose of this life estate by will, so as to pass the fee, is unquestioned; and if this had been the testator's own estate it would certainly pass under this provision of his will. He could dispose of it as he pleases, and was, when executing the power, passing to his devisees a perfect title.

What he regarded as his estate was that doubtless over which he had complete control; and having mortgaged the estate in which he held the fee, he knew full well that there could be but little left of his estate. The devise by the terms of the statute of what little he had carried with it the real estate over which he had the discretionary power of appointment, and the fact of his devising what little property he had does not negative the idea of his intention to pass by his will this life estate; and if it had been his own property, in the language of the statute, it would have passed by its provisions.

It is said that the will confines the devise to the property of the testator. If so, then by the statute the title to this life estate passes; for if not, a general devise of what the testator owns must be held not to pass that over which he had this discretionary power of appointment.

It is argued that a power of this sort is not property, and while this may be so, by this statute it passes as property from the donee of the power to his devisee under a devise of all the testator owns.

It was not originally liable for the debts of the donee of the power, but he can make it so; and having borrowed this money for his own purposes, we can not well see why he might not have intended to charge this estate with the payment of his debts. The will being in execution of the power, it is then evident that these appellees held no lien on that part of the share of Aaron H. Woolley in which he held a life estate.

The testator makes it liable for the payment of his debts, and hence is in fact a devise to creditors, who are entitled, in so far as this record shows, to receive the proceeds of sale in proportion to their respective claims.

It is argued that some of the borrowed money was applied to the extinguishment of liens on this land, created by the original testatrix, and the creditor should, therefore, be subtsituted to the rights of the lien holder. This can not be done. The creditor took indemnity by way of mortgage, and obtained all he bargained for in that way; and, therefore, has no priority over other creditors in the one-half of this land.

While all creditors are not necessary parties to an action by an administrator for the settlement of an estate, still they are entitled to be heard, and in a case like this, with no one representing them and their debts a charge upon the realty, they or some of them, were necessary parties to the action enforcing this lien.

A judgment has been rendered affecting those who have priority in the distribution of assets arising from the sale of this land, and they should have been heard.

The judgment is reversed, with directions to set aside the sale and for proceedings consistent with this opinion.

Judge Pryor delivered the following response and modification of opinion:

Counsel in his petition for a rehearing calls the attention of the court to that part of the opinion in which it is stated "it was not insisted by counsel that the mortgage to M. C. Johnson, etc., was an exercise of the power of disposition by A. H. Woolley," and says the point was directly made by him, etc.

This criticism of the opinion is just, as it is plain from the brief of the counsel that such was his contention, and the court has, therefore, stricken from the opinion so much of it as alluded to the concession of counsel on that subject. As to the revivor against or in the name of the widow and children of Frank Woolley, or his personal representative, we have to say, in view of the character of the litigation, the opinion must affect all interested, and when the case returns the revivor should be allowed, and the opinion is modified to that extent.

In this action the only question was, were the mortgages or other writing executed by A. H. Woolley in execution of the power conferred by the will of his mother?

This is not an action for a settlement in the nature of a creditor's bill, but one ignoring the rights of creditors, who were entitled to participate in the distribution of A. H. Woolley's estate, and a sale of the remainder interest, so far as one-half of A. H. Woolley's interest is concerned under a writing that passed no title, and was not, until the power was executed, subject to the debts of A. H. Woolley. The mortgages were passing an equitable interest that at the time belonged to others than the grantor. R. W. Woolley, as appears from the record, is a creditor, and entitled to be heard as to the merits of his claim, and under such circumstances we adhere to the opinion that the sale should be set aside.

The opinion is asked to be reopened as to whether or not the will of A. H. Woolley was an exercise of the power given him by the will of his mother. That question was presented and discussed in the brief of the appellants, and was made necessary as a guide for the chancellor in the court below.

The devisees of A. H. Woolley were before the court, and we are not inclined to modify the opinion in that regard.

The petition for a rehearing and modification are each and all overruled, except to the extent indicated.

CITY OF COVINGTON v. MENZIES.

(Filed December 7, 1893—Not to be reported.)

Constitutional law—The act of 1871, authorizing the city councils of Covington and Newport to pay a judge of a chancery court created by the act "such annual compensation in addition to that paid by the State as such councils may deem just and proper," is not unconstitutional or mandatory on the councils; and an ordinance of Covington allowing a chancellor a certain additional annual compensation is not void because without consideration.

W. A. Byrne for appellant.

Wm. Holt for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1871, the legislature created a chancery court for the counties of Kenton, Campbell, Bracken and Pendleton.

The salary of the chancellor was fixed at that paid the circuit judges of the State. By section 19 of the act "the city councils of the cities of Covington and Newport were authorized and empowered to allow and pay the chancellor such annual compensation in addition to that paid by the State as such councils may deem just and proper, but such additional compensation shall not be diminished during the term for which any chancellor shall have been elected." The act required the chancellor to hold courts at several places in each of the counties of Kenton and Campbell, viz., at the county seat of Kenton, Independence, and at Covington; at the county seat of Campbell, Alexandria, and at Newport.

The city council of Covington, in the month of June, 1888, by an ordinance, agreed to pay the sum of $500 per year from the 1st of July of that year, and further provided that it should continue so long as the chancery court is held in Covington.

This salary was paid up to January, 1891, but from that time and for the years 1891 and 1892 no salary has been paid, and this action was instituted by Chancellor Menzies to compel payment.

The ordinance has never been repealed or notice given by the council of its purpose to refuse payment. The chancellor has discharged the duties of his office faithfully and well, and is now met with the defense that the appropriation was made without any consideration, and further that the act of the legislature compelling the city to make the allowance was in violation of the Constitution in force when the act was passed.

We perceive nothing in the act mandatory in its character. It is left entirely to the discretion of the city council as to whether any additional salary should be given, and in the exercise of this discretion the council of its own volition made the allowance, or added $500 to the salary of the chancellor. Courts had to be held in two several places in the county for the convenience of its people—one at Covington and the other at the county seat—and the legislature, in creating the office, saw proper to place any additional burden (other than the regular salary allowed circuit judges) on those most interested in a tribunal organized for the rapid dispatch of litigation and so absolutely necessary to the interests of the city located within the district. Such considerations induced this legislation and was sufficient to authorize the legislature to invest the city with the power to pay a fair compensation to the able chancellor whose arduous labor justly entitles him to this small pittance allowed by the council.

Judgment affirmed.

HOLTON & CO. v. ALLEY, &c.

(Filed December 9, 1893—Not to be reported.)

1. Pleadings—Pendency of another action on some cause—In an action by an assignee on a note, an answer of the maker alleging the pendency of another action on said note, which is not replied to, presents a bar to any recovery.

2. Same—Mere possession of a note by one claiming it by assignment is not evidence of ownership where the maker has filed a verified plea denying the alleged assignment and ownership.

3. Record of mortgage destroyed by fire—Innocent purchaser—Where the records of a county clerk's office, in which an alleged mortgage was recorded, have been destroyed by fire, it is the duty of the mortgagee to take steps to have the lost record supplied as provided by statute, and when the mortgagee allows five years to elapse after such fire and then institutes suit on the mortgage without having supplied the lost record, one who has in the meantime, without notice of the alleged mortgage and for value, bought the land covered by the mortgage will be protected as an innocent purchaser for value and without notice. The mortgage will be treated as an unrecorded one.

William J. Hendrick, Reid Rogers and B. D. Lacey for appellants.

Wood & Day and T. L. Edelen for appellees.

Appeal from Rowan Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellants, claiming to own, by assignment from one Geo. V. Morris, a note for $300, executed by Nannie and Cyrus Alley in May, 1875, and alleged to be secured by a mortgage on a tract of land in Rowan county, instituted this action in April, 1885, seeking a personal judgment against the obligors and a foreclosure of the alleged mortgage.

Alley and wife answered, denying, first, the alleged assignment to the appellants; second, the existence of any such mortgage; and pleading, third, full payment of the note to Morris, the payee; and, fourth, the pendency of another suit, on the same note, between the same parties, the papers of which had been burned in 1880.

The appellants replied, denying the alleged payment, but failed to reply to the plea of the pendency of another action. The appellees, Day & Truet, were made defendants to the suit, and answered, alleging that they had bought and paid for certain portions of the land alleged to be under mortgage in about 1885, before the suit was instituted, and had no notice of any mortgage.

Upon hearing the chancellor refused any relief on the mortgage, but gave a personal judgment against Cyrus Alley. It seems to us, first, that the pendency of the former action was a bar to any recovery even against Alley, though he prays no cross appeal. The lost record should have been supplied as provided for by the statute (chapter 72, section 4, General Statutes). Second, there is no proof as to the assignment of the note, and the verified plea of the Alleys of non est factum, with reference thereto, is conclusive against the appellants, especially in view of the plea of payment to the assignor.

Mere possession of the note is not evidenced of ownership against a verified plea. (Crosthwart v. Misener, 13 Bush, 543; General Statutes, chapter 22, section 4.)

Third. Conceding that there was a mortgage on this land in 1875, and as to whether or not there was the proof is conflicting, it seems to us the negligence of the mortgagee, in failing to restore it in the easy way provided by the statute, was such as to prevent a court from disturbing an innocent purchaser.

Some five years elapsed between the burning of the courthouse and the records of the institution of this action. It is a case for the application of the rule that where a loss must fall on one

of two innocent parties, it will be put on him whose negligence has made the loss possible. As to these purchasers the alleged mortgage must be treated as an unrecorded one.

Judgment affirmed.

YOUNG'S GD'N, &c v. SADLER, &c.

(Filed December 5, 1898—Not to be reported.)

1. Power of court over orders—Settlement of decedent's estate—Where a court, after confirming its commissioner's report fixing the respective amounts to be charged to each of several children as advancements in the settlement of their father's estate, discovers that by an oversight large sums have not been charged to certain children as advancements, at a subsequent term the court has the power and should enter an order charging such children with such overlooked items so as to secure an equitable settlement and distribution of the estate.

2. Same—Advancements—Value to be charged for land—In this case the testator, in his lifetime, assigned certain land to one of his children and charged it to her at $5,840; subsequently he took back said land, and finally, by a codicil, gave an estate embracing much of the same land to his grandchildren without fixing any value on same. Held—Under all the facts of the case such land must not be charged to the grandchildren as worth $5,840, it appearing that in fact it is worth much less.

W. P. Sandidge and Wm. H. Holt for appellants.

Forgy & Petrie and Edward W. Hines for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hazelrigg.

Jonathan R. Bailey, a citizen of Logan county, Ky., made his will in February, 1887, added a codicil thereto in April, 1888, another in March, 1889, and died in September, 1890.

The executor named in the will not qualifying, at the instance of the parties interested the Fidelity Trust & Safety Vault Company qualified as administrator with the will annexed, and brought an action, out of which this appeal grows, for the construction of the will and for specific directions as to the administration of the estate.

The chancellor, at the January term, 1891, of his court, after a reference of the case to the master commissioner for that purpose, rendered a judgment, among other things, fixing the respective amounts to be charged to each of the children and grandchildren of the testator as advancements made to them in his lifetime, and directing a distribution among them accordingly.

Some months after the expiration of the term it was discovered that a tract of some 334 acres of land, devised in the last codicil to the grandchildren, and for which they were to account in the final settlement of the estate, had not been taken into the account or charged to them.

It was confessedly an oversight. The parties against whom the error was committed, Mrs. Sadler and Mrs. Browder, daughters of the testator, filed their answers and cross petitions in the action, and sought to have the judgment vacated or modified and the error corrected.

They alleged that they had employed no counsel because they relied on the court and on the plaintiffs' attorney to see that their interests were protected.

The guardian of the grandchildren resisted this upon the ground that the sons-in-law, Sadler and Browder, had notice of the action of the commissioner and of the judgment confirming it, and had in fact been largely instrumental in getting up the report as the basis for the judgment.

The chancellor adjudged that there was nothing in the former proceeding or judgment depriving the court of its power or releasing it from its duty to make such orders as appeared necessary to a fair and equitable settlement and distribution of the estate of the testator among his devisees, and rendered a judgment charging these grandchildren with these lands. In thus modifying the original judgment it is insisted the court exceeded its power and committed an error to the prejudice of the appellants, the grandchildren. We think differently, however.

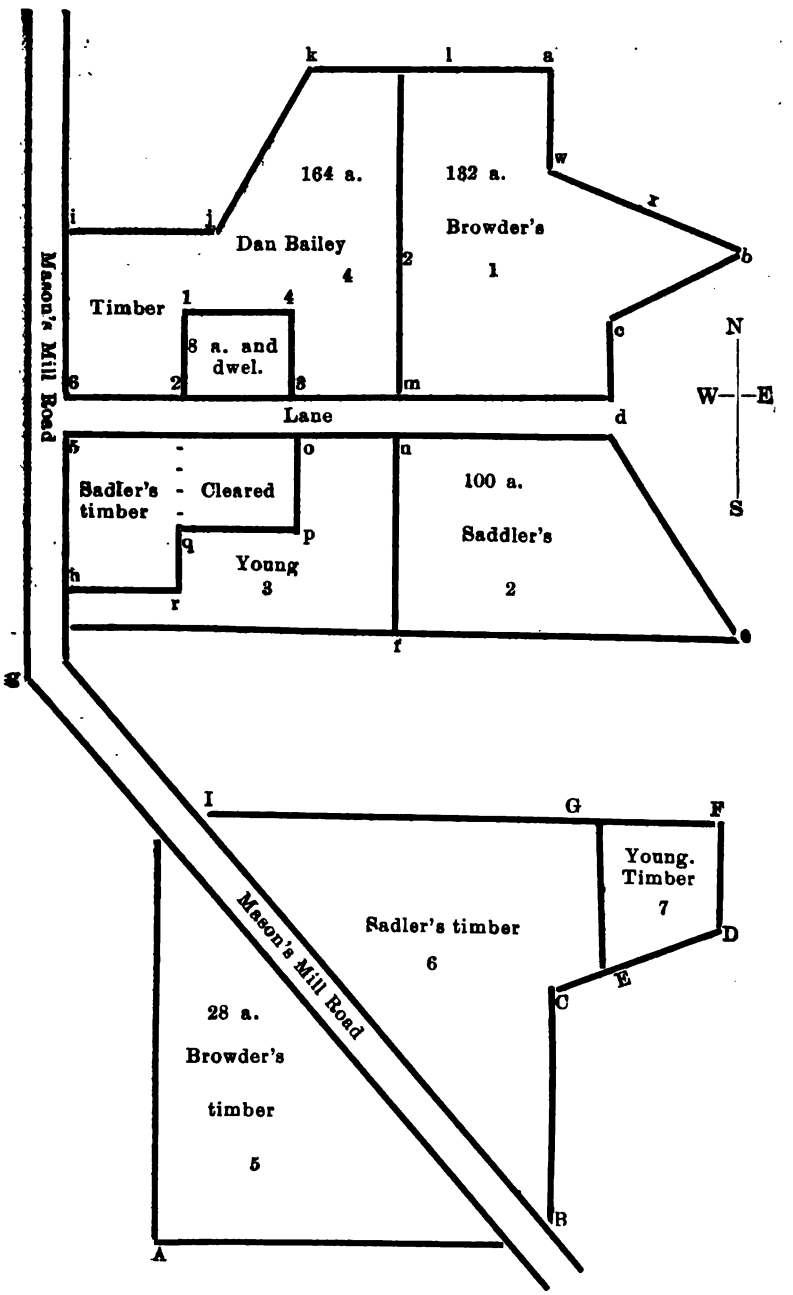
While we can not say that there was any "misconduct" or fraud practiced by the parties who obtained the advantage, of any "accident or surprise" or "unavoidable casualty or misfortune" which entitled the applicants to a new trial or a vacation of the former judgment. Indeed we may say there were none of these things; certainly no semblance of fraud or misleading conduct, nevertheless the chancellor still had full control of the case and the distribution of the assets; and, manifestly, upon the suggestion even of so palpable an error, his duty was to render a further judgment charging the favored devisees with the omitted items.

In fixing the amount of these omitted charges, however, it seems clear to us that the chancellor committed a serious erorr, and this brings us to a consideration of the real question involved on this appeal.

The testator left as his only heirs at law two daughters, Bettie B. Sadler and Florence Browder; also two grandsons, John R. and Geo. T. Young, infant children of Emma Young, a deceased daughter, and a granddaughter, Anna Bailey, infant child of Daniel Bailey, a deceased son. His widow also survived him.

He owned some 666 acres of land, exclusive of the mansion house and grounds, and in about 1874 had parceled it out into four equal parts, quantity and quality considered, and had given to his children, then all alive, one part each. No deeds, however, had been made to them.

The location of the tracts thus set apart is shown by the accompanying map:


k
l
a
164 a.
182 a.
w
x
i
j
Dan Bailey
4
Browder's
1
b
Timber
1
4
2
8 a. and
dwel.
c
N
6
2
3
m
W
E
Lane
d
Mason's Mill Road
5
o
n
Sadler's
timber
Cleared
100 a.
S
p
q
Saddler's
Young
3
h
r
2
f
e
g
I
G
F
Young.
Timber
7
Sadler's timber
6
D
E
C
Mason's Mill Road
28 a.
Browder's
timber
5
B
A

The lands were taken possession of and used by the children. The testator, in a book kept for the purpose of noting advancements to his children, charged these tracts to them respectively at the sum of $5,840.

Mrs. Browder, after using her portion some eight years, requested her father to take it back and invest its value in other lands, which he did. In the meantime his daughter, Emma Young, and his son Daniel had died. This was the situation in February, 1887, when he made his will. After providing out of the interest on certain U. S. bonds for the maintenance of his unfortunate wife, then a lunatic, he devised his whole estate in equal parts to his children and grandchildren. To Bettie B. Sadler and Florence Browder, one-fourth each; to Geo. T. and Jonathan R. Young, one-fourth, and to Anna Bailey one-fourth, the real estate, however, to be held for the life only of the first taker, etc.

He then provides thus: "As I have already, in pursuance of the purpose of this will, parceled out my land amongst my children and grandchildren named above, I desire the division I have made shall stand, so far as the land is concerned, giving Bettie B. Sadler 174 acres; Emma B. Young's children 168 acres; Anna Bailey, Daniel's only surviving child, 164 acres. * * * The money value of the lands first allotted to Florence has been invested by me in other lands at the request of my daughter. * * * The lands first allotted to Florence have been sold by me, one-half to Geo. T. Sadler and one-half to Daniel Bailey, to each one-half of 160 acres, to each 80 acres, at $2,920. Each one was to pay me 4 per cent. on this amount until paid. If Sadler's part is not already paid for at my death he shall have the privilege of still paying for it, and shall have further reasonable time to do so by paying 6 per cent. interest. * * * If not paid for in three years after my death, I desire Betty to take it as one of my heirs at the price at which it was sold, the lands, or any part thereof, so taken to be subject to all the conditions and restrictions of the real estate devised above in this will and testament. Daniel's death has thrown the other half back to my control, but at my death I wish Anna Bailey to take it on the same conditions Betty takes the other half," etc.

Thus matters stood until August, 1888, when the request of Mrs. Sadler to have the value of her portion of the home farm invested in other lands necessitated another change in the testator's plans. Her leaving not only threw back on his hands her own portion of the farm, but, of course, the trade by which she was to take one-half of the Browder portion was abandoned. This also seems to have altered the arrangement by which Anna Bailey was to take the other half of the Browder portion. The testator then had on hand and undivided the whole of the Browder and Sadler portions. The former consisted of two separate tracts of 132 acres, situated north of the lane or road running east and west through his farm, and 28 acres situated south of the lane.

The latter, or Sadler's portion, consisted of three tracts, all situated on the south side of the lane. The proof does not disclose how the Browder tract of 160 acres was divided between Geo. T. Sadler and Daniel Bailey, while the arrangement lasted for them to take it, and we do not know, therefore, just what portions were to go respectively to Mrs. Sadler and Anna Bailey, but as the 28 acres was at quite a distance from the Bailey portion and was adjoining a part of the Sadler land, it is safe to presume that to Mrs. Sadler was allotted this 28 acres, she getting the balance to make up the one-half of the 160 acres on the

north of the lane out of the 132-acre tract. As stated, the testator, by these changes of intention on the part of his daughters, was required, if he be held to this intention of dividing his land by his will, to make a new disposition of the two tracts thus thrown back on his hands, and in March, 1889, he made the following codicil: "In August, 1888, or about that time, I, at the request of my daughter Betty, took back the land allotted to her, and on which she was then living, and purchased for her another farm in Montgomery county, Tenn., of about 275 acres, which she accepts in lieu of that heretofore given her. Now, if I die before rewriting this will, I wish Johnathan R. Young and Geo. T. Young to have all the land heretofore allotted to Betty—that is, all the land south of the road—and Anna Bailey to have all north of said road or lane (subject to her mother's dower) and to account for it in the final division, and this additional land given to Emma's and Daniel's children, to be subject to all the conditions and restrictions of this will."

We have thus detailed the situation with some minuteness because of the earnestness and, we may add, the plausibility with which counsel for the appellees have contended that the plain intent of the testator was to devise to the Youngs the identical and original Sadler allotment of land, and to Anna Bailey the identical Browder land, and to charge them each with the sum of $5,840. Therefore, the point of the objection to such a charge on the part of the appellants being that the actual value of these lands at the time of the testator's death, at which rate they will be charged unless otherwise provided in the will, is some $2,000 less on each tract than the above figures. With the question of value, of course, we have nothing to do. The testator had the right to place his own estimate on the property advanced in his lifetime or devised in his will. Confessedly he does not charge the lands given in the codicil at any price. The grandchildren are to account for them in the final division, but he fails to add, what he could easily have done, the price at which they were to be charged. The testator not fixing the value, the law charges them with the value of the land at the time of his death.

The testator kept an "advancement book." In it he charged his children and grandchildren with these original allotments at a fixed value. He declines to do this in the codicil, when, for the first time, these lands were allotted to the grandchildren. It is true that at one time he contemplated that Anna Bailey should take half of the Browder land at $2,920, but this was to carry out the sale theretofore made to her father, who had had possession of the land. If he was careful enough to have fixed the price then, why does he not do so later on?

But it seems to us there is an insuperable obstacle in the way of the construction contended for. Anna Bailey does not get the identical land theretofore allotted to Mrs. Browder, nor do the Youngs get only the original Sadler tract. In the codicil of March, 1889, the testator makes a new deal. He provides that the Youngs are "to have all the lands heretofore allotted Betty —that is, all the lands south of the road."

They already had 168 acres south of the road, and now, by giving them the land heretofore allotted Betty, which included her original allotment and, as we may suppose, the allotment to her of the 28 acres, once Browder's, then they should get "all the land heretofore allotted to Betty—that is, all the land south of the road."

So Anna Bailey is "to have all north of said road or lane" (subject to her mother's dower). How, then, does she get the Browder land south of the lane? She is short 28 acres. Is she

to be charged, notwithstanding this, with the $5,840? The grandchildren do not, therefore, each get the specific tracts of land, the price of which had been carefully charged in the book of the testator when allotted to the older children and equally carefully not charged when devised to the grandchildren.

Therefore, not only did the testator not in fact charge the lands to his grandchildren at the price fixed in the judgment below, but he did not intend to do so. He could not have done so without destroying the equality among his heirs which he had kept uppermost in his mind all the while.

From the proof we are of opinion that the lands south of the road and devised to the Youngs in the codicil are worth $20 per acre as of the death of the testator, and the value of the lands north of the road devised to Anna Bailey is $25 per acre.

To the extent indicated the judgment of the chancellor is reversed, with directions to enter a judgment in accordance with the views herein expressed.

GREEN v. COMMONWEALTH.

(Filed December 7, 1893—Not to be reported.)

1. In criminal cases the jury are the exclusive judges of the facts, and a reversal can not be granted, on appeal, on the evidence alone.
2. The verdict convicting appellant of horse stealing was authorized by the evidence.

S. M. Payton for appellant.

W. J. Hendrick for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was convicted of the crime of horse stealing. He has appealed.

The same old effort to induce this court to grant a rehearing on account of the insufficiency of the evidence is repeated here, and we decide now, as heretofore, that the jury in a criminal case are the exclusive judges of the facts, and that we can not reverse on the evidence alone; but if we could review the evidence, the review would be as follows: That Mr. Morton's roan mare was taken from his pasture on Monday night; that the wires of the fence were cut in order to take her out of the pasture; that on Wednesday following he saw the appellant and his confused manner exciting suspicion, he asked him when he was last at Munfordsville, the place at which the mare was taken; he replied not for within the last three weks; that he then returned, and caused an officer to go and arrest the appellant; that the appellant told the officer that he had not been to Munfordville for three weeks; that he attempted to account for some roan horse hairs on his pants by saying that they came from the livery stable, where he had been working; that being put under arrest and taken back to Munfordville he said, on the way, that on Monday night he jumped off the train at Munfordville depot and hurt himself so bad that he could not walk, and desiring to visit his daughter, who lived only a few miles away, he went to

the pasture and got the horse to ride, with no intention of stealing it, and when he finished the ride he turned the horse loose to come home. It is a noteworthy fact, in this connection, that the horse was wild and hard to catch, and that there were other gentle horses in the pasture, and that the appellant was badly crippled.

All in all, we think that the jury had the right to believe that the taking of the horse was the same kind of borrowing as the entry into storehouses to borrow some property, and for which the Commonwealth put gentle restraint upon the appellant, as a reminder that that kind of borrowing was a mistake, offensive to its dignity. The instructions were full and correct.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

TEBBS v. LEWIS, &c.

(Filed January 24, 1894.)

Counterclaim—A claim for unliquidated damages connected with the subject of the action may be pleaded as a counterclaim.

In this action to recover damages for breach of contract, in which defendants denied the alleged breach on their part and pleaded as a counterclaim the damages which they alleged they had suffered by reason of plaintiff's breach of the contract, the claim of the defendants constituted a good counterclaim.

Blanton & Berry for appellant.

Swinford & Evans for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Yost.

This court has jurisdiction of this appeal. The judgment against the appellant is for $90.91, while his counterclaim, which was dismissed by the court, sought a judgment against the appellees for $1,500 in damages. The amount of the judgment, plus the amount of the rejected counterclaim, is the amount involved in the appeal.

Upon the 2d day of September, 1892, the appellant, Tebbs, agreed, upon the performance by them of certain precedent conditions, to sell to the appellees, Crumbers and Lewis, his farm in Harrison county and 80 head of sheep then thereon, for and in consideration of the sum of $9,500, $2,500 of which was due and payable on the 1st day of January, 1893, and the balance in three equal installments, due in one, two and three years, respectively, from that date, the deed to be made and possession of the land delivered on the payment of the $2,500 on the 1st of January, 1893.

Cumbers and Lewis then agreed to deposit with some party to be agreed upon a good and solvent note for $1,500 as surety for the performance of the contract by them, and in the event of their failure to take the land and pay the amount due January 1st, 1893, at its maturity, they authorized Tebbs, at any time after ten days from that date, to advertise and sell the land at public auction and to indemnify himself against loss out of the proceeds of the note. The contract was reduced to writing and signed by the parties.

Crumbers and Lewis failed to deposit the note for $1,500 as an earnest of their performance of the contract, nor did they pay or offer to pay the $2,500 on the 1st day of January, 1893. Fifteen days after this, however, they tendered this amount to Tebbs and demanded of him the conveyance and possession of the land and sheep, and upon his refusal to comply brought this suit against him for damages for a breach of his contract, which they fixed at $2,500.

In their petition they alleged that Tebbs had "waived the deposit" of the pledge and had extended the time of the payment of the $2,500 to the 15th of January, 1893.

In the first paragraph of his answer the defendant denied that he had waived the deposit of the note and controverted the other allegations of the petition.

In the second paragraph he alleged that after entering into the written contract for the sale of his land, he relying upon the promises of the plaintiffs to deposit the note for $1,500 as an indemnity and to pay the $2,500 when due, advertised and sold all of his personal property on the farm with the expectation of going into other business. And further, that upon their failure to make the deposit and pay the amount he was compelled to hunt for another purchaser of the land, but was unable to find one, and on the 1st of March released it for a term of one year. He then alleged that by reason of the failure of the plaintiffs to comply with the terms of their contract the land lay idle for three months and had depreciated in value before he could find a purchaser, by all of which he had been damaged in the sum of $1,500, which he pleaded as a counterclaim against the plaintiff's demand.

The court sustained a demurrer to this paragraph and dismissed the counterclaim.

The jury found a verdict against the defendant, who prosecutes this appeal from the judgment rendered thereon. Counsel for the plaintiff argue that the court properly sustained the demurrer to the second paragraph of the answer on the ground that unliquidated damages can not be set-off against an action for damages unless coupled with an allegation of insolvency or nonresidence.

The unliquidated damages set up in the answer were not pleaded as a set-off but as a counterclaim, and the allegations showed that they arose out of a breach of the identical contract which was the foundation of the plaintiff's claim, and were directly connected with the subject of the action.

In Shropshire, &c. v. Connard, 2 Met., 143, the matter pleaded in defense was not connected with the subject of action. The court there said that it did not constitute a good counterclaim and could not be used as a set-off.

Such claims as are for unliquidated damages, said the court, can not be relied upon by a defendant unless they are connected with the subject of the action.

In this case the action was for damages resulting from the breach of a contract. The defendant, denying the breach upon

his part, alleged that the plaintiffs had failed to comply with its terms, whereby he had been damaged in a certain sum which he pleaded as a counterclaim. The court erred in sustaining the demurrer and the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

EBLIN v. SELLARS.

Filed January 8, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Fraud—Liability of agent—One who was induced to subscribe and pay for a share of stock in an association by reason of the representations of the owner and his agent that certain other persons had subscribed for shares, can not recover of the agent the amount thus paid by him, although the representations of the owner were false and fraudulent, the agent himself being deceived as well as the purchaser, both having acted upon the same evidence, which consisted of a false list of subscribers exhibited by the principal. Nor can the agent be held liable as partner, although his compensation was measured by the amount of the sales.

S. B. & R. D. Vance for appellant; Yeaman & Lockett and M. Merritt for appellee.

BERRY v. CALLAHAN, &c.

Filed January 8, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, affirming in part and reversing in part.

1. Partnership—No person can be fixed with a liability on the ground that he has been held out as a partner, unless the holding out was done by him or with his consent, and was, before the contract was entered into, known to the person seeking to avail himself of it.

2. Claim to attached property—Although an attachment was properly discharged as to one of two defendants upon the ground that he was not liable for the debt sued on, yet as his claim to be the sole owner of the goods levied on was traversed and a separate issue thus made, he was not entitled to take possession of the attached goods until that issue was tried.

H. W. Rives for appellant; Samuel Spaulding for appellees.

WHEELER, &c. v. WHEELER.

Filed January 8, 1894. Appeal from Oldham Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Compromise of will contests—Revocation of agent's authority—In this action to enforce an alleged compromise of a will contest made with plaintiff, the contestant, by one who purported to act as agent of defendants, the defendants admitting that they originally authorized the agent to make such a compromise, but claiming that after plaintiff's refusal to accept the first proposition made by the agent they revoked that authority, the case is one to which should be applied the rule that when an agent is appointed to do a thing it will be presumed that his authority continues until it is revoked,

and those dealing with him concerning the subject-matter of the authority to be affected by the revocation must have notice of it.

2. Fraud—The fact that it was agreed that the will case should stand upon the docket for the time being, in order to prevent the contestant's creditors from learning of the compromise and intercepting the money he was to receive was not of such an immoral character as to vitiate the whole proceeding.

F. Hagan, Rogers & Duncan and P. W. Hardin for appellants; J. W. McCain, Carroll & Clure and D. H. French for appellee.

LONDON AND LANCASHIRE INS. CO. v. OAKS & COOK.

Filed January 3, 1894. Appeal from Metcalfe Circuit Court. Opinion of the court by Judge Yost, affirming.

Insurance—Settlement procured by fraud—The insured in a fire insurance policy was not bound by a settlement by which he accepted, in full satisfaction of his claim, one-half the amount previously fixed by the adjusting agent of the company as the amount of the loss, if he was induced to accept the reduced amount through the false or fraudulent representations of the agent of the company. And this issue having been submitted to the jury, and their finding for the plaintiff being sustained by the evidence, the court will not disturb the verdict.

J. A. Craft for appellant; A. W. Scott and Lewis McQuown for appellees.

MONTAGUE, &c. v. SMITH & NIXON.

Filed January 5, 1894. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Delivery of personal property—Right of plaintiff to dismiss—In this action for the recovery of personal property, in which the property was in advance of judgment turned over to the plaintiff under an order of delivery, the court erred in dismissing the petition on plaintiff's motion without first determining the issue made by the pleadings as to the right of defendants to a return of the property. And this error was not cured by a subsequent order for the restitution of the property. If the case had been tried by a jury, as should have been done, and their verdict had authorized a judgment for the recovery or return of the property, they must have assessed its value and the damages for the taking or detention of it, and the defendants could have had judgment for the return of the property, or its value if a return could not be had, and damages for the taking and withholding of the property; but by the action of the court the defendants were prevented from having such a judgment.

H. M. Buford for appellants; Nelms & Bickers and Park Phipps for appellees.

MONTAGUE v. SMITH & NIXON, &c.

Filed January 5, 1894. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Delivery of personal property—Right of action on bond executed by plaintiffs—In an action for the recovery of specific personal property, the plaintiffs having taken the property into their possession upon the execution of the bond required by section 184 of the Civil Code, their failure to return the property as required by the final judgment of the court gave the defendants a right of action upon the bond by which plaintiffs undertook to perform the judgment of the court. So long as the judgment is not set aside or reversed it is immaterial that it was not full or what it should have been.

H. M. Buford for appellant; Nelms & Bickers and Park Phipps for appellees.

BERRY'S EX'OR, &c. v. BERRY'S ADM'R, &c.

Filed January 5, 1894. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Barbour, affirming on original and reversing on cross appeal.

1. Construction of devise—Under a devise by a testator to his wife of one-third of the surplus of his personal estate or the proceeds thereof, with the provision that certain shares of bank stock should not be sold during the lifetime of his wife, but that his executor should "collect and pay to her as they accrue one-third of all the dividends that may accrue thereon," the wife took an absolute estate in one-third of the bank stock, subject only to the restriction that it should not be sold during her lifetime.

2. Same—Where a testator, after devising to his wife one-third of the surplus of his personal estate and one-third of all his real estate, declared that it was his intention, if possible during his life, to give to each of his children by his last wife $1,000, in order to make them equal with his children by a former marriage, but provided that if he should fail to do so that sum should be paid to them "before any other division is made among my children," it was error to take from the personal estate the amount necessary to make the children of the last marriage equal with the children of the former marriage before giving the wife her one-third. It was the intention to give the wife what she would have received without the will.

Ross & Owens and John P. Norvell for appellants; Hanson Kennedy and W. H. Holt for appellees.

COMMONWEALTH v. PENCE, &c.

Filed January 5, 1894 Appeal from Breathitt Circuit Court. Opinion of the court by Judge Yost, reversing.

In a proceeding upon a forfeited bail bond in the Breathitt Circuit Court a response alleging that at the calling of the case for trial the accused was confined in the jail of Wolfe county under a capias pro fine, which issued from the clerk's office of the Wolfe Circuit Court, "and that by reason thereof he could not be in attendance in this court upon the calling of said cause," was insufficient, because it failed to allege either that the accused would have appeared if he had not been imprisoned, or that he was arrested in Wolfe county before the day his case was set for trial in Breathitt. If he was in Wolfe county on the day he was under bond to be in Breathitt it must be assumed that he would not have appeared if he had not been arrested.

W. J. Hendrick, Cromwell & Franklin and A. H. Howard for appellant; J. J. C. Bach for appellees.

CARDWELL, &c. v. ATWATER, &c.

Filed January 10, 1894. Appeal from Breathitt Court of Common Pleas. Opinion of the court by Presiding Judge Brent, reversing.

1. For the breach of a contract by one person to advance money to another only the person with whom the contract was made and to whom the money was to be advanced can recover damages. Third persons who were not parties to the contract and between whom and the person undertaking to advance the money there was no privity have no right of action. And the party himself can recover only such damages as are the natural and proximate result of the breach.

2. Mistake—In an action upon a promissory note an answer alleging that it was agreed between the parties that the note was not to be paid in a certain contingency, which had happened, and that this agreement was omitted from the note by mistake, constituted a good defense.

3. A contract for the sale of standing trees in contemplation of their immediate removal from the soil is not within the statute of frauds.

4. Amendment of pleadings—Election—Although an amended answer offered by defendant was inconsistent with the original answer, the court should not have refused to permit it to be filed, but, after it was filed, should have put defendants to their election as to which of the inconsistent allegations should be stricken from their pleading.

Riddell & Riddell and J. B. Marcum for appellants; Beckner & Jouett for appellees.

CRAWLEY v. WHITE.

Filed January 10, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Liens—In this action to enforce a lien on land created by defendant's vendor, in which the defense was that defendant was induced to finish paying for the land upon the representation of plaintiff that the lien had been discharged, the judgment of the lower court for plaintiff is sustained by the evidence.

Yeaman & Lockett for appellant; Montgomery Merritt for appellee.

HENDRICKSON v. COMMONWEALTH.

Filed January 10, 1894. Appeal from Bell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Judicial notice—Upon the trial of appellant for the offense of selling liquor unlawfully in Bell county the statement of a witness that he bought whisky of defendant after defendant moved to Pineville authorized the inference that he bought the whisky at that place, and as the court judicially knows that Pineville is in Bell county, it sufficiently appears that the whisky was sold in that county.

2. Bill of exceptions—Whether the statement of the evidence in the bill of exceptions signed by the judge or the statement in a bystander's bill be taken as true the judgment must be affirmed, but even if this were not true this court would not hesitate to accept the judge's bill as the true one.

Weller & Hays for appellant; W. J. Hendrick for appellee.

THE FISCHER-LEAF CO. v. CALDWELL.

Filed January 10, 1894. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Damage resulting from tearing down division wall. The wall dividing from defendant's property a house occupied by plaintiff as tenant having been torn down by defendant against plaintiff's protest, the plaintiff is entitled to recover of defendant the damages sustained, although the wall was torn down by an agreement between defendant and plaintiff's landlord, whereby the landlord indemnified defendant against all damage that the plaintiff might sustain. And the fact that the defendant built a temporary wall for the protection of the leased house does not exonerate him from liability, for although experts testify that it was impossible for rain sufficient to do any serious injury to beat through this wall, that testimony is overcome by the testimony of plaintiff that the rain did beat through to such an extent as to seriously injure her household goods.

2. Same—Landlord and tenant—The fact that the plaintiff was in arrears for her rent, and that under the lease she could have been ejected at any time upon five days' notice, does not deprive her of the right to recover of defendant the damages sustained, as the lessor never exercised his right of forfeiting the lease.

3. Same—As the instructions assume that defendant had the right to tear down the wall, and that it was only liable in the event it failed to take the

usual and necessary precautions to protect the plaintiff, they are certainly not prejudicial to defendant.

4. Same—Instruction as to damages—An instruction authorizing the jury, in the event they should find for plaintiff, to "award the plaintiff such a sum in damages as will reasonably compensate her for the damage so sustained, not exceeding the amount claimed in the petition," was not misleading, the elements of damage being clearly and plainly defined in the evidence; and the amount of the verdict clearly demonstrates that the jury was not misled.

5. Same—The court properly refused to instruct the jury that if the defendant "did what persons of ordinary prudence are accustomed to do under similar circumstances, with a view to prevent injury to others from such rains as were reasonably to be expected at the time and place," they should find for defendant. Cyclones and unprecedented rains might be termed inevitable casualties, against which a party could not be required to provide, but that is not the meaning of the instruction. Besides, the defendant does not in his pleading rely upon the fact that the damage was the result of inevitable casualty or unprecedented rains.

Humphrey & Davis and John S. Jackman for appellant; Mare Mundy for appellee.

COUCHMAN, &c. v. LISLE, &c.

Filed January 10, 1894. Appeal from Clark Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Unauthorized bond—Validity as common law obligation—A bond executed in the course of a judicial proceeding is not valid either as a statutory or a common law obligation, where the tribunal or officer who took the bond had no authority to take it.

Pending an appeal in the circuit court from an order of the county court probating a will the appellants made a motion for the appointment of a curator; but the court refused to make the appointment unless the appellants would execute a supersedeas bond. Pursuant to this requirement appellants executed a bond with sureties, wherein they covenanted with appellees that they would pay to them all costs and damages that might be adjudged against them on the appeal. Upon the trial of the appeal the will was sustained and judgment rendered against appellants for appellees' costs; and the costs not being paid, appellees brought this action on the bond to recover their costs. Held—That the bond was an absolute nullity, and that there can be no recovery upon it either for the ordinary costs of the appeal or for the extraordinary costs incurred by reason of the appointment of the curator.

2. Same—Even if there could be a recovery on the bond for any additional costs incurred, by reason of the appointment of a curator, no such special damage is shown, as it is fair to infer that the expenses of the curatorship were reasonable; and that if they had not been paid to or incurred by the curator, they would have been paid to or incurred by the executor, who is not complaining that he has been derived of his fees.

3. The circuit court has no power to appoint a curator pending an appeal from an order of the county court probating a will. Whether the county court has power to make the appointment is not determined.

Beckner & Jouett and George B. Nelson for appellants; M. C. Lisle, W. T. Ogden and Haggard & Benton for appellees.

BROWN v. POPHAM.

Filed January 10, 1894. Appeal from Boone Circuit Court. Opinion of the court by Judge Yost, reversing.

Recovery by vendor of property fraudulently purchased—A party to a contract fraudulently procured has the right to rescind it if he elects so to do

within a proper time, and he has the right after such election to follow property obtained from him by such fraudulent contract and recover its possession from the vendee. An action to vacate the contract with an attachment against the property, as provided by section 250 of the Civil Code, is not his only remedy.

The plaintiff exchanged horses with defendant, and electing within a few days to rescind the contract on account of fraudulent representations made by defendant, she tendered to him the horse she had received from him; and upon his refusal to accept it turned it into the defendant's field, and brought this suit for the recovery of the horse she delivered to him at the time of the exchange, alleging the fraud and the facts showing a rescission. Held—That the court erred in dismissing the petition upon demurrer.

O'Hara & Rouse and G. G. Hughes for appellant; J. M. Lassing, Joel Clore and John S. Gaunt for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. FEBRUARY 15, 1894. No. 16

KENTUCKY COURT OF APPEALS.

SMITH, &c. v. NORMANT, &c.

(Filed September 30, 1893—Not to be reported.)

Ejectment—Partition—In an action by parties holding the legal title to land against defendants claiming by adverse possession, the court will not at this day hold that deeds of partition executed in 1797 between original patentees, made by commissioners appointed for that purpose, do not pass the legal title because the division was made by six instead of two commissioners as the statute required. The parties to the division and those claiming under them have acquiesced in and claimed under it for nearly a century, and those having no title to the land embraced in the division except that acquired by an adverse holding will not be heard to question its regularity or validity.

R. H. Cunningham and S. B. & R. D. Vance for appellants.

Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

This action was originally instituted in equity by the heirs of Mary Hillyer for a divison of the land descending to them from and through her.

Henderson & Co., of which one David Hart was a member, obtained from the State of Virignia a large grant of land that, in the year 1797, was divided between them, and the heirs of David Hart obtained their interest in the allotment.

In the year 1811 that part of the grant allotted to Hart's heirs was divided between them, and deeds made by the commissioners making the partition. Mary Hillyer, being one of the heirs, obtained her deed (made to husband and wife), and it is this land the present appellees are seeking to have divided in the present action. They had made previous attempts to have the land di-

vided, but by reason of some irregularities the partition was not sanctioned or approved by the heirs.

When the division of the land was made in the year 1797 between the original patentees they all took actual possession, except Hillyer and wife, and have sold their respective interests until divested of title.

The appellants, Stembridge and Smith, being in possession of a part of the land, were made defendants to this action, and set up an adverse claim based alone, as this record shows, on an adverse possession.

On their motion the case was transferred to the ordinary docket, that the issue of title might be tried, and resulted in a judgment for the plaintiffs.

It is claimed that the original deeds of partition made to the patentees is invalid because the statute under which the division was made required that six commissioners should be appointed, instead of two, and, therefore, no title passed.

It is plain that these parties entered on their respective parcels and have disposed of them, except Hillyer and wife, and a division made nearly a century ago should be sustained as evidencing such a title as to enable the partitioner to maintain his ejectment for an entry upon his allotment.

The court will not inquire whether these deeds of partition were executed by two or six commissioners, after such a lapse of time, as against those who enter and claim only by an adverse possession. The appellants were in possession of this land claimed by the appellees, and it was not necessary that separate actions should be instituted in order to a recovery, or that the plaintiffs should be held bound to a division that all repudiated by seeking another partition.

This was an issue out of chancery sought by the defendants for the purpose of passing on the title, and as title is shown in the plaintiffs and none in the defendants, the verdict and judgment was proper. Neither of the defendants pretend to have any paper title to the Hillyer land, and the lines and the courses of the Hillyer tract being established by the weight of the testimony, and embracing the land sued for, we see no reason for reversing this case. The deed from Gayle, Smith's evidence of title, covers no part of the land in dispute, and it is unreasonable to suppose that Smith, as one of the commissioners, when attempting to divide these lands between Hilyer's heirs in 1875, allotted in fact to them land which he claims now to have owned and been in the actual possession of at that date.

As to Stembridge, he never claimed but 127 acres of the land to which title was asserted by Hillyer's heirs, and this he recovered or was adjudged to be the owner in a former litigation between Hillyer's heirs and himself.

He obtained all he then claimed, and has no title to any of the land in dispute, by reason of the former litigation, and the title asserted by adverse possession he failed to sustain, as was adjudged by the verdict and judgment below.

It is apparent from the record that these appellants have attempted to acquire title by actual possession, and whether that possession ripened into a title before this action was instituted was one for the jury.

We perceive no error of which the appellants can complain, and the title having been established, all the court is now required

to do is to order a division between the heirs, as asked for in the original action.

Judgment affirmed.

Judge Pryor delivered the following response to a petition for rehearing:

It is manifest that neither of the appellants have title to the land in controversy, and whether regarded as an action for the division of land between the heirs of Hillyer or an ejectment against the appellants, the appellees were entitled to recover. The original action was in equity, and evidently intended as one for a division, but it is conceded that as against appellants, who claimed to be in the possession, it was an ejectment.

In the former judgment, in an action between these parties and Stembridge, the latter only claimed 127 acres of land claimed by the Hillyer's, and this he obtained, and it is now an undisputed fact that no part of this 127 acres is claimed by the appellees; and the amended petition filed in that action and the answer thereto puts in issue the title to the land in Arterbury's possession, who was a tenant of Stembridge.

That proceeding, when considered with reference to the issue made in the original action, sustains the claim of the appellees as against Stembridge, as it is evident he disclaims to own any part of the land except the 127 acres, and the appellant, Smith, is now claiming to own land that was allotted the appellees by him as a commissioner, appointed for that purpose. Neither are entitled to hold possession.

This land was allotted to James Hillyer and wife, nor is it disputed that these appellees are the heirs of James and Mary Hillyer, and the conveyance was made to the latter by commissioners in the year 1811. They have the title, and are entitled to recover.

Petition overruled.

BOONE v. NEVINE.

ROWAN v. SAME.

(Filed October 10, 1893—Not to be reported.)

Lien for street improvement—Apportionment of cost—The charter of the city of Louisville requires the assessment for cost of street improvement to be made upon the whole of each quarter of the square binding on the improvement, therefore, the property of appellants was properly assessed for a certain street improvement, where the square in which it is located binds upon the improvement, although the improvement does not extend the whole distance of the square or reach some of the property to be assessed.

James S. Pirtle for appellants.

Lane & Burnett for appellee.

Appeals from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

The appellants appeal from the several judgments against them enforcing liens upon their respective lots for the cost of improving Bank street in the city of Louisville. Their sole contention is that the apportionment is not correct.

The other parties owning property on said street, who were assessed for the purpose of the improvements, and against whom there were judgments, do not complain.

Bank street runs east and west, and the improvement in question is from Eighteenth to Nineteenth street, which two streets run north from Bank at right angles with that street. On the south side of Bank street Eighteenth street makes an offset, and, beginning at a point, about its width, west of the intersection with Bank on the north, runs southeast; and Nineteenth street, beginning at a point about one hundred and twenty feet east of its intersection with Bank on the north, also runs southeast and parallel with Eighteenth. Griffith avenue, for Nineteenth street, runs northeast, and at right angles with Nineteenth street, intersecting Bank at Eighteenth street.

Thus it will be seen that the distance between Eighteenth and Nineteenth is greater on the north than it is on the south side of Bank—a line running on the north extending at each end beyond the line between the same streets on the south of Bank—and that on the south side are three singularly-shaped squares.

The lot of Mrs. Rowan and one of Mrs. Boone's lots are in the square, surrounded by Nineteenth street, Griffith avenue, Bank street, Eighteenth street and Owen street, which latter street runs parallel with Griffith from Nineteenth to Eighteenth. The northern angle only of this square is on Bank street. Pirtle's lot is in the tri-angular square, bounded by Bank, Nineteenth and Griffith avenue. Mackay's, and the greater part of Mrs. Boone's property, is in the square south of Bank and west of Nineteenth street.

It is clear that Pirtle can have no grounds or complaint, for the reason that if different assessment should be made it would put an additional burden upon his property. Though the improvement on Bank does not extend the whole distance from Nineteenth to the street west of Nineteenth, and in fact does not reach some of the property which is assessed in that square, the square certainly binds upon the improvement; and as the charter requires the assessment to be made upon the whole of each quarter of the square binding on the improvement, Mackay's and Mrs. Boone's property was properly assessed, for if their property is not liable to assessment for said improvement, no property in that square, though lying directly on the improvement, could be assessed.

The principles announced in the case of Stengel v. Preston, 89 Ky., 616, fit this case and control it.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. WILLIAMS.

(Filed December 12, 1893).

1. A railroad may refuse to receive a car from another company for transportation over its road if the car is in such an unsafe condition, or so defective in its plan of construction, as to render the handling of such car by its employes, in connection with its own cars, hazardous or unsafe.

2. The constitutional provision (section 213) compelling one railway to receive and transfer over its line cars of another company was not intended to compel a road to receive cars in a defective or unsafe condition.

3. A brakeman, by accepting employment as such, assumes the risks ordinarily incident to his undertaking; but at the same time he has a right to

assume that all appliances will be afforded him to enable him faithfully to discharge his duties.

4. A railroad receiving from another company cars for transportation owes the duty to its employes of making a careful superficial inspection as to their condition, such as an ordinarily prudent man, engaged in like business, would make for the protection and safety of the employes required to handle the cars; and where defects in such cars are patent, and cause an injury to an employe who did not know of their existence, the company is liable.

A brakeman was injured in coupling a car by reason of a projecting bolt on a car received by the railroad from a connecting line. The projecting bolt made the car dangerous to those attempting to couple it to other cars; but such bolt as a structural part of the foreign car, placed there according to the design of its construction and not by neglect or accident. The railroad made no inspection of the car before receiving it. Held—That the company is liable to the brakeman for the injury.

J. W. Bryan for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, Daniel Williams, while in the employ of the Louisville & Nashville Railroad Co. as a brakeman, in the attempt to couple two freight cars, had his hand so badly mashed as to render the amputation of his arm necessary below the elbow. He instituted this action for the injury received, alleging gross neglect on the part of those over him, and whose orders he was required to obey, and recovered the sum of $3,500 in damages.

His recovery was based on the alleged defective condition of one of the cars he was engaged in coupling, the defect causing the injury. He avers the defect was known to the company or could have been known by the exercise of ordinary care and inspection.

The defect consisted, as is alleged and proven, in a long iron pin or bolt projecting from the deadwood of the car, near the place of coupling, so that in making this coupling his coat sleeve was caught by the pin, preventing him from withdrawing his hand, which was caught between the bumpers and mashed.

The appellant relies in its argument on two grounds as a defense:

First, that the defect, if any, consisted in the construction of the car that was being coupled; that it belonged to another and distinct corporation, coming to the defendant's road laden with merchandise, and the bolt was not loose, nor did it project further than was intended in its original construction; that no defect existed, but the extension of the bolt was the manner in which the car was built, and it being the duty of the defendant to receive and transport over its line of road the car with the merchandise to its place of destination, the company could not be held liable for the mode in which the car was constructed; if the defect was one of construction, the car belonging to another company and the appellant compelled to receive it by reason of section 213 of the State Constitution, no liability can arise.

The second ground is that of contributory neglect on the part of the appellee.

The answer filed merely puts in issue the defective condition of the car, and there is no averment that the car belonged to another and distinct corporation, or that the defect was one of construction, if any existed.

The testimony, however, shows that the car was the property of another railroad company, the New York, Lake Erie & Western, and the appellant received it upon its line for the purpose of transporting the merchandise to its owner, and, as the case seems to have been tried on the issue arising from the testimony as to the liability of one railroad for the condition of the cars of another company when receiving the cars of the latter on its line of road, it may be proper to determine the question as both counsel present it.

It seems to us the constitutional provision by which one railroad company is compelled to take cars of another over its line can have no bearing in this case.

If the cars were in an unsafe condition, or even so defective in their construction as to render them unsafe to those who are required to handle them, it is the duty of the company to refuse to receive the car, if such defects exist, and no other construction, it seems to us, can well be given this clause of the Constitution.

The brakeman had been employed to discharge a duty in coupling cars that was dangerous whenever attempted, and when entering into the service he assumed all the risks ordinarily incident to such an undertaking, and at the same time he had the right to assume that all the appliances would be afforded him to enable him to faithfully discharge this duty.

It is immaterial whether the car with the merchandise belonged to the one corporation or the other; it was the duty of the appellant, by inspection or otherwise, to ascertain whether or not the car was in such a condition as that it could be safely handled by its subordinates.

This care to be exercised is not such as would require the company receiving the car to test the strength of the metal or the material out of which it was constructed, or to make that rigid examination into the car's condition as could only be arrived at by actual tests, but the care must be of at least an ordinary inspection by one competent to know whether or not the car is in a safe condition for transportation, and can be handled by a subordinate, who will exercise ordinary care, without danger.

The cases relied on by counsel for the appellant are not inconsistent with the right of recovery in this case.

The case of Baldwin v. C., R. I., & P. R. R. Co., 50 Iowa, 680, was where the defendant received upon its road a car of another road that was equipped as cars in general use, and it was claimed that the injury would not have happened if the latest and most approved appliances had been used in coupling. The court said that as such cars from which the injury originated were in general use, although not constructed upon the most approved plan, the employe must be presumed to have assumed such risks when entering into the employment.

In the case of Indianapolis, Bloomington & W. R. R. Co v. Flanegan, 77 Ill., 365, the court adjudged that the company was not liable for a personal injury to the employe while coupling cars having double buffers simply because a higher degre of care is required in using them than in those differently constructed.

The cases referred to by counsel all proceed on the idea that the employe assumed all the ordinary hazards arising in the performance of what he has undertaken.

These cases, as well as others cited by counsel for the appellant, are in harmony with the rule requiring the company to furnish safe cars and machinery in the conduct of its business for the use

of its subordinates or employes. It was the duty of the appellant to have cars belonging to another company, when coming on to its road, inspected; and if there is such a defect as renders it dangerous to handle them in the ordinary mode, to refuse to take them.

It is not expected of a brakeman that he shall make an inspection for himself, as it must constantly happen that he is required to couple and uncouple cars, without time afforded him to make even a cursory inspection. He has the right to rely on his principal to furnish what is safe for his use. There are different appliances used for coupling and uncoupling cars and in the manner of constructing cars, still if such appliances are those ordinarily used, although they may differ from those used by the road in which the injury occur, the company is not responsible if the difference in the appliances alone produced the injury. A car, however, may be so constructed or built as to render it more than ordinarily dangerous when attempting to couple it with other cars of different construction, and when this is patent the company must see to it that the danger is removed.

In Shearman & Redfield on Negligence, section 193, 3d edition, the rule is laid down as follows: "The duty of the master to inspect materials, machinery, etc., used by his servants in the course of his business, extends not only to those things which are his property or are directly furnished by him, but also equally to all things which it becomes the duty of his servants to use in the course of their employment. Thus where a railroad company requires its servants to handle cars not belonging to it, or run trains over a track belonging to another company, its obligations, superficial as to inspection, are the same as though such cars and track were its own."

In the case of Gotlieb v. N. Y., L. E. & W. R. R. Co., a brakeman was seriously injured while coupling cars. The bumpers of the cars were not wide enough, when the drawheads passed one another, to protect the employe from injury.

The defect was in the construction of the car, but so obvious that one by an ordinary inspection could see the defect. The cars also belonged to another company. The court in that case said: "It is not bound to take such cars, if they are known to be defective and unsafe; even if not bound to make tests to discover secret defects, it is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. Employes can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company." (100 N. Y., 462.)

In Goodrich v. N. Y. C. & H. R. R. R. Co. the same doctrine was recognized, the court saying: "This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon defendant's road and furnished to its employes for transportation. Where so furnished the employes, whose duty it is to manage the trains, have the right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty," etc. (41 Am. & Eng. Railroad Cases, 259.)

The rule deducible from all the cases is this: That where one company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition, such as an ordinarily prudent man, engaged in like business, would make for the protection and safety of the employes required to handle

the cars; and when such defects are patent, and an injury occurs to the employes by reason of the defect that is unknown to the party injured, the company is responsible.

There are but two witnesses in the case—the party injured and an employe of the company. The plaintiff states that he was injured by this projecting bolt that had become loosened. The witness for the company states that he examined some of the cars after the accident, and found no such state of case as that detailed by the plaintiff; that the bolt did project, but this was owing to the mode of constructing such cars.

Whether they were such as could be coupled safely with other cars does not appear, nor is there any testimony showing that any inspection had ever been made of this car by any one before or after receiving it, and not until the injury was inflicted.

If the testimony of the railway company is in conflict with the plaintiff's statement, it was with the jury to say which one they believed, and unless the court erred in giving the law of the case the judgment must be affirmed.

The defense asked the court to say that if the injury was caused from the mode in which the car was constructed they must find for the defendant. This the court refused to give, and properly, for the reason, if no other, that the construction might have been of such a character as to render it dangerous to couple these foreign cars with the cars of the defendant, and, besides, the court had given the law of the case in the instructions for the plaintiff.

The court said in effect to the injury that if they believed that this iron bolt projected from the deadwood of the car the plaintiff coupled, and that this was such a defect in said car as made it unsafe and dangerous to couple, and that by reason of said projecting bolt the injury occurred, and that the servants for the defendant, whose duty it was to inspect the car, knew, or by the exercise of ordinary care could have known, that said bolt did project from the deadwood for a time long enough before plaintiff was injured to have enabled the servants of the defendant, by the exercise of ordinary care, to remove the bolt or pin or repair the defect, if any existed, etc., they must find for the plaintiff.

The question of contributory neglect was also submitted to the jury under a proper instruction, and finding no error this judgment must be affirmed.

SHELBY v. COMMONWEALTH.

(Filed January 9, 1894—Not to be reported.)

1. The evidence wholly fails to connect appellant with the murder for which he was indicted and convicted, and discloses no circumstance inconsistent with his innocence. The judgment must, therefore, be reversed.
2. A reversal of a judgment of conviction in a criminal case can not be granted upon the sole ground of insufficient evidence to sustain the verdict; but if there is no evidence or circumstance conducing to show the guilt of an accused, the judgment will be reversed on appeal.
3. Evidence to contradict the statement of a witness, as to a conversation he had with the appellant as to a collateral matter, was incompetent and prejudicial to the accused.

W. G. Bullitt, J. D. White & Son, J. M. Nichols and W. T. White for appellant.

W. J. Hendrick for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Hazelrigg.

On the morning of October 15, 1887, Mrs. Sallie Moore was mysteriously murdered while engaged at work at her home in Ballard county.

She and her two sons, James and Henry were living together on a public road leading from Hinkleville to Bandana, along which, on the morning of the murder, various persons were seen passing. The sons left the house about sunrise that morning to attend to some work on a part of their land, distant something over a mile from the home place. When they returned, between 10 and 11 o'clock, they found their mother lying in the cook room dead, with her throat cut and skull crushed.

A trunk belonging to Henry Moore, containing a pocketbook with $480, had been broken open and the money taken. This money had been left there by one Harvey more than a year before, and it was not thought that any one knew it save Harvey and the two Moore boys, as they agreed not to tell anyone.

In an adjoining room in James' trunk there was a pocketbook containing $150, which was not molested, but in the same room the drawers of the bureau had been ransacked, and some change belonging to Mrs. Moore taken. Henry Moore had several hundred dollars which he carried in his pocket.

In about a week after the murder Ivan Shelby, who was a nephew of the appellant, was arrested, charged with murdering the old lady, and after an exciting trial, in an intensely excited community, was held over by the examining court for further trial without bail. In these proceedings the appellant took an active part in defense of his nephew. He became embittered against the Moores for what he termed the persecution of an innocent boy, and went so far as to use harsh and unbecoming language with respect to the murdered woman. Upon the termination of the trial, holding over his nephew without bail, he was deeply affected and distressed.

In April, 1888, the Shelbys—the appellant and his nephew—were each indicted for the murder. Upon the separate trial of the nephew he was found guilty and sentenced to the penitentiary for life; but on an appeal to this court the judgment was reversed, after which, as we learn from the current history of the times, he was taken from jail and hung by a mob.

In June, 1893, the appellant was tried, convicted and sentenced to the penitentiary for life. His motion for a new trial having been overruled, he has appealed to this court, relying mainly on the fact that there is an utter absence of testimony connecting him with the crime, and no proof whatever of his guilt.

Passing over the testimony of the accused and his two sons, to the effect that he was at home at work making sorghum molasses on the morning of the murder, and that of his neighbor, Wigginton, who was at work with him, we will notice briefly the testimony supposed to be important for the State, and thought to show the guilt of the prisoner.

The first witness was M. Moore, who testified that after the committal of Ivan he was one of his guards and had the following talk with the appellant, who was then not charged with the crime: "We was talking about the case—Ivan Shelby's— I says 'Mort, I don't know Ivan Shelby like I know the older ones.

There's Alf. and Watt and yourself I've been acquainted with some time, may be for twenty years, but I don't know Ivan.' He stopped, he throwed his eyes to the ground and sorter stamped his foot and says: 'Jim, we'll be made examples of for your children and mine to see.' I says, 'Mort, what time are you going out;' he says 'now directly.' Well, I overtaken him about a mile from his place, going out home, too, on Sunday, and I drove my buggy on behind his, him and Miss Nellie Morton was together, me and Mr. Joe Tucker was together in the buggy, and when we got to the corner of Frank Henderson's field he drove his buggy on, I turned to the left to go home. He stopped and says: 'Jim, I want to talk to you.' I got out of my buggy; he started in the woods, and went about fifteen steps from the road. He stopped. I went and laid my hand on his shoulder and I looked at him, and I'll tell you it hurt my feelings to look at him."

Question by Commonwealth. "Did you weep?"

Answer, "I did. He made this remark; no, I am a little too fast on that. When I wept he looked at me and said: "O God; I wish I could cry,' and turned from me and said: 'Jim, I'll be at your house to-morrow and tell you all about it,' and went back to his buggy and I went back to mine. I think he cried."

Ques. "Was he excited or not?"

Ans. "Well, I do think he was. I know he was; I think nothing about it; said he couldn't cry; wished to God he could."

On cross-examination the witness volunteered the statement that he took this to mean that Mort and Ivan "had done made an agreement and done that deed." This was objected to, but what action, if any, the court took on it does not appear from the record. The witness afterwards met the accused, but no further talk of importance occurred between them.

The State next introduced Mrs. Thornberry, who proved that a week before the killing she saw two men near Mrs. Moore's, leisurely coming from the direction of Mr. Scott's, and going down the lane, as she supposed, to a turkey-shooting match in the neighborhood; one of them she took to be Mort Shelby, but didn't know the other.

C. C. Homer, next introduced, said that during the examining trial of Ivan Shelby he was approached by the appellant, who told him that he had learned that he, the witness, was a detective, and offered him $100 to come down to his, appellant's house and help him work up the case; that he believed that Hall Moss was the guilty man. Witness went down to the neighborhood and saw the appellant, who asked him how it would do for Nellie Eubank to swear in Ivan's case that she saw Hall Moss running with his hat in his hand on the day of the murder from Mrs. Moore's house toward Moss' house; that he asked him if she saw this, and he answered that she would swear it. Witness told him that as Miss Eubanks' character was bad, she would have to be corroborated. He said "he would try to find where the stick was cut, and that he could dry limbs by the fire. Defendant knew I was a detective." He said that there were $900 in gold at Moore's (this rumor is shown by other testimony to have been communicated to the accused and others after the murder).

A. J. Moore proved that on the morning of the murder he went to Shelby's house and found him at work making sorghum with his two sons and Wigginton, and told him about the killing, and he said that Pemberton was the man that killed her; that he was

a thief and had stolen corn from him. That night at Mrs. Moore's house they took a vote on who was guilty, and fourteen out of sixteen voted that Pemberton was guilty, and Shelby thought so too.

David Hudson testified that on the day after the murder he saw the accused over at Mrs. Moore's, and "saw something on his shoes that looked like blood; it was on both shoes about alike; it extended from the toes to the instep; never worked around the pan of a sorghum mill and didn't know what effect it would have on leather."

O'Donley also proved that the accused, on the day after the murder, passed excitedly among the groups of men and among the officers from Paducah, who were at the Moore house investigating the murder, with blood on his shoes.

Winfield Scott, introduced for the State and whose character, it is argued in the record, was impeached "by many witnesses and sustained by none," swears that while Ivan was in jail the accused tried to get him to swear that he saw Hall Moss running back to Henry Turner's field on the morning of the murder, with his hat off, and agreed that he would give him $50 to so swear; that Alf. Shelby, another uncle of Ivans, saw him and asked him if he saw Hall Moss there, and he told him no, and he said he wanted nothing more to do with him.

George Ragland proved that a short while before Ivan's trial he saw the appellant at Scott's house, and that Shelby told him that "Scott knew something about the Moore matter, but he could not get it out of him;" and wanted witness to assist in getting Scott to come to Bandana where they could get the facts out of him.

Mrs. Clark, supposed to be a very important witness, testified that "she saw Mort Shelby after the murder a short while at Bratton's, a brother-in-law of Shelby's;his wife and Nellie Morton, who then lived with defendant, were there; Mort and his family had just returned from a visit to Ivan Shelby in jail; we were talking about the murder, and Nellie Morton, sometimes called Nellie Eubank, who lived with Mort at the time, but who had lived with Ivan at the time of the murder, and she said she did not care if Mrs. Moore was killed because they had that innocent boy prosecuted, and Mort said her d—d old throat ought to have been cut forty years ago; that she was a liar and a tattler, and it was a slip of her d—d old tongue that caused her throat to be cut; that she was nothing but a mischief maker."

Mrs. McElyea testified that "she saw the appellant at Mrs. Moore's on the night after the murder, and he said 'no white man did it, a negro did it;' he was chewing tobacco very fast, seemed restless and nervous, kept his feet going."

The Commonwealth then introduced proof showing it to be improbable that Pemberton committed the murder, and Hall Moss testifies that he didn't do it.

David Sims, of color, proved that about a week after the murder he heard the appellant "ask Ivan what the news was." Ivan said "bad news." They went off and talked, and witness heard nothing more.

The next and last witness introduced for the State, Tom Stuart, testified that Mort came to see him and learn what his testimony would be in Ivan's case; he was accusing Henry Moore and others of doing the murder. He said that if it had not been for the slip of the tongue the d—d old b—'s throat would not have been cut; that they had Ivan into it, and he was afraid they would get him into it.

We have thus given in some detail the testimony upon which the State relied, and we are unable to say that there is any evidence whatever connecting the accused with this horrid crime.

There is no circumstance at all inconsistent with his innocence. His own testimony, though corroborated by others and free from contradiction or inconsistency, might have been ignored by the jury, and if there had been any evidence or circumstance offered by the State conducing to show guilt, we could not disturb the verdict.

We need not discuss this testimony. Its mere statement is sufficient to show that it falls short of its purpose. It would take a vivid imagination indeed to transvert the vague, unsatisfactory and incomprehensible jargon of Ivan Moore into a solemn confession of guilt made by the deceased. Still less is it evidence of guilt or a circumstance indicating guilt that the appellant should draw attention to himself, incur the hostility of the Moore's, and invite a prosecution by going about the county denouncing the old lady in harsh and unfeeling language.

The proof that he attempted to hire Scott to swear falsely in Ivan's behalf is admittedly unworthy of belief, and if true would throw no light on his own guilt. He was not then charged with the crime.

Whatever may be uncovered now of this crime, we are certain that the record before us discloses nothing upon which the verdict can be allowed to rest. There are a number of errors of law occurring during the trial, but they are insignificant as compared to the question we have discussed.

The assessor, for example, proved that when he took the list of the appellant, a week before the killing, he told appellant that he thought the Moores had money, but they had given in none; and the appellant told him that the Moore's had no money, as old man Moore had bought land with what money he had. The Commonwealth was permitted to prove the assessor had made different statements from this at various times when the appellant was not present, viz., that the appellant had told him that the Moores had money, and that he ought to make them give it in for taxation.

The testimony of the assessor as to what took place between the appellant and himself on the collateral matter was conclusive on that question, and it was prejudicial to the appellant to show by incompetent testimony that he knew, prior to the killing, that the Moores had money in their possession.

While this court has no power to reverse a judgment of conviction in a criminal case upon the sole ground that there was not sufficient evidence to sustain the verdict, yet we may do so, and, we may add, it becomes our duty to do so when the record discloses no evidence or circumstance conducing to show the guilt of the accused.

The judgment is reversed, with directions to grant the appellant a new trial, and for proceedings consistent with this opinion.

HILLARD v. ROUNTREE.

(Filed January 9, 1894—Not to be reported.)

1. A judgment directing the sale of land to satisfy a vendor's lien must describe the land so as to identify it. A description of it as the land "set out and described in the petition" is not sufficient.

2. The petition by a vendor to enforce his lien on land sold by title bond for the unpaid deferred payments must set out the terms of the bond and the character of title he agreed to convey, and his ability and willingness to so convey. A default judgment, based on a petition not setting out these facts, is erroneous.

Scott & Wilson for appellant.

J. W. Jones for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hazelrigg.

The petition of appellee sought a sale of certain lands to satisfy the unpaid purchase-money notes executed and delivered to him by the appellant. He alleged that he had sold the land to the appellant and executed to him a title bond therefor.

There was judgment of sale by default, which is now complained of because the pleadings do not support it. This contention is manifestly correct. To entitle the vendor to the relief sought it was incumbent on him to set out the terms of the bond to which he refers, the character of the title to be made and his ability and willingness to convey according to the terms of the contract. (Calvin v. Duncan, 12 Bush, 101.)

Moreover, the land was described in the judgment as that "set out and described in the petition," which is insufficient. (Lawless v. Barger, &c., 9 Bush, 665.)

Judgment reversed, with directions to proceed as herein indicated.

MARLER v. COMMONWEALTH.

MARLER v. SAME.

1. The appellants were not entitled to a continuance in this case since they made no effort to secure the attendance at court of their absent witness.
2. To shoot into a train of cars with the intent to assassinate is a common law offense, which may be joined in an indictment with other common law offenses.

(Filed January 9, 1894—Not to be reported.)

Chas. H. Price and M. H. Rhorer for appellants.

W. J. Hendrick for appellee.

Appeals from Bell Circuit Court.

Opinion of the court by Chief Justice Bennett.

The evidence shows beyond a doubt that the appellants from ambush shot into a train of cars and killed Mary E. Bowden. They evidently intended to assassinate a man, but missed their mark and assassinated a woman.

They contend that to shoot into a train of cars and kill a person is a statutory offense which can not be joined with a common law offense; but we think that to shoot into a train of cars to do mischief is a common law offense, and the use of some expressions that are used in the statute makes no difference.

The appellants also contend they ought to have had a continuance on account of the absence of a witness. The appellants did not take any legal steps to have the witness appear for them, hence they were not entitled to a continuance on account of his absence. There is no error in the instruction.

The judgment is affirmed in each case.

DICKEY'S ADM'R v. SANDERSON, &c.

(Filed January 9, 1894—Not to be reported.)

Judicial sale—Mistake of purchaser as to quantity of land sold—Where the judgment describes the land to be sold by metes and bounds, as containing twenty-seven and three-fourths acres, and the bonds executed by the purchaser for the purchase price and the commissioner's deed to him so describe it, the purchaser can not have the deed and his notes cancelled on the ground that he and the commissioner making the sale thought at the time that the land sold included the whole of a certain tract; nor does the fact that the commissioner, in making the deed to the purchaser, promised to insert therein the statement that he conveyed twenty-seven and three-fourths acres, "more or less," show a sale of the entire tract or a mistake as to the number of acres sold.

Porter & McQuown for appellant.

Geo. T. Duff for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Chief Justice Bennett.

E. Dickey, as administrator of Cyrus Dickey, deceased, and the heirs of said deceased brought an action in the Barren Circuit Court to settle the estate belonging to said deceased, and to sell his land for a division among his heirs and for the payment of his debts.

A judgment was obtained to sell three parcels of land. Each parcel was described by metes and bounds, courses and distances, and the number of acres was given. One parcel was described as lying on the east side of the turnpike road, and as containing twenty-seven and three-fourths acres, the courses and distances of which were given. The administrator, E. Dickey, as special commissioner, made the sale and the appellees purchased the twenty-seven and three-fourths acres' parcel, and executed bond for the purchase price, which bond followed the judgment in describing the land as twenty-seven and three-fourths acres.

This sale was reported to court and confirmed, and a deed was made to the appellees for the twenty-seven and three-fourths acres. The deed followed the judgment and bond. Afterwards the appellants obtained by supplemental judgment the sale of twelve acres of land adjoining the twenty-seven and three-fourths acres.

The appellees, after, then obtained an injunction against the collection of their sale bond upon the ground that E. Dickey had sold all the land lying on the east side of said pike to them, and as their bond and deed only called for twenty-seven and three-fourths acres, it would be a fraud upon them to compel them to pay their bond and take only the twenty-seven and three-fourths acres.

The lower court took the view that all the land on the east side of the pike had been sold, or at least appellees thought it was, at said sale to the appellees, and that as the deed only called for twenty-seven and three-fourths acres, twelve acres less than the whole, the appellees should be released from the obligation to pay their bond, and that the deed and bond should be cancelled. The appellants have appealed.

It is a fact that the appellant, E. Dickey, thought at the time he made the sale that the twenty-seven and three-fourths acres' tract was all the land that Cyrus Dickey owned on the east side of the pike, and doubtless announced that fact; but did the appellees understand that they were buying only the twenty-seven and three-fourths acres? If they did so understand it, the mis-

take of E. Dickey, as to his intestate owning other land adjoining, does not affect the right of the appellees.

The appellees say that they believed when they made the purchase that it included all the land that Cyrus Dickey owned on that side of the pike, which was the thirty-nine acres.

A number of witnesses, who were present at the sale, say that all the land belonging to said deceased was sold; but let us call attention to a few facts that ought to control the question as to whether or not the appellees knew they were only buying twenty-seven and three-fourths acres, which are as follows: The judgment authorized the sale of twenty-seven and three-fourths acres, and the appellees' bond called for that quantity, and the sale was confirmed and a deed made in conformity with the judgment and the bond; but the appellees say that the bond was signed by them by inadvertance and mistake.

They say that when the bond was prepared and read to them, calling for twenty-seven and three-fourths acres, that they said it ought to call for twenty-seven and three-fourths acres, more or less, and that E. Dickey promised to correct it in that particular.

Now we have the declaration of both the appellees that they knew they had bought only the twenty-seven and three-fourths acres of land, more or less. Besides, the appellee, Geo. D. Dickey, had conveyed this parcel of land and the twelve-acre parcel by separate deeds to Cyrus Dickey.

They say that the words "more or less" ought to cut a big figure. Is it meant that said words ought to be a secret battery on E. Dickey's ignorance and entitle them to the twelve-acre separate tract? It seems to us that said words, had they been used, would have only accounted for a reasonable falling off or excess of the number of acres mentioned, and that the twelve-acre tract would not be included. We think it is clear that the appellees knew that they were purchasing only the twenty-seven and three-fourths acres' parcel of land.

The judgment is reversed, with directions to compel the appellees to pay said bond and to accept the deed heretofore made, and for further proceedings consistent with this opinion.

STEVENS, &c. v. ARNOLD'S EX'OR.

(Filed January 9, 1894—Not to be reported.)

1. Settlement of decedent's estate—Sale of lands—Jurisdiction—In an action in Kenton county by executors to compel one of testator's children to contribute a part of certain sums unlawfully obtained by her from the testator before his death, for the purpose of paying the debts and specific bequests of the testator, the court has no jurisdiction to order a sale of land located in Boone county, for such purchase, which had never belonged to testator, but which had been bought by the testator's child with the property so unlawfully received from him and sold again by said child to a bona fide purchaser for value and without notice.

2. Same—Trusts—Liens—The wrongful receipt of property by his child from the testator in his lifetime did not convert the money so received into a trust fund, so that land purchased with such money would be impressed with the trust, even in the hands of an innocent purchaser for value and without notice; nor does the pendency of the suit by the executors for contribution against the child create a lis pendens lien on the land.

8. Same—Estoppel—A vendee from the child, who bought as an innocent purchaser for value, while the suit was pending in Kenton county, but who was not a party to it, is not estopped to question the validity of the order of sale made in said suit in Kenton county by purchasing the land at the commissioner's sale made under said order, his intervening petition for that purpose having been offered in the suit in Kenton county before the sale was confirmed.

J. W. Bryan, A. G. Winston and James O'Hara for appellants.

W. H. Holt and A. C. Ellis for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

James G. Arnold died in the county of Kenton, leaving a last will that was executed in the year 1867.

There was a contest over the probate of this paper that finally terminated in sustaining its validity in a decision by this court in the year 1883.

The testator left four children surviving him and a grandchild. In the year 1873 the four children entered into some arrangement by which the testator gave to each a large portion of his estate, consisting of notes and land.

The testator died in the year 1876, and having by his will given legacies to his grandchildren, it was ascertained that the estate left after the division in 1873 between his children was insufficient to pay his debts, and the special devises made to his grandchildren.

The executor of the will, in September, 1883, filed a petition in the Kenton Chancery Court to sell what was left of the estate and to subject the property that had been divided among his children in the year 1873, to supply any deficit that might exist after the estate left in the testator's name had been exhausted. The executor also filed an amended petition in the case, alleging that the testator, when he made the distribution in 1873 between his children, was mentally incompetent to dispose of his estate.

It was held that the testator was incompetent to make the distribution, and that the estate the children had obtained should contribute to the payment of the debts of the testator, and the legacies devised to his grandchildren.

The testator left a daughter, Mrs. Virginia Willis, who, in the division of 1873, had received a considerable portion of the estate of her father, much of it consisting in cash notes, and who, by the judgment in the action to set aside the division, was made to refund what she received or to contribute her proportion of what was necessary to pay these legacies.

After this division had been made Mrs. Willis, as is alleged and shown, purchased with the proceeds of the notes given to her a tract of land in the county of Boone, containing 160 acres, and obtained a conveyance.

While this action was pending to compel contribution, and before final judgment, Mrs. Willis sold to the appellant, Stevens, this Boone county farm for $5,500 cash, and executed to him a conveyance. Stevens was not a party to the action in which the distribution of 1873 was cancelled, and was in nowise connected with the litigation. He paid his money, as the pleadings show, in good faith, and for land the testator never owned, and to which a perfect title existed, as appeared from the records of the Boone county clerk's office.

It appearing from proof taken or upon admitted facts that this tract of land was purchased by Mrs. Willis, she having converted the notes given her in the distribution into money, the chancellor in rendering the judgment directed this land sold to satisfy and discharge what Mrs. Willis owed the estate. The land was advertised and purchased by Stephens for $4,000. After this purchase Stephens came into court resisting the confirmation of sale on the ground that the land was his; that he had purchased it in good faith; was not a party to the action in which it was sold, and never knew that this land was involved in the litigation or of the pendency of the action until he saw, or was informed, that it had been advertised by the commissioner for sale to satisfy the judgment against Mrs. Willis.

He offered to file a petition setting up all these facts, and asked to be made a party to the litigation before the confirmation of the sale, that he might be heard and his rights determined. The court refused to permit his petition to be filed, overruled his exceptions to the report of sale, and confirmed the act of his commissioner and he has appealed.

Some objection has been made to the appeal for the reason that all the record bearing on the question is not before the court. There is nothing affecting the issue raised by Stephens omitted from the record so far as we can discover, and none has been pointed out by counsel, and it was wholly unnecessary to bring up the large record involving the litigation between Arnold's executor and devisees for the settlement of his estate.

The petition speaks for itself, and objections to the filing is equivalent to a demurrer, and the question is, has the land of Stephens been sold to pay what Mrs. Willis owes the estate of her father? There is enough in the record to show what land was sold, and the pleadings are all before us under which it was sold, and if the appellant was the owner his motion to file the petition should have been sustained.

It seems to us there are only two questions necessary to be decided in this case, and those are, can the executor follow the proceeds of the notes given to Mrs. Willis by her father that had been invested by her in this land and sold to an innocent purchaser for value, who had no notice of the pendency of the action in the Kenton Chancery Court, and had that court the jurisdiction to subject this land, even as against Mrs. Willis, if she had not parted with the title?

There was no lien created by attchment or otherwise, but a lis pendens, it is urged, existed by reason of the action instituted by the executor for a settlement of the estate of the testator. There is no effort or claim on the part of the appellee that the appellant was other than a bona fide purchaser. Arnold, the devisor, never owned this land, and the appellant, in examining the title, found a record in the county of Boone where the land is, showing a perfect title in his vendor, Mrs. Willis.

There was nothing upon the records of that county showing that either the devisor, Arnold, or his estate had any interest in this land, or any fact of record that would put the most cautious man on further inquiry as to the title.

The action in Kenton county by the executor was to make Mrs. Willis liable for a debt or claim held by the testator in his lifetime against her for wrongfully obtaining possession of these notes and appropriating them to her own use, and while the chancellor had jurisdiction of the person of Mrs. Willis, he had no jurisdiction to sell this land or to convert the wrongful appropriation into a trust that would follow the proceeds of these

notes into the land to the prejudice of one not a party to the action, and who is conceded to have been a purchaser in good faith.

Under such circumstances the chancellor had no jurisdiction to disturb the purchase of Stephens or to sell this land by reason of the wrong committed upon the testator in his lifetime, and it is, therefore, not necessary to determine whether the land was or not sufficiently described in the petition to constitute a lis pendens, as none existed, conceding the description sufficient for that purpose. Nor is the appellant estopped by becoming a purchaser. He has injured no one by it or altered in any manner the status of the parties. He was purchasing his own land, and to require him to pay the purchase money notes would be coercing payment without any consideration.

The judgment below is reversed and remanded, with directions to permit the petition to be filed, and to hear the exceptions of the appellant and to sustain them, if on the hearing it appears that he purchased the land of Mrs. Willis that was sold by the commissioner.

MASSIE v. COMMONWEALTH.

(Filed January 11, 1894—Not to be reported.)

1. Criminal law—Insanity—Evidence—Opinions of the neighbors and associates of an accused as to his mental condition are competent on the question of his insanity, especially after they have detailed incidents and circumstances connected with the accused and conducing to show his mental condition and the facts on which their opinion is based.

2. Same—Prejudicial remark of judge in presence of jury—During the trial of one for murder, and after the Commonwealth had objected to the propounding of a question to a witness by defendant's attorney before it had been submitted to the court in writing, a remark by the judge in the presence of the jury, that "the court was getting tired of being humbugged and bamboozled by the counsel for the defendant and had stood this as long as he intended to," was improper, and prejudicial to the defendant.

3. Same—Evidence—Instructions—On a trial for murder defendant stated that as soon as one H. told him of certain statements made by the deceased reflecting on his integrity and the chastity of his wife and two nieces, he immediately told H. to go home, and in a greatly excited condition started out to find deceased for the purpose of carrying him to H. and make him retract before H. the scandalous language; that he met deceased and repeated what H. had said and started with deceased to find H.; that they quarrelled violently, and that deceased said he would say last what he first said to H. and cursed defendant and put his hand behind him as if to draw a pistol, when defendant fired and killed him. A brother-in-law of deceased, who was present at the killing, corroborated defendant to some extent. Held—

First—The disclosures made by H. to defendant were competent to show defendant's motive in seeking deceased.

Second—Defendant was entitled to an instruction as to the law of self-defense. It was for the jury to determine whether he sought the deceased for such a purpose as would deprive him of the right to avail himself of the plea of self defense.

Third—An instruction as to the law of manslaughter should have been given. The repetition of slanderous charges against defendant, wife and nieces by deceased to defendant was sufficient provocation to create sudden heat and passion that might reduce the crime from murder to manslaughter.

E. E. Settle, Lindsay & Botts, J. A. Scott and J. C. S. Blackburn for appellant.

Wm. J. Hendrick for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Hazelrigg.

In July, 1893, in the Owen Circuit Court, the appellant was tried and convicted of the crime of murder, and sentenced to the penitentiary for life.

The chief reasons assigned for a reversal of the judgment below are that the court refused to instruct the jury on the law of self-defense, of voluntary manslaughter and of the law applicable to insane persons, also in refusing to admit as evidence the communications of the witness, James Hanna, made to the appellant shortly before the killing, and in refusing to admit the testimony of divers witnesses, experts and nonexperts, on the alleged insanity of the accused.

The court gave two instructions only—one on the subject of murder and the other as to reasonable doubt.

The facts attending the homicide, briefly stated, are these: The accused was a reputable physician in active practice, living with his wife and six children on Cedar creek, in Owen county. He was a quiet, law-abiding citizen, and his high character is testified to by many and questioned by none. There had also lived with him during the winter before the homicide two nieces from Indiana, who were engaged in teaching school in the neighborhood and who were orphans and under the protection and in the care of the appellant while in Kentucky.

The arrival of one of them at Frankfort to resume her work was expected, and the accused sent his tenant, Jas. Hanna, to meet her and bring her out. On the road to that city Hanna met Honaker (afterwards killed by the accused), who, after learning the purpose of Hanna's trip, detailed to him a horrid story, involving the chastity of the young ladies, and in a measure that of the doctor's wife—charged the appellant, in fact, with keeping a house of prostitution in language too foul for repetition. When upbraided and cautioned by Hanna, Honaker flourished his pistol and said he would tell Massie the same thing, and if he denied it he would give him the contents of the pistol.

This so weighed on the mind of Hanna that on the next day he sought the appellant at his house, and revealed the story to him. It threw him into a state of frenzy; he ordered Hanna to go home and wait there until he came; he seized his gun, mounted his horse and started out to find Honaker, to have him, as he testifies, to right the great wrong he had done him. He rode rapidly, throwing the gates wide open as he passed through them, and reached Honaker's house in a few minutes.

We give what follows in his own language: "Have an indistinct recollection of what occurred there (Honaker's); don't know what purpose I had except to see Honaker, and get him to right the great wrong. I think his wife told me he had gone to Monterey. I told her he had been talking scandalously about me. My feelings were awful. I think I rode fast; have no recollection of seeing any one or meeting any one after I left Honaker's house until I saw Honaker. I met Honaker and Richardson at Stevens' barn, above Stevens' house; have no recollection of going below Stevens' house. I told Honaker I wanted him to go with me and

right the wrong he had done in talking about me and mine. I told him he had ruined me and my family. He said he didn't have to go; that he was not afraid of me and my guns and pistols; that he didn't have to go. I told him that when he got drunk he let his mouth go off. He turned round and put his hand back of him as though he was going to draw a pistol and said, you are a d—d lying son of a b—, and I shot. I thought he was going to shoot me and carry out his threats, and believing so, I shot. I told him that Hanna had just told me that he (Honaker) had told him the day before that I was keeping a whore-house, and that my wife was assisting me; that I was —— my two cousins, and that he had pulled out his pistol and threatened to give me the contents of it. * * * My purpose in going to see him was for him to straighten up what he had started. I knew he was a dangerous man, and I took my gun to protect myself. He called me a son of a b— and a liar, and I thought was attempting to draw his pistol. He said he would face Hanna, and what he said first he would say last. He never denied any time the slanderous things he had said. * * * It was not my intention to shoot him when I met him until the shot was fired."

Richardson, who was by far the most important witness introduced for the State, as he alone was immediately with the parties at the time of the killing, was a brother-in-law of Honaker's, but testified on cross-examination as follows: "We met Massie forty yards below Charles Stevens' stiles. It was five hundred yards from where we first met Massie to the place of the killing. He was very much excited and talked loud. He paid no attention to me; he did not appear to see me. I saw Honaker with a pistol the evening before. Just before the shot Honaker turned in his saddle and placed his left hand behind him, and said. you —— something. I couldn't tell what he said," etc.

Upon this state of case we are at a loss to understand why the accused was not entitled to an instruction on the law of self-defense.

If his purpose in sending Hanna home was that he might bring Honaker before him, in order that this foul blot upon his own character and that of his wife and family—his nieces being in effect members of his family—might be cleared up, and the circulation of the slander stopped upon assurance of its falsity, then that purpose was a lawful one, and the meeting between himself and Honaker, though of his own seeking, was not with the intention of harming the deceased. It could not, in such event, be said that by his own wrongful act, in bringing on the fatal meeting, he had deprived himself of the right of self-defense.

That they started off to meet Hanna on this peaceful errand is conceded, or at least rendered entirely probable from the proof; that they traveled together for five hundred yards, at any step of which the appellant might have shot the deceased, is also admitted; that they quarreled violently is undisputed, and that just before the shot the deceased turned in his saddle, hurled a vile epithet at the accused, and threw his hand behind him, is sworn by the brother-in-law of the dead man, the chief witness for the State.

It may not be true that the accused sought the deceased for this peaceful purpose, or that after their violent quarrel in the road the deceased sought to draw his pistol as sworn to by the witness. In fact it may be true that his intention was formed at the moment of the disclosures made to him by Hanna to kill the deceased; that he took this wild ride with the deliberate and

cool determination to find him and slay him; but clearly there is testimony conducing to show the contrary.

We have nothing to do with the truth or falsity of the evidence. The accused is entitled to have that passed on by a jury of his county, acting under proper instructions.

It follows from what we have said that the disclosures made by Hanna to the appellant, just before the killing, constitute, from the appellant's standpoint, the motive for his seeking the deceased. Without this he is left without any explanation of his conduct in mounting his horse and riding three or four miles to find him.

This testimony was not allowed to go to the jury, save such part as constitutes a threat. It is the foundation of the appellant's claim that the object of the meeting was a lawful one, and is competent for that purpose.

It follows, also, from the views we have expressed, that the manslaughter instruction should have been given. If the purpose of the meeting was peaceful, and upon the mission to find Hanna hot words and a violent quarrel ensued, growing out of the loathsome and vile slanders, substantially repeated in that quarrel, then there is an absence of premeditation, and the foul charges made against the accused and his wife, and re-asserted in his face, afford sufficient provocation to reduce the crime from murder to manslaughter.

This might not be the case as long as the charges were hearsay. Hanna may have misunderstood Honaker, but when told face to face by Honaker that what he told first to Hanna he told last, coupled with an epithet which enforced his meaning, the accused no longer doubts that the honor and chastity of his wife and nieces have been wantonly assailed and sought to be published to the world.

The law considers the weakness of human nature, and treats these attacks as a sufficient provocation to create sudden heat and passion. These considerations render it doubly sure that the statements of Hanna to the accused, of the slanderous words of Honaker, should have been admitted as competent testimony.

Again, proof was introduced showing a condition of mental unsoundness on the part of the accused at different times during his life. Incidents and circumstances were detailed by his associates and neighbors conducing—slightly it may be—to show such condition. Upon the facts shown, and upon their knowledge of the man, these witnesses were asked their opinion as to his sanity at the time of the homicide. The court refused to permit an answer from any of them, observing, in the hearing of the jury, that if he thought the prisoner insane he would discharge the jury and order a trial of that question. Now nothing is better settled in our law than that the opinions of those who have had the proper opportunity may give their opinions to the jury for what they are worth.

In Brown v. Commonwealth, 14 Bush, 398, the question is fully discussed, and it is there said: "The ability of the witness to detail certain facts, which are in themselves substantive evidence of the condition of the mind, may add very greatly to the weight of the opinion given in evidence, but they will not, of necessity, affect the question of competency. One of the main reasons for permitting such evidence is that the facts and circumstances which go to form the opinion in the mind of the witness can not be reproduced and made palpable in the concrete to the jury. Common observation teaches us that mind and character manifest themselves through subtle mediums of communications that can not be made tangible in all cases to the understanding of others, even by the most studied and powerful use of language." (Wharton on Evidence, section 451).

So also was the testimony of the experts, Doctors Stewart and Tobin, competent. They were asked hypothetical questions, based on the particular facts which had been established by the proof already introduced on the subject of the sanity or insanity of the accused, and their opinions were clearly competent, according to the rules of evidence prevailing everywhere.

Another error, likely prejudicial to the rights of the accused, is thus shown in the bill of evidence: "The defendant's attorney then started to propound a question to the witness. The Commonwealth's attorney insisted that the question should be in writing and submitted to the court, and the court said in the presence of the jury that the court was getting tired of being humbugged and bamboozled by the counsel for the defendant, and he had stood this as long as he intended to," to which language the defendant excepted.

The counsel for the accused were trying, doubtless, to present the case of their client as best they could. There is at least nothing to indicate any bad faith in asking the question which brought forth the response of the court. It seems to us that what the court said was likely to create contempt in the minds of the jury for the counsel for the accused and for defense offered by him.

For the reasons indicated the judgment below is reversed and a new trial granted, to proceed according to the principles announced in this opinion.

GREEN v. COMMONWEALTH.

(Filed January 18, 1894—Not to be reported.)

The appellant's affidavit for a continuance was vague and indefinite; did not disclose the materiality of the evidence of the absent witnesses, and did not state that the affiant believed such evidence to be true, hence his motion for a continuance was properly overruled.

J. Alexander Chiles for appellant.

W. J. Hendrick for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted of the crime of horse stealing, and complains of the judgment below because, first, his motion for a continuance was overruled; second, incompetent testimony was permitted to go to the jury; third, the court misinstructed the jury; and, fourth, the verdict was not sustained by the evidence.

Of the first alleged error it is sufficient to say that the materiality of the testimony expected to be obtained is not shown with certainty; the affidavit is vague and indefinite in its character; moreover it does not appear, as is required by the Code, that the affiant believed the proposed testimony to be true.

The testimony complained of, it may be admitted, was not relevant to the issue, but it was not prejudicial.

If the appellant is to be believed, he had gone to Richards' to have him witness a note which he intended delivering for the horse which he is charged with stealing, and was looking at his hogs with a view of buying them, and Richards testifies that he found the appellant driving his hogs, and asked him what he wanted. He answered that he wanted to buy his hogs. Rich-

ards would not trust him or credit him, but proceeded to witness the note for the horse. This evidence is not suggestive of hog stealing by the appellant, as feared by his counsel, and while incompetent is not to his prejudice. The instructions are explicit and free from error, and the verdict is supported by the proof, which discloses a clear case of horse stealing.

Judgment affirmed.

CAUDILL v. CAUDILL.

(Filed January 13, 1894—Not to be reported.)

In this common law action, submitting to the chancellor by agreement, and involving only the location of a boundary between adjoining tracts of land, the judgment of the chancellor was fully sustained by the evidence.

John L. Scott & Son for appellant.

S. B. Dishman for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Pryor.

This common law action went to the chancellor by the consent of all parties, and the pleadings, not especially denied, were considered as traversed of record. The only question involved was one of boundary between two adjoining tracts of land. The court below dismissed the petition upon the evidence, and, in our opinion, the judgment is fully sustained by the testimony of those who ought to know where the real line is located.

Judgment affirmed.

EVANS v. COMMONWEALTH.

(Filed January 13, 1894.)

1. License to sell liquors as a druggist may be granted by the county court, although the applicant has not posted the five notices of such application, as required by law, when the application is for license to sell liquors as a retail dealer.

2. Same—A license to sell liquors as a druggist should not be granted when it appears that the applicant is and has been engaged in the business of unlawfully retailing liquors, and that he is not a drugigst in good faith, but assumes that name merely for the purpose of retailing liquors.

3. Same—Such license to sell as a druggist can not be granted to one who has engaged in a business requiring it without taking out the license within the next six months preceding the application, and who will not, and can not, in addition to the regular license tax for such period, pay an additional sum equal to 20 per cent. thereof.

Alexander Lackey for appellant.

Wm. J. Hendrick for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, by motion before the county judge of his county, and after posting for ten days the notice of the application required of persons who desire to sell spirituous, vinous and malt liquors by retail, sought to obtain a druggist license, with privileges to sell liquors as provided by law.

His application was refused, and the only argument used by the counsel representing the appellee in the court below is that the notice of the application was posted at only four places instead of five, as required by law. A casual examination of the statute will show that this notice, posted at the courthouse door and at four other places for ten days, is intended to apply only to retail dealers of spirituous, vinous and malt liquors and not to druggists, as such who may sell by the quart, under certain restrictions and on the prescription of a physician, so that if this were the only reason for refusing the license the applicant's motion should have prevailed. But on the trial of the motion the appellant testified that he had sold spirituous liquors in violation of law since Novemebr 1i, 1892—the date of the passage of the new revenue law—and that he could not tell the number of times he had done so; that he was in the store but little and his clerk attended to the business; that he had been in business fourteen years, and that at nearly every court since he began business he or his employe had been indicted for the illegal sale of liquors.

From this proof it is easily inferable that the applicant was engaged in the business of unlawfully retailing liquors, and that he was not a druggist in good faith and had assumed the name or business for the purpose of retailing liquors. Upon such a state of case the court properly refused the application. (Acts 1891-2-3, article 110, subdivision 2, section 16.)

Moreover, section 3 of the same article of the Act 1891-2-3 provides that no person shall be granted such a license who has been engaged in a business requiring it, and has been selling without the license witihn six months next preceding his application for license, "who will not, in addition to the regular license tax, pay a sum equal to 20 per cent. thereof."

The applicant made no offer to pay this sum or penalty, and could not do so because he had violated the law so many times he couldn't tell the amount due under the section named.

The judgment is affirmed.

COMMONWEALTH v. MILBY.

(Filed January 16, 1894—Not to be reported.)

Indictment—Malfeasance in office by county judge—An indictment against a county judge for malfeasance in office, which merely follows the language of the statute and charges that defendant practiced law in courts inferior in jurisdiction to the county court, and was engaged as attorney in suits pending in his own court involving the settlement of estates, is not sufficiently definite or certain. It must fully set out the particular actions and courts in which the accused has appeared as attorney at law contrary to law.

W. J. Hendrick for appellant.

D. T. Towles and Jas. Garnett for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, W. H. Milby, being county judge of Green county, it is claimed that he practiced law in the inferior courts and in actions involving the settlement of estates.

He was indicted for malfeasance in office under section 16 of article 13, chapter 28, General Statutes, that provides: "No county judge shall prepare any pleadings to be filed or used in the quarterly or county courts of his own county, nor shall he practice as attorney at law in any court of his own county having jurisdiction inferior to either of the courts aforesaid. He shall not act as counselor or attorney in any cause pending in a court of his own county, by appeal from either the quarterly or county courts, nor shall he bring or be engaged as attorney in any suit in his own county involving the settlement of the estate of a decedent, or the settlement of the accounts of a guardian or trustee. A violation of any of the provisions of this section shall cause a forfeiture of his office of county judge."

There was a demurrer to the indictment and the demurrer sustained, and we think properly. The charges are too indefinite and uncertain, with no fact whatever stated, except the general charge that the accused practiced law in courts inferior in jurisdiction to his own, and was engaged in suits pending in his own county involving the settlement of estates, etc.

The language of a statute can not always be followed in prosecutions for offenses of either a criminal or penal nature. Enough must be stated to enable the defendant to know in what particular he has violated the statute; what action he has brought or he has been employed in as counsel; what court was that action pending, and in whose name; what action was he engaged in involving the settlement of a decedent's estate, and in what court was it pending.

Such facts must be alleged and proven to bring the case within the statute. Under this general charge the defense is at a loss to meet the accusation by the State, and can not prepare his defense unless informed in what action he took part as counsel and the court in which it was pending. No such pleading can be sustained, however liberal the practice may be.

Judgment affirmed

SLAUGHTER v. COMMONWEALTH.

(Filed January 18, 1894—Not to be reported.)

An indictment alleging that the defendant feloniously, etc., and in the night time, broke open and entered a certain dwelling house, with the intent to commit a felony, need not set out the particular felony the defendant intended to commit.

W. R. Haynes for appellant.

Wm. J. Hendrick for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Pryor.

This is a motion in arrest of judgment. The appellant was convicted of burglary, and it is now urged the indictment fails to allege a public offense.

There was no demurrer to that pleading, and if there had been should have been overruled. It is alleged that he feloniously, willfully and unlawfully, and in the night time, broke open and entered the dwelling house of W. B. Hill, with the intent, then and there, to commit a felony, etc.

It is argued the indictment should have shown in what the felonious intent consisted—that is, whether the intent was to steal money, goods or commit a crime upon the person of some one within the dwelling. If, then, in the absence of testimony as to the felony actually committed by the person entering the dwelling, the Commonwealth is required to show the kind of felony the party charged intended to commit, it would be difficult to obtain a conviction. At common law the charge in an indictment of the unlawful breaking into the dwelling and the acutal taking of the property of the owner would authorize a conviction for larceny, and an acquittal for burglary, if the facts failed to show that a burglary had been committed, and for that reason the particular felony committed was generally alleged, but where the intent to steal or commit a felony in general terms is stated, the indictment is good, both under the rule of the common law and the Criminal Code.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

CARDWELL, &c. v. ATWATER, &c.

(Filed January 10, 1894.)

1. For the breach of a contract by one person to advance money to another only the person with whom the contract was made and to whom the money was to be advanced can recover damages. Third persons who were not parties to the contract, and between whom and the person undertaking to advance the money there was no privity, have no right of action. And the party himself can recover only such damages as are the natural and proximate result of the breach.

2. Mistake—In an action upon a promissory note an answer alleging that it was agreed between the parties that the note was not to be paid in a certain contingency, which had happened, and that this agreement was omitted from the note by mistake, constituted a good defense.

3. A contract for the sale of standing trees in contemplation of their immediate removal from the soil is not within the statute of frauds.

4. Amendment of pleadings—Election—Although an amended answer offered by defendant was inconsistent with the original answer, the court should not have refused to permit it to be filed, but after it was filed should have put defendants to their election as to which of the inconsistent allegations should be stricken from their pleading.

Riddell & Riddell and J. B. Marcum for appellants.

Beckner & Jouett for appellees.

Appeal from Breathitt Court of Common Pleas.

Opinion of the court by Presiding Judge Brent.

Plaintiffs, Atwater and Allse, brought suit against Tevis, Cardwell and Cole on their joint and several promissory note for $750. Tevis has not yet answered in the case.

Defendants, Cardwell and Cole, in their original answer, admit the execution and delivery of the note, but set up, by way of counterclaim, that the obligor, Tevis, had, by written contract, bought of the Davis heirs a heavily-timbered tract of land on Holly creek, in Breathitt county, for the sume of $3,750; that the plaintiffs agreed to furnish him with the money to pay for it and obtain a conveyance by buying from him all the poplar, ash and cucumber timber, the money to be advanced and the timber to be cut and delivered by Tevis at the mouth of Holly; that the $750 sued for was advanced under this contract; that Tevis was to and did get them to sign as guarantors the note which Tevis gave for it in order to secure plaintiffs against loss in event he failed to get a good title to the land and the timber sold to them; that it was further agreed that in a few days plaintiff would furnish the other $3,000, and then, surrendering the note sued on, would take the note of Tevis, signed by the answering defendants, for the whole amount, $3,750, to be held as a guarantee against loss by failure of Tevis to get the land and timber; that they, Cardwell and Cole, did, in pursuance of this agreement, a few days after the advance of the $750, tender the note of the defendants for $3,750 to plaintiffs, who refused and failed, and still refuse and fail, to advance any more money, and still kept the note sued on, and that Tevis could have gotten the land and timber if they had fulfilled their agreement. They also allege that their co-defendant, Tevis, was to pay them for going upon the note for the money to be advanced $1,000; that by plaintiffs' refusal to complete the purchase of the timber and advance the money they have been damaged in that sum, which they seek to recover, and for which they ask judgment against the plaintiffs.

If there is any right to damages on account of the alleged refusal of the plaintiffs to carry out the contract averred with Tevis, they are responsible to him alone. There is no priority between plaintiffs and Cardwell and Cole in relation to their compensation as claimed, nor any contract for the breach of which they are liable to those defendants; and to Tevis they would, if liable at all, only be so for such damages as are the natural and proximate rusult of their refusal. To make them responsible for all the collateral engagements that Tevis might have entered into, dependent though they might be on his contract with them, would be stretching the doctrine far beyond what has ever been claimed. Parties in making and breaking contracts are not held to look beyond the reasonably to be expected consequences, and are not supposed to contemplate indirect and remote results.

There was a demurrer filed to the answer as it then stood, and it should have been sustained, though no action was taken on it so far as this record shows. The defendants, Cole and Cardwell, then offered an amended answer, in which they set up that they entered into the contract between plaintiffs and the defendant, Tevis, at the request of plaintiffs, and were to receive by its terms $1,000 out of the proceeds of the land and timber; and further, "they say the note sued on was not to be paid unless the title to said land and timber should prove to be bad and plaintiffs should lose the amount of said note by reason of the failure of said title. They say that this part of the contract was left out of the writing sued on by mistake, and that the title to said land is now good, and has not failed."

The first part of the amendment, taken in connection with the

original petition, still fails to present a cause of action against plaintiffs. All the facts so presented do not constitute a counter-claim. That part of it, however, which alleges that by mistake the agreement between the parties, that the note should not be collected unless the title to the land and timber should prove to be bad, and plaintiffs thereby incur loss, appears to be a good defense, though imperfectly and somewhat indefinitely stated, and the court should have permitted it to be filed. Even if it was inconsistent with the statements of the original answer, and we do not think it is, the court should not have refused to let it be filed, but after it was filed should have put defendants to their election as to which should be stricken from their pleading. We can not agree with counsel for defendants that the sale of the trees was within the statute of frauds, and should have been in writing. The pleading shows that it was a sale in contemplation of their immediate severance from the soil, in which case it has been repeatedly held the statute does not apply.

The judgment is reversed and the cause remanded, with directions to sustain the demurrer to the original petition, to permit the filing of the amended petition, and for other proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

GALLAGHER, &c. v. LOEB, BLOOM &c.

Filed January 10, 1894. Appeal from McCracken Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Improvement of wife's property with husband's money—In this action to subject the property of a married woman to the payment of a debt of her husband, to the extent that it had been improved with the husband's money, the evidence is sufficient to sustain the finding of the lower court, that the husband's money was used in improving the property.

2. Objection to depositions waived—Objection to the reading of the deposition of one of the plaintiffs, upon the ground that it was taken after other depositions had been given, comes too late when made in this court for the first time.

Rhey Boyd for appellants; Quigley & Quigley for appellees.

COMMONWEALTH v. FINLEY.

Filed January 10, 1894. Appeal from Whitley Circuit Court. Opinion of the court by Judge Yost, reversing.

Obstruction of street—While a temporary, reasonable and occasional obstruction of the use of the street for any legitimate purpose is not a nuisance, yet any continued encroachment, it matters not for what purpose, is a nuisance, and punishable as such.

Upon the trial of appellee for creating a public nuisance by obstructing one of the streets of the town of Williamsburg, as the evidence showed that twenty-four feet of the width of the street had, for more than forty days, been occupied by stones placed there by defendant, and that travel along the street had for that length of time been impeded by this obstruction, the court erred in giving a peremptory instruction to find for defendant.

W. J. Hendrick for appellant.

WILSON v. HOCKER & TABOR.

Filed January 10, 1894. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Brent, affirming; Judge Yost dissenting.

Taking of depositions in term time—Continuance—Where the defendant in an equity case waited for three months after the issue was made up before taking any steps to prepare the case, and then began the taking of depositions on the Saturday preceding the Monday on which the next term of court began, and the taking continued into the term, by reason of which the plaintiff and his attorneys could not be present, the one being on the grand jury and the other busy in court, the depositions, which were not filed until after the case was called for trial, were properly suppressed. And the court did not abuse its discretion in refusing a continuance which was asked, in order that the depositions might be retaken, no diligence having been shown.

Judge Yost, dissenting, holds that as the depositions were taken after a sufficient notice, the mere fact that they were taken during the term at which the case was set did not authorize the court to suppress them.

J. Edwin Rowe and M. L. Heaverin for appellant; J. E. Foyle for appellees.

WRIGHT v. WRIGHT, BY &c.

Filed January 17, 1894. Appeal from Simpson Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Benefit societies—Rights of beneficiaries—Where a benefit certificate in the Knights of Honor, a mutual benefit association, was made payable to the wife and children of the member to whom it was issued, and the wife died before the husband, who married again, leaving at his death the second wife as his widow, the children were entitled to the whole of the fund designated in the certificate, to the exclusion of the widow, it being provided by the general law of the association that "in event of the death of one or more of the members elected by the member before the death of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries." The statute relating to the revocation of wills by marriage of the testator has no application.

John J. Milliken for appellant; G. W. Whitesides and Edward W. Hines for apppellees.

LYTTLE'S ADM'R v. RAWLINGS.

Filed January 17, 1894. Appeal from Knox Court of Common Pleas. Opinion of the court by Presiding Judge Brent, reversing.

Trusts—Where a mother advanced money to make a payment upon a house and lot which it was understood by her had been purchased for and was to be deeded to her daughter, and the daughter executed a writing reciting that the mother was to have an interst in the property to the extent of th sum advanced until it should be repaid to her, the husband of the daughter having, without the mother's consent, taken the title to himself with knowledge of the agreement, a trust resulted in the mother's favor, and she has the right to proceed against the son-in-law personally for the amount she paid, the property having been sold by him.

John T. Hays for appellant; H. C. Faulkner for appellee.

NEWCOME, &c. v. TURNER, &c.

Filed January 17, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. A statement by parties, naming T., "etc.," as appellees, makes T. alone a party appellee, as the statement must show the names of the appellees, without reference to the record.

2. Jurisdiction — In this transitory action, instituted in the quarterly court, judgment having been rendered in that court in favor of the only defendant served in the county in which the action was pending, and against the other defendants, and the case then appealed to the circuit court, as it does not appear that the defendant, in whose favor judgment was rendered, was an appellee, it must be assumed that the judgment in his favor was not appealed from; and as neither the circuit court nor the quarterly court had jurisdiction to render judgment against any party defendant so long as that judgment stood, the judgment of the circuit court dismissing plaintiff's petition must be affirmed.

H. W. Rives for appellants; S. A. Russell for appellees.

VOWELLS v. COMMONWEALTH.

Filed January 17, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Prejudicial errors—In the absence of a bill of exceptions showing the testimony heard on the trial, this court can not say that the defendant was prejudiced because he was not given an opportunity to contradict certain witnesses for the prosecution.

2. New trial—The fact that defendant was detained at home by the illness of his wife, and was thus prevented from being present at the trial to aid his counsel, did not authorize the court to grant a new trial, as he failed to furnish his attorney with any facts in relation to his absence upon which to base an application for a continuance, although he had ample time to do so after he knew that he could not be present.

3. Same—The fact that defendant's attorney was, in the opinion of some of the spectators, not well enough to try the case did not authorize a new trial.

W. E. & S. A. Russell for appellant; W. J. Hendrick for appellee.

SOUTHERN CALIFORNIA INSURANCE CO. v. LUCAS.

Filed January 17, 1894. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

Fire insurance—Failure to disclose incumbrances—An applicant for fire insurance, whether inquiry was made of him or not, was bound to communicate all facts known to him and by him believed to be material, and his failure to do so must be regarded as a concealment; and it is to be presumed that he knew and believed what men of ordinary intelligence know and believe.

Where a house and the sixteen acres of land upon which it was situated was worth only $1,700, and the house was insured for $1,000, the failure of the insured to disclose the existence of mortgage liens amounting to more than $700 was sufficient to invalidate the policy, although no inquiry was made as to incumbrances, as the insured must have known that after satisfying the mortgage liens his interest in the insured property would not be as much as the amount for which he was insuring it.

James A. Mitchell for appellant; Edwards & Drake for appellee.

PHILLIPS v. ELIZABETHTOWN BUTTER AND CHEESE FACTORY.

Filed January 17, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing.

Nuisance—Any use of property which corrupts the atmosphere and fills it with stenches and smells is a nuisance, whether it arises from the exercise of a trade or business or any other use; and it is not necessary that the smells should be hurtful or unwholesome. It is sufficient if they are so offensive or produce such discomfort as to impair the comfortable enjoyment of property by persons of ordinary sensibilities.

A hog pen within sixty feet of plaintiff's door, and in which forty or fifty hogs are fed on slops and refuse stuff from defendant's factory, causing such offensive smells as to compel plaintiff to abandon her home, is a nuisance, and plaintiff is entitled to have it abated.

Hobson & O'Meara for appellant; James Montgomery for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. EIFERT.

Filed January 17, 1894. Appeal from Clark Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Fellow servants—In the case of employes of the same grade or rank, and engaged in the same field of labor, the master is not liable for an injury to one employe by the negligence of another, even though the negligence be gross; but the engineer or fireman in charge of the engine of a railroad train and a brakeman on the train are not fellow servants of the same grade or rank, engaged in the same field of labor, and for an injury to the brakeman through the gross negligence of the engineer or fireman in charge of the engine the company is liable.

2. Gross negligence—An instruction telling the jury that "gross negligence is the failure to exercise such care and skill as one of common sense and reasonable skill in the business, but of careless habits, would observe to avoid danger under similar circumstances." conforms substantially, in its application to the facts of this case, to the definition of gross negligence in the case of L. & N. R. R. Co. v. McCoy, 81 Ky., 413. In view of the evidence the jury could not have been misled by the omission of the words "to this own person or life," after the words "to avoid danger."

3. Contributory negligence—The rule that the plea of contributory negligence will not be allowed when willful neglect is alleged applies only to actions under the statute authorizing the recovery of punitive damages when the life of one is lost by the willful nelgect of another person.

4. Contract exempting master from liability for negligence—A contract by a railroad company with an employe, whereby the latter, in consideration of his employment and the compensation to be paid him, assumes all risks of accidents from any cause while in its service, and exempts it from any liability to him on account of such risks or accidents, is void as against public policy.

Breckinridge & Shelby for appellant; Beckner & Jouett for appellee.

HUGHES v. LAUGHLIN.

Filed January 17, 1894. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

Breach of warranty—Judgment sustained by evidence—In this action upon a note and mortgage which the defendant for answer alleged were executed in consideration of a horse which he had bought of plaintiff, and which the latter warranted to be sound when in fact he was unsound, the plaintiff for reply denying that the horse was the sole consideration, and also denying both the alleged warranty and its breach, the evidence was sufficient to sustain the judgment of the chancellor for plaintiff.

O'Neal, Phelps & Pryor for appellant; Dodd & Dodd for appellee.

SLUSHER v. JONES.

Filed January 17, 1894. Appeal from Bell Court of Common Pleas. Opinion of the court by Judge Yost, reversing, Presiding Judge Brent dissenting.

1. Separation of conlcusions—As this was an action at common law tried by the court without the intervention of a jury, and the court failed to state its conclusions of fact separate from its conclusions of law, and there is no bill of evidence in the record, the only question is whether or not the judgment was authorized by the pleadings.

2. Judgment not sustained by pleadings—As the plaintiff sought by his petition to recover upon a contract whereby he and defendant were to share equally in the proceeds of the sale of a tract of land, and his allegations as to the amount for which the land sold and the amount he has received of the proceeds fail to show that the defendant is indebted to him in any sum, the judgment in his favor must be reversed.

Thomas H. Hines and A. K. Cook for appellant; O. V. Riley and W. H. Holt for apppellee.

EPENBAUGH v. GOOCH, &c.

Filed January 17, 1894. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Injunctions—Counsel fees—Where an injunction is merely ancillary, or in aid of the relief sought, or to prevent the commission of a wrongful or tortious act that would result in irreparable injury before the termination of the principal cause of action, a recovery may be had on the bond for reasonable counsel fees where the defendant has succeeded in dissolving the injunction. But where the injunction is the relief sought and the defendant is successful, the costs are taxed as in any other ordinary or equitable action.

Upon the dissolution of an injunction, the sole purpose of which was to restrain the defendant from cutting timber from lands he had purchased from plaintiff, upon the ground that it would endanger plaintiff's lien for the unpaid purchase price, defendant was not entitled in an action on the bond to recover counsel fees.

2. Remote damages—Conjectural profits which might have been realized from the use of land are too remote and uncertain to be recovered as damages on account of being deprived of the use of the land.

W. H. Miller for appellant; Hill & McRoberts for appellees.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. MARCH 1, 1894. No. 17

KENTUCKY COURT OF APPEALS.

POWELL COUNTY v. KENTUCKY LUMBER CO.

(Filed December 9, 1893—Not to be reported.)

1. Pleadings—Election—Where the petition alleged that a lumber company unlawfully appropriated to its own use a highway belonging to a county, by erecting buildings upon it and otherwise assuming control over it, and that when the company made assignment for the benefit of its creditors the assignee continued to hold such possession and control over the highway, the petition states one cause of action—the continued possession of the highway—and it is error to require the county to elect whether it will prosecute the action against the company for its unlawful possession of the highway or against the company's assignee for his unlawful possession.

2. Same—Where the highway so taken possession of by the company has become a part of a municipal corporation, which has full right of possession and control over it as one of its streets, before the assignee took possession thereof, the county has no cause for action against such assignee for retaining such possession, nor can it recover any damages on that account.

W. H. Averitt and O. A. Lyle for appellant.

Arthur Cary and Humphrey & Davie for appellee.

Appeal from Powell Court of Common Pleas.

Opinion of the court by Judge Pryor.

This action is by the county of Powell to recover of the Kentucky Union Lumber Co. and its assignee damages for the obstruction and appropriation to its own use of a public road in that county and also for the recovery of the road. There is but one paragraph of the petition, in which the unlawful entry and appropriation by the Union Lumber Co. is alleged, its assignment to the Columbia Finance Trust Co., and the continued use and possession by the assignee from the date of the assignment to the institution of the action.

The lumber company, insisting that two causes of action were alleged against it, required the appellant to elect whether it

would proceed against the assignee or the trust company or for the trespass committed by the lumber company or its assignee. The plaintiff elected (reserving exceptions to the court's rulings) to prosecute the action against the assignee, and it appearing from the defense filed that, when the assignee was appointed and before, the highway alleged to have been appropriated to the use of the lumber company formed a part of Clay City that had been incorporated a short time prior to the assignment, with the right and power on the part of the municipality to use and control the streets, the action was dismissed. The highway had become a part of the city and was no longer subject to the control of the county, and, therefore, the court very properly held the assignee not liable to the county and dismissed the petition. Did the court below err in requiring the plaintiff to elect? There was one cause of action by the county, and that was against the lumber company for appropriating this highway to its own use by erecting buildings upon it and otherwise assuming control over it. The possession passed into the hands of the assignee, and it was in fact but one continued use by the lumber company, and for the extent of the injury done the county up to the time the highway became a part of the city, or was placed under municipal control, the appellee as assignee is liable, and the judgment, if recovered, is only an unsecured debt that will share its proportion of the assets of the insolvent with its other creditors.

Judgment reversed and remanded for a trial consistent with this opinion.

BIRD v. BOARD OF COMMISSIONERS OF KENTON COUNTY.

(Filed December 9, 1893.)

1. The constitutional validity of acts creating taxing districts for the construction and maintenance of turnpike roads is now well settled in this State by repeated adjudications of this court.

2. Construction of statutes—Particular words found in a statute which, if literally followed, lead to an absurdity or defeat the manifest intent of the legislature, as gathered from the entire act, may be disregarded in its interpretation.

The act of the legislature authorizing the construction of turnpikes and requiring that the width of the macadam shall not be less than eight inches nor more than fifteen inches, should be so construed as to read the word depth where width occurs, such being clearly the legislative intent, and a literal following of the words of the act leading to an absurdity.

O'Hara & Bryan for appellant.

Wm. Goebel for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The taxing district, as laid off by the legislature, was to equalize the burden with the taxpayers, and we perceive nothing in the act that could produce such an irregularity as would induce or authorize this court to interfere.

Taxing districts, created for turnpike purposes, whether constituting the whole or a part of a county, have been upheld by this court in many instances, and the only question proper for consideration in this case is, shall this court, where a statute

has been enacted of such public utility as in this case, look to the plain letter of the act, and following the literal construction or meaning of certain words nullify the entire statute, making the legislative intent an absurdity, or shall the court look to the entire act with a view of carrying out the legislative will, and attach such a meaning to the language used as will uphold the statute?

Courts in such cases will look to the object of passing the law, and if it can be discovered in its provisions will not suffer it to be defeated.

Under this enactment the voters of the turnpike district have favored the law, and bonds have been issued and sold and the money expended in constructing turnpike roads, and because of that, which is a mere clerical error, and which error, upon reading the act, must necessarily correct itself, it is insisted this court should declare the whole act invalid or require the commissioners to comply with the strict letter of the law.

In the eighth section of the act it is provided that the width of the macadam shall not be less than eight inches nor more than fifteen inches.

It is manifest that such a provision is absurd, and it is, therefore, insisted the act should be held invalid. The section should read: "The depth of the macadam shall not be less than eight nor more than fifteen inches," and this will carry into execution the legislative will.

"The right rule of construction is to intend the legislature to have meant what they naturally expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would not be the right one." (Potters on Statutes, 207.)

"In interpreting the law judges are to explore the intentions of the legislature; yet the construction to be placed upon an act of parliament must be such as is warranted by, or at least not repugnant to, the words of the act. But they must not, in order to give effect to what they may suppose to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence would be to defeat the act." (Potters' Dwart. St., 204.)

Under this rule it is urged this court has no power to say that in using the word width the legislature intended to use the word depth, and it is, therefore, necessary to determine how this rule is to be applied. Where the object of the legislature is plain, and its intent, gathered from the whole context certain, the use of a single word that would render the act meaningless and absurd should be disregarded.

Mr. Endlich, in his work on the interpretation of statutes, says: "Where the language of a statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, to inconvenience or absurdity, hardship or injustice, not presumably intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This is done sometimes by giving unusual meaning to particular words; sometimes by altering their collocation, or by rejecting them altogether, or by interposing other words, the court having an irresistible conviction that the modification thus made are mere corrections of careless language and give really the true intention." (Page 400, section 295.)

The general rule of construction is that full effect must be given to any word in a statute; still, if no sensible meaning can

be given to a word, the authorities are that it should be disregarded or eliminated from the statute.

In the Metorpolitan act it was provided "that no road shall be formed as a street for carriage traffic unless widened to forty feet, or unless such street shall be opened at both ends," the word or was read nor, the intention being that both conditions should be complied with.

The word venile used in a statute was read venue—final judgments for penal judgments. (Endlich on Int. of Statutes, 436.)

In the case before us the legislative intent becomes so apparent that where words have been carelessly inserted that lead to an absurdity there is no reason why such a judicial interpretation should not be placed upon the statute as will effect its object, the court being satisfied the use of the word was a mere inaccuracy, and the modification made in furtherance of the legislative purpose.

The judgment below is affirmed.

McCLURE, GD'N v. CLARK, &c.

(Filed December 14, 1893—Not to be reported.)

Assignment by operation of law—Evidence—The evidence shows that at the time of his death the estate of the debtor was appraised at $3,275, while his debts amounted to $3,384. Although the amount of his widow's dower reduced the assets to some extent, it can not be inferred or reasonably believed that the debtor, at the time he executed the mortgage, which is herein assailed as an unlawful preference, then contemplated insolvency or executed the mortgage with a design to prefer. On the contrary it may be fairly assumed that if he had lived he would have realized sufficient from his assets and otherwise to pay all his debts.

M. D. Gray and Wm. Cromwell for appellant.

W. W. Dickerson for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Pryor.

The object of this action is to have the estate of the debtor, Clark, pass to creditors under the act to prevent preferences by insolvent debtors in behalf of one or more creditor.

Clark executed a mortgage to Littell that the appellant alleges was given with the design to prefer and in contemplation of insolvency.

The debtor, Clark, gave two notes to the Deposit Bank at Williamstown for $400 each. The appellee, Littell, was on one of the notes as surety and the other was signed by F. C. and W. W. Clark as sureties.

When these notes became due the two amounts were embraced in one note for $800, and the appellee, Littell, became the sole surety on this note. He took a mortgage as indemnity on the land of the debtor, and it is this mortgage that is claimed from the estate of Clark to his creditors.

Clark died during the pendency of the action, and his estate, when sold to pay the debts, only brought about $2,541 and his indebtedness was $3,384, showing a deficit exceeding $800.

While courts will not assume that property of the debtor failed to bring its full value at forced sales, still it is rational to con-

clude that ordinarily such would be the case, and where the property of the debtor in value is about equal to his debts, and there is no other evidence of insolvency and the design to prefer, ought the court to imply that Clark knew he was insolvent, and in contemplation of the development of his condition made this mortgage to prefer Littell?

The sureties on the note, for which Littell was not liable, were perfectly solvent, and no creditor, so far as this record shows, was pressing the debtor, or any other circumstance indicating that Clark believed he was unable to pay what he owed, and we are satisfied that Littell made himself liable for both notes under the belief that Clark was solvent, and that Clark then believed in his ability to pay his debts.

The good faith of the creditor, of course, can not affect the question, and where the debtor in contemplation of insolvency, and for the purpose of preference, makes the transfer, his estate passes under the statute to creditors generally, although the creditor preferred may have had not even a suspicion of the purpose and design of the debtor.

The debtor's death was not contemplated at so early a day when this transaction occurred, and but for his death, from the record before us, we have no doubt but that creditors would have been satisfied—the debtor with enough property to pay them. When he died his indebtedness was $3,884, and his assets, at public auction and appraisement, were worth $3,275, and the reason of the deficit is from the claim of dower by the widow. We think it is fair to assume that the assets of the debtor when this mortgage was executed were sufficient to pay the debts of Clark, and certainly proper to assume that the mortgage was not made in contemplation of insolvency and with the design to prefer. It was natural for Littell to require indemnity upon becoming bound for the entire debt, and equally as natural and reasonable for Clark to furnish the indemnity without contemplating insolvency at the date of the mortgage.

The mortgage under the law gave the preference, but that insolvency was then contemplated by the debtor is not warranted by the facts.

Judgment affirmed.

COMMONWEALTH v. DOUGLASS.

DOUGLASS v. COMMONWEALTH.

(Filed December 16, 1898.)

1. The grant of lottery privileges for the benefit of the Henry Academy and Henry Female College has expired by limitation.

2. Repeal of grant of lottery franchise—Impairment of the obligation of contracts—A grant by the State of lottery privileges to one who acquires rights and incurs liabilities upon the faith of such grant may be repealed at any time by the State. Such a grant is made by the legislature in the exercise of its police and not its contractual powers; therefore, the provisions of the State and Federal Constitutions, forbidding the impairment of the obligations of contracts, does not prevent the repeal of such a grant. Stone v. Mississippi, 101 U. S., 814, followed. Gregory v. Trustees of Shelby College Lottery, 2 Met., 598, overruled.

3. Same—Res adjudicata—The question of the right of the State to repeal the grant of appellee's lottery privilege is not res adjudicata in this court. The doctrine announced in previous adjudications of appellee's rights under

his grants having been virtually overruled by subsequent decisions of the Supreme Court of the United States, which this court ought to follow, the question is no longer res adjudicata.

W. J. Hendrick, Reid Rogers and Frank Parsons for Commonwealth.

J. G. Carlisle, D. W. Sanders, Thomas H. Hines, Muir, Heyman & Muir and Kohn, Baird & Speckert for Douglass.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Bennett.

These proceedings were commenced and prosecuted by the Commonwealth to prevent the usurpation of the franchise, claimed by Doulgass, to operate said lotteries.

It seems that the legislature in 1850 authorized J. N. Webb to raise money by lottery for the benefit of the Henry Academy and Henry Female College.

The third section of the act empowered the grantors to sell the scheme, which they did, and which fell into the hands, by purchase, of the appellant, Douglass, who proceeded to operate the same and under said grant. He claims that the legislature having authorized the sale of the franchise, and he having become the purchaser thereof, his right to it became a vested right, which the legislature could not thereafter take away, because it would be impairment of the obligation of contracts which article 1, section 10 of the Constitution of the United States expressly forbids. The lower court, upon the hearing of the case, decided that the grant had expired by limitation, and that decision must stand and is affirmed.

In 1838 the legislature granted the privilege to certain gentlemen to raise money by lottery for the benefit of the city schools of Frankfort, and in 1872 the said act was amended so as to allow the board of councilmen of the city of Frankfort to sell and convey the privileges granted for the purposes mentioned. And the appellee, in 1875, purchased all the lottery franchises and privileges conferred by the act of 1838, and also the amendatory act of 1869.

The appellee, Douglass, contends that he was the purchaser of said franchise, and claims that, by reason of the act authorizing the sale of said lottery and the purchase thereof, he acquired a vested right which the legislature could not take away by its act of 1890, repealing said franchise, and relies upon article 1, section 10 of the Federal Constitution, which prohibits the States from passing any laws impairing the obligations of contracts as sustaining his contention and the decisions of this court thus construing his purchase.

This court, in the case of Gregory v. Trustees of the Shelby College Lottery, 2 Met., 598, decided that a lottery grant might be repealed by a subsequent legislature, unless rights had been acquired and liabilities incurred upon the faith of the privileges conferred by the grant, in which case the rights thus acquired and liabilities incurred become contractual, which the provision supra protected from repeal by subsequent legislation.

The appellant contends that the grant of the lottery privilege by the State was an exercise of its police, not its contractual, power, which is inherently lodged in the State for the promotion and protection of its welfare and happiness, which the State can not surrender and barter away, either as a gratuity or for pay; that while the legislature may, in the exercise of its police

power, grant a lottery privilege, the grant is only a privilege or license and not contractual, and a subsequent legislature, in the interest of good order and morals, may revoke the privilege thus granted and repeal the grant, although pecuniary interests have been acquired under and by authority of the grant.

It seems that this court, in the Gregory case supra, decided expressly that when rights had been acquired and liabilities incurred upon the faith of the lottery grant, such rights and liabilities should be regarded as contracts, which are protected by the Federal Constitution against impairment by the State legislature, and which should be upheld to the extent at least that the party has the right to enjoy the right thus acquired until he realizes his money thus invested out of the lottery business. The famous Dartmouth College case and others that have followed it is invoked to sustain this position. The other cases upon the same subject, subsequently rendered by this court, repeat the same doctrine.

But the Supreme Court of the United States, in Stone v. Mississippi, 101 U. S., 814, in construing the provision of the Federal Constitution that declares that the States shall pass no law impairing the obligation of contracts, held that the inhibition related to "property rights" and not to matters that were "governmental." The court then held, in strong and emphatic language, that lotteries, being species of gambling, were vicious and demoralizing in the community, and that as it was the trust duty of the State government to protect and promote the public health and morals, it could not sell, barter or give away that duty, and that the utmost power the legislature could exercise was to grant a license to carry on that species of gambling which only protected the licensee from the pains and penalties imposed upon that species of gambling during the existence of the license, and that the legislature granting the license had no power to bind a subsequent legislature to its line of policy upon these subjects, and that a subsequent legislature might repeal the grant of the license, although it had been paid for.

It seems to us that this decision defining the provision of the Federal Constitution as to what subjects are contracts and protected by it, and that lottery grants, although paid for, are not protected by said provision, is binding upon this court and has the effect to overrule its decisions holding the contrary view.

But apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between the contractual and governmental power of the States, to wit: That the provision of the Federal Constitution in reference to contracts only inhibits the States from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental.

The reason for this distinction must be apparent to all, for when we consider that honesty, morality, religion and education are the main pillars of the State, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that the government, through its agents, can not throw off these trust duties by selling, bartering or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away. If it be conceded that the State can give, sell and barter any one of them, it follows that it can thus surrender its control of all and convert the State into dens of bawdy-houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the priv-

ilege and thus deprive the State of its power to repeal the grants and all control of the subject as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now it seems to us that the essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government.

The power of the State to grant a license to carry on any species of gambling, or with the privilege of revoking the same at any time, has an unwholesome effect upon the community and tends to make honest men revolt at the injustice of punishing others for engaging in like vices. We have, for instance, at this day men confined in the State penitentiary for setting up and carrying on gambling shops, whose tendencies are not much more demoralizing, if any, than the licensed lottery operator, who goes free under the protection of the law. The one wears a felon's garb and the other is protected by license which he claims as an irrevocable contract because he has paid for the privilege. The privilege ought never to be granted, and under the present Constitution can never be. As said, to impress the privilege with the idea of contract because it was paid for might fill the whole State, and especially the cities, with gambling shops and enterprises protected by contract, and the few gamblers that might not be thus protected and who would be liable to be punished for gambling would not be, because it would strike honest men as unjust to punish the poor wretch for doing that which was made lawful for others to do by paying for the privilege.

As said, we are bound by the construction given to the provision of the Federal Constitution by the Supreme Court, relating to the impairment of contracts by the States, to the effect that the provision does not relate to lottery franchises, though paid for, and that the matter of such grants being strictly within the police power of the State, the State could not sell or barter away its control of the subject.

It is contended that the subject of the appellee's right is res adjudicata in this court. It is sufficient to say that the State had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right of the State to repeal it. And the decisions of this court, that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been virtually overruled by the Supreme Court of the United States, destroys he contention of the res adjudicata; and, while the judge of the urt below was loyal to this court in following the opinions retofore rendered, we must affirm the judgment in the Henry unty Lottery case, and reverse his judgment as to the Frankrt Lottery and remand the case for further proceedings in nformity with this opinion.

MILLIKEN v. PILES.

(Filed January 4, 1894—Not to be reported.)

Mortgages—After a sale has taken place to satisfy a mortgage lien, pursuant to a judgment of court, the debtor can not object to the issuing of a writ of habere facias on the ground that one not a party to the suit holds a mortgage on the land involved prior in date to the mortgage that has been foreclosed.

Winfield Buckler for appellant.

O. S. Denning and W. H. Holt for appellee.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Pryor.

This was an action to foreclose a mortgage, and a judgment of sale being ordered and the land sold, the debtor or mortgagor is resisting the writ of habere facias on the ground that a third party held a lien created some fifteen years and more before the sale took place under the judgment, and, therefore, had priority over the lien for which the land was sold. The debtor is too late in raising this question after judgment upon the ground alone that some one else is interested and with a lien as stale as this seems to be. If there is a lien the party not before the court can enjoin it. It is plain the appellant is not entitled to retain the possession.

Judgment affirmed.

KIRKSEY v. TURNER.

(Filed January 11, 1894.)

1. Virginia treasury warrant entries—Patents—Appellee's remote vendors made two entries under the treasury warrant law of Virginia in 1781; survey of the entries was made in 1784, and patents therefor issued by Kentucky in 1806. At a session of the Virginia legislature, which begun before such entries were made, an act was passed, subsequent to such entries appropriating the body of land, including such entries, for military purposes, Held—

First. Even though by the law of Virginia then in force all acts of the legislature related back and took effect as of the first day of the session, the act appropriating such land for military purposes did not overreach or render void the inchoate rights already acquired by the making of the entries, since the act did not in express terms declare such entries void.

Second. Even if such entries and survey were void the patent issued in 1806 by Kentucky is not also void, because at the date of the patent such land belonged to Kentucky, and this State had a right to dispose of it.

2. Collateral attack of patent—A patent valid on its face can not be assailed in a collateral proceeding for some latent defect.

W. G. Bullitt for appellant.

Oscar Turner and L. D. Husbands for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

On November 20th and December 3d, 1781, Mayo made two entries under the treasury warrant law of Virginia, embracing 17,000 acres of land lying on Clark's river, and west of the Tennessee river, in this State. In 1784 these entries were surveyed, and in 1806 a patent was issued by this State for said land.

The appellee many years ago purchased a part of this land, and it is admitted that he is the owner thereof, as far as the patent and deed to him confers title and right to possession. The appellant was sued by the appellee for trespassing upon said land, by cutting and taking timber therefrom. To this action the

appellant made defense that the appellee was not the owner of the land; that Clark, by entry April 1, 1785, under the Virginia land warrant law, and survey in 1825, and patent from this State in 1826, obtained title to this land; and as the Mayo entry, survey and patent were void, Clark's entry, survey and patent is the paramount and only title to the land which the appellant relies upon as a bar to the appellee's right of action.

There is no evidence connecting the appellant with Clark's title, if he has title. He stands before this court as a trespasser upon land that does not belong to him, and to which he has not even color of right, and his only hope of protection is to show that the entry, survey and patent of Mayo is void, and confers upon the appellee no paper title whatever upon which to rely; and as he had no actual possession of the land at the time of the trespass, he had no right of action whatever.

The appellant relies on an act of the Virginia legislature, passed subsequently to the two entries mentioned, setting apart the land west of the Tennessee river for military purposes, etc.

It is claimed that by the law then in force in Virignia an act passed at any time during the term of the legislature related back and took effect on the first day of its term; and as the first day of its term was prior to the Mayo entry and survey, the same was overreached and made void, and the patent that was thereafter issued upon said entry and survey was likewise void.

Now the act relied upon as setting this land apart for military purposes does not declare that entries, surveys, and patents, in contravention of it, shall be void. We understand that entries, surveys and patents are not void merely because they contravene some statutory regulation, unless the statute declares that they are void if issued in contravention of its provisions, or that they shall be deemed fraudulent if made and issued under certain circumstances.

As said, the legislature, by said act, not having done either of these things, the entry, survey and patent are not void. Then the question is, the patent being valid upon its face, can it be attacked in a collateral proceeding and disregarded by showing some latent defect, the same as would authorize a court to declare it invalid and set it aside in a direct proceeding for that purpose? It is sufficient to say that this court by uniform decision has decided that such patents can not be attacked in a collateral proceeding; that it required a direct proceeding to attack them; that such patents as are declared void or fraudulent, in the manner suggested, are the only ones that can be attacked collaterally. Also there is no question raised that these entries were not valid at the time they were made, and nothing appearing to the contrary, we must presume that they were.

In the case of Rollins, &c. v. Clark, 8 Dana, 15, this court decided that such entries were, when made according to law, locations and appropriations of vacant land and vested an inchoate legal right, which was perfected by a patent issued in conformity thereto. According to this rule we are at a loss to know how a subsequent act of the Virginia legislature could by construction relate back and antedate these entries so as to destroy the inchoate legal title with which Mayo was vested by said entries and prevent him from perfecting the same by patent. It seems to us that to allow it to be done would be monstrous. Besides all this, it is expressly held in the case supra that, conceding such entries as were made in this case void, the patent that issued to Mayo in 1806 by this State was not also void, because,

at the date of the patent, the land was not actually entered and patented, but belonged to the State of Kentucky, and she had the power to dispose of all the land within her limits, not specifically disposed of to others, so as to invest them with title. No person at the date of the patent had taken up this land so as to vest an inchoate legal title in him. It belonged to the State of Kentucky, and no title to it having been vested in any individual under said Virginia act, Kentucky had the right to appropriate it to other uses, which she did by the act of 1795, authorizing the appropriation of it, and which was actually appropriated to Mayo by patent. The rule thus announced in the case supra, whatever counsel may think of its correctness when rendered, should be invoked now as a bulwark to protect persons in property rights acquired nearly an hundred years ago, and which have never been questioned until now, and to overrule the case in the particular mentioned would have the effect to invalidate the paper title to all the property in the growing, beautiful and magnificent city of Paducah.

The judgment is affirmed.

JOHNSON v. JOHNSON.

(Filed January 11, 1894—Not to be reported.)

A married woman may, by will, dispose of her estate when, by a written antenuptial contract between herself and husband, power to dispose of all her estate by deed or last will and testament, without any interference on the part of her intended husband, has been expressly conferred upon her.

Owens & Finnell and Lieber & Lincoln for appellant.

Jas. F. Askew for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Pryor.

Mrs. J. W. Bradley, whose maiden name was Sallie Johnson, prior to her marriage entered into an antenuptial contract with her husband, by which each relinquished all their marital rights in the estate of the other.

The contract provides that after the marriage the wife (then Sallie Johnson) shall "hold and retain the same right, title, interest and control of all her said estate which she now holds and exercises as a feme sole, with power to give, grant, bargain, sell and convey, and devise by deed or last will and testament, all of said estate, without any interference on the part of her intended husband.

The said John W. Bradley, Jr., hereby relinquishes and renounces all claim or claims to any interest, either legal or equitable, in or to said estate which he might otherwise be entitled to by law as her husband after the intended marriage."

In the year 1871 Mrs. Bradley died, leaving children by her former husband and three grandchildren, the children of a deceased son. Shortly before her death she made and published a paper purporting to be her last will, and after her death it was admitted to probate.

In the devise of her estate she excluded, in effect, her grandchildren, and they are in this court insisting, as they did below,

that Mrs. Bradley, being a feme covert at the date of the will, the antenuptial contract of September, 1870, conferred on her no power to make a will so long as she remained under the disability of coverture.

The statute of the State regulates and determines the manner in which wills are to be executed, and those competent to execute such instruments.

The General Statutes, chapter 113, section 4, provides that "a married woman may, by will, dispose of any estate secured to her separate use by deed or devise, or in the execution of a written power to make a will."

It is argued that a mere contract between those who afterwards marry, in reference to this right of property, can confer no power on the wife to dispose of her estate, and that the right to do so must emanate from a donor conferring the power to the donee, who executes it, as the writing creating the power provides; and, besides, the donee must have some devisable interest in the thing given or granted. While some of the earlier cases may conduce to sustain this view of the point raised, it is now well settled that the intervention of a trustee, in whom the title is to vest, in order to create such rights in those who are about to become disabled by reason of coverture to dispose of their estate, is not necessary.

The execution of a deed to a trustee by the owner of the estate, with the power reserved in the owner of appointment, or a reconveyance by the trustee to the owner conferring such power, it is conceded would authorize the reservation and existence of such a power.

There seems to be and is in fact no valid reason for requiring those who, at the time, are able and willing to contract without the intervention of third parties to resort to such an indirect mode for regulating and securing their marital rights.

Courts of equity, long prior to any statute in this State on the subject, have held that such contracts, based upon the consideration of marriage, would be upheld, and in cases where the legal title remained in the wife and had never passed out of her, so as to satisfy the demands of the common law with reference to the disposition of property by those laboring under the disability of coverture.

In the case of Bradish v. Gibbs, 3 Johnson's Chy. Reps., 523, an antenuptial contract, similar to the one in this case, was entered into by the parties, under which the wife, after coverture, was empowered to dispose of her estate by will, and the wife having exercised the power by making the devise to the husband, it was held by Chancellor Kent to be a valid disposition of the real estate of the wife in equity, and her heirs compelled to convey the legal title to the husband.

In that case the learned chancellor reviewed the authorities, and seems to have had no doubt in his mind that such a contract was valid and created a power of disposition that the wife, although at the time covert, could execute in favor of the husband, with whom the contract was made.

The statute of this State expressly authorizes a feme covert to dispose of her estate in the exercise of a written power, and while silent as to the manner in which the power is to be created, there is no reason why it may not be created as well by an antenuptial contract as by any other written instrument.

The courts have been gradually abandoning the technical common law rule on this subject, and when a contract is made by

parties laboring under no disability that changes the marital rights as to property upon the consummation of the marriage, it is as binding as if attended with all the formalities of a recorded deed; and now, by reason of the statute enacted at the session of the legislature of 1891-2, a feme covert may dispose of her realty by will as if she was a feme sole.

A separate estate in the feme created by writing, although unrecorded, is a valid deed between the parties, and to hold all writings imperative because of such technical objections would nullify the statute from which the right of a feme covert to dispose of her property is derived.

The surrender by the wife of her marital rights is a sufficient consideration to uphold the agreement, and, not only so, the consideration of marriage alone will support it, regardless of any other benefit to the wife than the power to dispose of her estate. That she must part with the legal title to her realty to a third person before this can be done is a doctrine of the past; and in fact courts of equity have been sanctioning such agreements and enforcing them for so long the doctrine is found in every textbook on the subject.

This court, in Stevens v. Mulholland, 88 Ky., 38, has in effect decided the question involved here. (See also Hickman v. Brown, 83 Ky., ——, and in the older decisions in this court of the Gates will in 2 Dana, 447.) In Hart v. Soward, 14 B. M., 243, this doctrine is recognized.

Judgment affirmed.

ALDERSON v. CASKEY.

(Filed January 16, 1894—Not to be reported.)

Mortgages—Conditional sales—The intention of the parties at the time of the execution of a particular conveyance determines whether it is to be considered a mortgage or a conditional sale; in a case where the nature of such intent is doubtful the conveyance will be considered a mortgage rather than a conditional sale.

Although the conveyance to appellant was absolute on its face, yet the writing executed by the parties simultaneously with it shows that it was intended to secure money loaned to appellee by appellant, therefore, the deed must, in equity, be treated as a mortgage.

W. W. McGuire for appellant.

John P. Salyers for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, who was the defendant in the court below in an action in ejectment brought by the appellant against him for his home farm of some 800 acres which he and his wife had conveyed to the appellant by deed of general warranty, relies on the following writing, executed simultaneously with the deed, as showing it to have been in fact a mortgage and not a conditional sale of the land in contest:

"This agreement, made this 4th day of October, 1860, between Warren Alderson of the first part, and W. M. Caskey of the second part, witnesseth: That whereas, the W. M. Caskey and E.

A. Caskey, his wife, have this day, for the sum of $4,647.29, sold and conveyed to said Alderson the farm or tract of land on which said W. M. Caskey now resides, in Morgan county, Ky., on Licking river, near West Liberty, now the said Alderson agrees with the said Caskey to let the said Caskey occupy the said farm as his tenant for the term of twelve months from this date, and the said Caskey is only to pay as rent on said land such taxes as may now be due thereon and such as may accrue thereon within said twelve months; and the said Alderson also agrees that if the said Caskey shall pay or cause to be paid to said Alderson the sum of $4,647.29, on or before the 4th day of October next, 1891, that said Alderson will reconvey said farm or land back to said Caskey by deed with special warranty; but if said Caskey should fail to pay said money as agreed, then he, Caskey, tenant of Alderson as aforesaid, is to surrender to said Alderson full, entire and complete possession of said farm, with all that appertains and belongs thereto, on the 10th day of October, 1891, hereby waiving notice and demand for possession. Said Alderson further agrees that if said Caskey can, within said twelve months from this date, sell said land or any part of it to any other person for a larger sum than Alderson has paid for it, or for a sum sufficient to pay said Alderson the sum Caskey is to pay him, that he, Alderson, will convey said land or any part of it to any one Caskey may desire, one part to Caskey and part to others, as he may direct, provided said Alderson shall, before making said conveyance, have his money, so agreed to be paid, paid to him; that is, Alderson shall receive his money, the $4,647.29, before he makes any conveyance of said land or any part of it.

"Witness our hands date above.

(Signed) "WARREN ALDERSON,
"W. M. CASKEY."

The cause was heard in equity, and the chancellor determined the writings to evidence a mortgage and not a conditional sale, and gave judgment accordingly.

In all the cases the true rule by which may be determined the character of the transaction is said to be the intention of the parties, gathered from their surroundings and from the writings between them, and in cases of doubtful intent the doubt is resolved in favor of the construction creating a mortgage rather than a sale.

It is admitted on all sides that no conclusive test can be laid down to determine when a conveyance, absolute on its face, but accompanied by an agreement reserving to the grantor a right to repurchase, constitutes a mortgage and when a conditional sale.

In the present case it is specially noticeable that the grantor might sell his land within the year to any person he could find who would give him a better price than the Alderson price; in fact he might sell off a part only of the farm, if he could do so, for enough to pay the sum due the appellant, and in this event the appellant bound himself to accept the money and to convey the part sold to the purchaser, and the other or unsold part to the appellee.

Such an arrangement seems conclusive of itself to constitute the transaction a mortgage and not a sale. (Ogden v. Grant, 6 Dana, 473; Edrington v. Harper, 3 J. J. Mar., 354.) In the latter case it is said: "Where land is conveyed absolutely, and the grantee by a separate instrument or defeasance covenants to reconvey to the grantor on his paying a certain sum of money, the transaction amounts only to a mortgage."

It is evident that all the appellant wanted or stipulated for

was the money advanced by him to the appellee. It is clear he did not want the land. The appellee retained possession of the farm, and although denominated a tenant, he is only to pay the taxes then due or those to become due within the year as the rental value of the land. This is a circumstance furnishing evidence of the intention of the parties to treat the transaction as one in the nature of a mortgage.

It is not unlikely that this form of contract was adopted because it was thought to secure a rate of interest to the appellee not otherwise allowable by law; but whether this be true or not, it is clear that the judgment giving the appellant a lien on the land to secure his debt and interest effectuates the real intention of the parties, save as to the amount of interest contracted for, and it is, therefore, affirmed.

EVANS v. COMMONWEALTH.

(Filed January 16, 1894—Not to be reported.)

The evidence authorized the verdict convicting appellant of the crime of maliciously shooting with the intent to kill.

E. K. Wilson for appellant.

Wm. J. Hendrick for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was indicted for the crime of maliciously shooting Enos Brewer with the intention of killing him.

The appellant was found guilty of shooting and wounding in sudden heat and passion and was fined $250.

It seems that Enos Brewer was dogging the appellant's cow, and the appellant went to the place armed with his pistol, as he says, to shoot the dogs, but Brewer and appellant got into a scuffle over a stick that Brewer had, and in the scuffle the pistol was fired, which wounded Brewer. The question for the jury to decide was, was the pistol fired by the appellant with the malicious intention of shooting Brewer, or in sudden heat and passion, or in self-defense, or accidentally in the scuffle over the stick? The jury was properly instructed on all these subjects, and the evidence in the case clearly authorized the verdict of the jury.

The judgment is affirmed.

HUNT v. COMMONWEALTH.

(Filed January 16, 1894—Not to be reported.)

The affidavit for a continuance in this case shows that the presence of the absent witnesses is very important for defendant, since they were present when the homicide was committed, and would show whether it is the testimony of the prosecuting witness or that of appellant that is false; although the affidavit does not disclose with certainty that the presence of these witnesses can be procured, appellant should be allowed one more chance to secure their presence.

Lewis McQuown for appellant.

Wm. J. Hendrick for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Chief Justice Bennett.

As this case must go back for a new trial, we will make no comment upon the evidence except only so far as is necessary to explain the ground of reversal. It seems that the appellant, in company with James Eatman, met David Laycock, in company with his son, in the public road. Appellant and Eatman were on horseback and Laycock and son were on foot. Each party was armed with a gun, and appellant says that the son was armed with a pistol also. The appellant says that David Laycock accosted him in reference to a man by the name of Allen, who had been sent to the penitentiary for burning the appellant's barn, and who was the son-in-law of Laycock, with the inquiry if he was looking for another Allen; that Laycock then accused the appellant of having given his, Laycock's, daughter and children a great deal of trouble, and that he had intended to kill appellant for two years; that he then presented his gun at appellant and appellant knocked him with the but of his gun before he could shoot; that he then sprang from his horse and took Laycock's gun away from him and carried it away; that in the meantime Laycock's son fired his pistol at appellant.

On the other hand, the son says that appellant commenced the difficulty with his father, and sprang from his horse and knocked an unresisting old man down and killed him. The appellant asked the court to continue his case on account of the absence of James Eatman and one Turner and others. The appellant's affidavit discloses that their eivdence is highy important for his defense, which would result in his acquittal, if believed by the jury.

It is supposed that the court overruled the motion to continue the case on the ground that there was no reasonable probability shown that the appellant could procure the attendance of these witnesses. As to Eatman he was indicted for aiding and abetting the crime, and, as appellant says, at the instance of the son, that he might not be a witness, etc. Eatman, when indicted, went away and has been absent ever since. His testimony, according to the affidavit, is so important to the defense of the appellant that we think that he should have had one more chance to obtain it.

As to Turner, the affidavits showed that he had only recently been heard of in Barren county, where he had been at work, and the probability is that he may be found if one more chance is allowed.

The judgment is reversed and remanded for a new trial.

SHAW, &c. v. SHAW, &c.

(Filed January 18, 1894—Not to be reported.)

1. Assignment by operation of law—Preferences by debtor—An insolvent debtor had a right to execute a mortgage to secure debts due his brother, even though the intent of such brother and the mortgagor was to secure a lien on the insolvent's home and thus secure it to him; but such mortgage might have been assailed, under the act of 1856, as an unlawful preference

by other creditors of the debtor within six months after it was lodged for record.

After the expiration of six months from the date the mortgage was lodged for record it can not be assailed by creditors, but creates a lien valid as to all parties.

2. Same—Although the plaintiffs assailed the mortgage, they did not allege that they had secured a return of nulla bona against the insolvent; the defendant, by failing to demur to the petition and filing an answer, waived the right to object on that account.

3. Same—Equity—Jurisdiction—A court of equity has jurisdiction of the subject-matter of an action by a creditor to set aside a voluntary conveyance of an insolvent debtor as an unlawful preference, even though the creditor has not obtained a return of "nulla bona;" but unless the debtor does allege that he has obtained such return his petition in equity fails to state a cause of action in such case.

4. Certificate of acknowledgment of mortgage by married woman—If the certificate of acknowledgment of a conveyance by a married woman evidences a substantial compliance with the statute on that subject, it is sufficient.

A married woman acknowledged in Tennessee a mortgage intended to create a lien on her husband's land in Kentucky. The clerk's certificate shows that the wife, privately and apart from her husband, acknowledged the execution of the deed to have been done by her freely, voluntarily and understandingly. Held—That it must be presumed that the clerk did his duty, and explained to the wife the contents and effect of the mortgage.

Petrie & Downer for appellants.

J. I. Landes and W. R. Howell for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Pryor.

On the 2d of January, in the year 1891, Thomas H. Shaw and his wife, Mollie E. Shaw, executed and delivered to his brothers, George W. Shaw and James Shaw, a mortgage on a house and lot in the town of Fairfield, in Christian county. The mortgage on its face purports to secure an indebtedness by the mortgagor to his brothers, evidenced by notes that are filed with this action brought for a settlement of Thomas Shaw's estate and a foreclosure of the mortgage.

Thomas Shaw having died, one of the defendants, George W. Shaw, administered on his estate, and as administrator and in his own right, in conjunction with James Shaw, the brother, is seeking to collect the mortgage debt.

A creditor intervened by petition to be made a party to the action in which the mortgage is assailed as fraudulent, and upon the facts the chancellor below cancelled the mortgage in so far as it affected the rights of creditors.

It is proven that the purpose on the part of the two brothers was to save the home of their brother, Thomas Shaw, by securing their debts in preference to those of other creditors, but the validity of the notes for which the mortgage was executed is not assailed, or rather the testimony relied on to establish fraud, if conceded to be true, is not inconsistent with the legal right of the two brothers to secure their indebtedness. While they deny it was their purpose to have this mortgage executed to secure their brother in a home, if such statements were made and the notes valid, the transaction shoud be upheld in a court of equity.

Their brother had left his home in Fairfield and removed to the State of Tennessee, and in his insolvent condition they

might well have supposed that creditors would seize his property and thereby deprive him of a home, as well as obtain a preference over their claims. Under such circumstances the right to preference existed, subject to be defeated by a proceeding within six months, claiming a transfer of all the debtors' estate for creditors under the act of 1856, or a similar enactment now in force.

The execution of the notes by the debtor is not questioned, and because some part of the indebtedness had been secured by a former mortgage is no reason for denying the right of the appellants to obtain additional security.

We have no doubt the brothers made their trip to Tennessee for the purpose of having the mortgage executed, and to place themselves in a position so that when other creditors attempted to make their debts their own claims would have priority, and to enable them, if they saw proper, to leave their brother in the possession of the home if they became the owners. This is not fraudulent, and the appellees failing to attack the mortgage within six months, their claims must be held subordinate to the mortgage lien.

It is argued the court below had no jurisdiction to entertain this charge of fraud without a return of no property found. There was no demurrer to the petition, but an answer filed placing in issue the averments of fraud by the creditor, and in this sort of case this court has very properly held the defense has waived the right to raise such a question. (Benton v. Benton, 80 Ky., 212.)

It will be admitted, says counsel, "that a court of equity has no jurisdiction to set aside a fraudulent conveyance by the creditor unless he has first pursued his legal remedy."

Such an admission would likely result in establishing the proposition that a failure to demur does not waive the jurisdiction, and in fact when saying that a court of equity has no jurisdiction, as found in some of the adjudged cases, it means only that the plaintiff has failed to present a cause of action, as there is a manifest difference between facts giving jurisdiction and facts essential to a cause of action.

It is not pretended that there is a want of jurisdiction over the subject-matter, that is, to set aside a conveyance for fraud, but to do so it is essential to allege certain facts, else there is no cause of action. You waive these essential averments, as in any other pleading, by curing the defect in the answer that denies the fraud. The court below erred in holding the mortgage fraudulent.

The widow claims she is entitled to a homestead in this house and lot or to dower; the homestead on the ground that her husband only left the premises temporarily, and still claimed them as his own. She united with her husband in the mortgage, and the defense is the notary failed to certify her acknowledgment as required by the statutes of this State. She was then, as is claimed and proven, living out of the State. The certificate of the notary reads:

"State of Tennessee, }
"Montgomery County. }

"Personally appeared before me, C. B. Lyle, a notary public in and for said county and State, Thomas H. Shaw and Mollie E. Shaw, his wife, the within-named bargainors, with whom I am personally acquainted and who acknowledged they executed the within instrument, for the purposes therein contained, and Mrs. Mollie E. Shaw, wife of said Thomas H. Shaw, having appeared before me privately and apart from her husband, the said Mollie E. Shaw acknowledged the execution of the said deed to

have been done by her freely, voluntarily and understandingly, without compulsion or constraint from her said husband and for the purposes therein expressed. Signed by the notary, with his seal affixed, on the 2d day of January, 1891."

The form of certificate as provided by the General Statutes, 310, is: "I, A B, do certify that this instrument of writing from C D and wife, E F, was this day produced to me by the parties, and the contents and effect of the instrument being explained to the said E by me separately and apart from her husband, she thereupon declared that she did fully and voluntarily execute and declare the same to be her act and deed, and consented that the same might be recorded."

The variance between the two certificates consist in the omission of the notary in Tennessee to certify that the contents and effect of the writing was explained to the wife by him.

He certifies as to the privy examination of the wife apart from the husband, and she acknowledged she signed it freely, voluntarily and understandingly, without compulsion or constraint from her said husband.

The chancellor held the variance between the certificate of the notary and that required by our statute to be substantial, and gave the right of homestead.

There is no claim by the widow that a fraud was practiced on her, and she is relying solely on omission of the notary to properly certify her acknowledgment.

The rule is well settled that with reference to such certificates accompanying the evidences of title a substantial compliance with the statute on the subject is all that is required, and the cases of Martin v. Davidson's Heirs, 3 Bush, 572, and Nanty v. Bailey, 3 Dana, 111, settles this question.

In Nanty v. Bailey the statute of 1793 required the writing to be shown and explained to the feme, and the clerk in his certificate failed to certify that he had explained the contents to her, but did certify that she relinquished her inheritance in the land of her own free will and accord, and without the compulsion of her husband. The court held that this was sufficient to show that the wife understood the deed and the legal consequences of her acknowledging it. The decision in 3 Bush, 572, Martin v. Davidson, is to the same effect.

In this case it is certified the wife, apart from the husband, acknowledged the execution of the mortgage; that it was done freely, voluntarily and understandingly and for the purposes therein expressed. This is in every way sufficient to show that the writing had been fully explained to her and that she knew its legal effect. The presumption is that the clerk did his duty, and the feme knew the contents and the purpose in executing it. His certificate shows it, and by virtue of this acknowledgment, she being a party to the mortgage, her homestead passed.

There is some statement by the wife, when deposing for creditors, that she understood it was executed by her husband to secure a home for himself and family. While this may be so, it can not contradict the certificate of the notary.

There is no fraud charged by the wife and none proven. Such testimony can not affect the question presented.

The judgment is reversed, with directions to enforce the mortgage lien as herein indicated and deny to the feme her claim for homestead or dower.

McCONNELL v. WILBORN.

(Filed January 18, 1894—Not to be reported.)

The commissioner's deed to appellee's vendors embraced the strip of land in controversy in this action, and the appellee has a perfect legal title to it, and the verdict of the jury for him is sustained by the evidence.

S. Hodge and J. G. Rochester for appellant.

J. Bell Kevil for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Pryor.

This is an ejectment by the appellee, W. B. Wilborn, against Hugh McConnell to recover a small strip of land fronting McConnell's residence and lying between his dwelling and the river.

Both parties claim title under Levi Yeakey, who died the owner of this land, and being insolvent, his real estate was sold at decretal sale and from that sale the title to each party comes. Yeakey had laid off a town called Ford's Landing, or Bell City, on this land, and some of the lots were not sold by the decree at the time the strip of land in controversy was disposed of. The part of the decree affecting this case directs the commissioner to sell "all that part of said tract of land from the mouth of the creek (laid down on the plat as Crooked creek) down the river immediately fronting the town lots and including the general landing and ferry privileges," etc. This strip, together with the general landing and ferry privileges, was sold to Richard McConnell and Johnathan Brown, the commissioner reporting that the home farm, including the mansion house (but excluding the town lots at Ford's Ferry and the landing and ferry privileges) was sold to A. F. Scott: "The landing and ferry privileges, including the narrow strip of land between the town lots and the river, was sold to Richard McConnell and Johnathan Brown for $1,310."

This report was confirmed and the commissioner made to McConnell and Johnathan Brown a deed to their purchase.

Scott, who purchased the home farm, transferred his bid to George Brown; Brown sold this land to a man by the name of Wilson; Wilson to Flannay and Flannay to the appellant. It is plain that the deed from the commissioner to George Brown did not embrace this disputed territory, and the deed from Flannay to the appellant (the title coming through George Brown) conveys the same boundary of that from the commissioner to Brown, and this constitutes appellant's title, except his claim of adverse holding.

How, then, did the appellee, the plaintiff in the ejectment, derive title? McConnell, one of the vendees from the commissioner of this strip of land, died, and after he died his widow purchased of Johnathan Brown his half of this strip of land and ferry privileges. Brown died and the widow of McConnell, having paid the purchase money, instituted an action against his heirs for title, and, obtaining a decree, E. C. Flannay, as commissioner, made her a deed. After this was done the widow, Mrs. McConnell, and her children filed a petition to sell this strip of ground and ferry privileges, and it was sold by the judgment of the Crittenden Circuit Court, and a man by the name of J. W. Lyon purchased it as the strip of ground, ferry and ferry privileges. He obtained a deed in February, 1879. The appellant was a party to that action. Lyons then sold this prop-

erty to R. M. Wilborn and the title passed from R. M. Wilborn through Jennings and others to the appellee, W. B. Wilborn, Wilborn, the plaintiff, has, therefore, a perfect legal title, unless there has been some adverse holding.

The strip of land was uninclosed and used by others as well as the appellant. The latter had a hog pen upon it shortly before suit was brought.

The only question is, did the original deed to McConnell and Johnathan Brown embrace this disputed territory? The jury responds by their verdict that it did embrace the land in dispute, and the verdict is sustained by the testimony.

Judgment affirmed.

HAYDON, &c. v. EASTER, &c.

(Filed January 18, 1894—Not to be reported.)

1. Conveyances—Delivery—A conveyance may be delivered by the grantor to a third person for the grantee; and if subsequently assented to by the grantee it will be as good a delivery as if it had been made directly to him. The grantor executed a deed and delivered it to an attorney to keep until the grantor's death, when it was to be recorded in the proper office. The attorney was instructed to see that the grantee got the land so conveyed. After the grantor's death the conveyance was put to record by the attorney for the grantee, who was an infant. Held—The delivery of the deed was sufficient, and it conveyed title to the grantee.

2. Same—Evidence—Where such attorney brings suit for the grantee against those in possession of the land, he is a competent witness to prove the delivery of the deed; nor does any alleged interest in the land he might possibly have by virtue of his lien for his attorney's fee for its recovery from defendants render him incompetent as a witness.

3. Same—The sale by the grantor of ten or twelve acres of the land after the execution and delivery of the conveyance to the attorney does not show that he retained control and dominion over the deed during his lifetime, or that he did not intend to divest himself of the legal title by it.

Hobson & O'Meara and D. C. Haycraft for appellants.

H. T. Kendall for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

On the 23d day of March, 1886, Jacob Haydon, then temporarily in Frankfort, Ky., executed the paper in controversy, which purports to convey a tract of some thirty acres of land in Hardin county to Sallie Easter, whom he recognized as his natural daughter. He delivered the conveyance to his friend, Kendall, to be kept by him until the grantor's death, when it was to be put to record in the proper office for the benefit of the grantee, and Kendall was enjoined also to see that the reputed daughter and grantee got the land so conveyed.

The circumstances show reasonably clearly that the mother of the daughter, who was given a right of occupancy in the land, was notified of the conveyance at the time it was executed. Upon the death of the grantor, which occurred in September, 1891, Kendall produced the deed to the clerk of the Hardin County Court and had it recorded in obedience to the request

made to him when the instrument was first executed. In doing this he acted in behalf of the daughter, then a minor, and the representatives of the grantor refusing to give up the land, she and her mother instituted this action for it. The judgment below gave it to them.

It is insisted that Kendall was not a competent witness for the appellees because he was interested in the recovery, and the only interest which he is supposed to have is his fee as attorney in bringing the suit for which he is supposed to have a lien on the land if it be finally recovered.

There is no proof showing that he has any interest, and if the law does give a lien for a reasonable fee and secure it by a lien on what is received, we know of no rule of evidence which renders him an incompetent witness.

It appears that the grantor, after the execution of the deed, sold and conveyed some ten or twelve acres of the land to another, and this circumstance, it is thought, shows that he retained control and dominion over the deed during his life, for which reason, it is insisted, the grantor did not intend to divest himself of the title. Nevertheless the fact remains that even if he had the legal right he did not recall it or attempt to, and on the contrary indicated an intention to give other land or money in lieu of what had been sold off.

In Colyer v. Hyden, &c., ante, 101, it was said of the deed there in controversy: "It was signed and acknowledged by the old man and his wife and delivered to the draftsman, the deputy clerk, for the grantee, and delivered to and accepted by him in some three or four weeks thereafter, though after the death of the grantor. It is now fully settled that a deed may be delivered to a third person for the grantee; and, if subsequently assented to by the grantee, it will be as good a delivery as if it had been made directly to him." (Fonda v. Van Horne, 15 Wend., 633.)

Judgment affirmed.

SLONE v. BEVINS.

(Filed January 20, 1894—Not to be reported.)

Slanderous words concerning officer—Pleading—The petition charges that plaintiff, in discharge of his official duty as a constable, had levied a certain execution for $1.50 and $6.50 costs on the property of defendant, and that then defendant had spoken and published concerning plaintiff the following words: "This execution is unjust except $1.50, and that is the way you make your living." Held—The words spoken do impute to plaintiff a want of integrity, or charge him with corruption or official wrongdoing. They are not sufficient to support an action for slander.

Bowles & York for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was a constable in Pike county, and as such had levied an execution in favor of one Childers on some personal property belonging to the appellee, who was the defendant in the writ. The execution had issued from the court of M. Stone, a justice of the peace, and was for the sum of $1.50 and $6.90 costs. After the property had been advertised for sale, the

appellee is charged in the petition of the appellant with having spoken and published of and concerning the appellant, and in the presence of many reputable persons these words, alleged to be false, malicious and slanderous, to-wit: "This execution is unjust except $1.50, and that is the way you make your living." A demurrer to the petition was sustained and, we think, properly so. No sort of discredit or wrong is attributed to the constable by the words "this execution is unjust except $1.50."

The justice of the peace had issued it, and it was the duty only of the officer to enforce its collection. The imputation of wrong seems to be against the justice. The words do not "touch" or affect the appellant in his office.

The subsequent words do not seem to us to be sufficiently definite to import a want of integrity or competency on the part of the officer, or to charge him with corruption or official wrong doing.

The meaning of the alleged defamatory words is not clear, and the imputation, if there be one, is far fetched and indefinite.

Judgment affirmed.

GRESHEM'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 23, 1894—Not to be reported.)

1. Railroads—Injury to trespasser on track—Failure of train to stop at crossing—Contributory neglect—A boy twelve years old attempted to cross a railroad track when a train running at the rate of ten miles an hour was within seventy yards of him. His foot hung in something and he fell and was run over and killed by the train, which could not have been stopped in time to save his life. Held—The accident was the result of the boy's own carelessness in attempting to cross the track in front of the train, and the failure of the train to stop at a crossing near the place of the accident, as required by statute, was not willful neglect, although if the train had stopped the accident would not have happened.

2. The statutory regulation requiring trains to stop before crossing the track of another road was intended to secure the safety of trains at crossings and not to protect trespassers using the track without right.

Robert Harding and Robert J. Breckinridge for appellant.

Thompson & McChord for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Bennett.

John Gresham, a lad about twelve years old, was run over and killed by the appellee's freight train at Junction City, Ky. His administrator, W. A. Sharp, brought this action against the appellee to recover damages for the killing upon the ground that the same was caused by the willful neglect of the appellee. The court, upon the conclusion of appellant's evidence, instructed the jury to find for the appellee, and the same having been done, the appellant has appealed.

The facts in reference to the killing are these: There were some boys on the appellee's platform, opposite appellee's depot, pushing trucks on the platform, and some one called to Gresham from the south side of the road and he started from the north to the south side of the road in the direction of the call. The appellee's train was then about seventy yards from the place that Gresham attempted to cross, and coming in that direction at the

rate of about ten miles an hour. When Greshem got to the south side of the track he got his foot hung in something and fell between the rail and the platform on the south side of the road and before he could get up the train ran over him and killed him.

There was no watchman or flagman at the crossing, nor any stop before the train got to it. The train was so close to the boy when he fell that he did not have time to get up before it ran over him, nor could the train have stopped in time to save him. It is evident that the boy saw the train before he attempted to cross the track, and that he believed he could cross in safety before it could reach him, and he doubtless would have succeeded in the attempt but for the fact that he got his foot hung and fell. It is now contended that if the train had stopped, as required by the statute, before it got to the crossing, Greshem would have had ample time to recover from his fall and have crossed the track in safety, and that because it failed to stop, as required, the killing was the result of willful negligence. Let us suppose that the appellee was guilty of negligence in not stopping before it got to the crossing, as required by the statute; what then? Evidently the requirement was intended for the better regulation and safety of trains at the crossings, and not for the protection of strangers, stragglers and idlers that might be on the track or cross it in the pursuit of their own pleasure, if not as trespassers without right. Such persons have no right to believe that they will be protected by the train's obedience to a regulation required by a statute for the better protection of trains running on the respective tracks at such crossings. The persons indicated must take their chances at such crossing, or at other parts of the track, and if the injury is caused by their negligence, and but for which it would not have happened, they can not recover. Here, as said, Greshem evidently saw the train coming at a rapid rate of speed and close at hand, and, believing that he could make the crossing in safety, made the venture, and he would doubtless have succeeded but for the fact that he fell, which caused him to be overtaken and killed.

In this there was no negligence of the appellee in reference to him. The negligence that caused his death was his.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. EIFORT.

(Filed January 17, 1894.)

1. Fellow servants—In the case of employes of the same grade or rank, and engaged in the same field of labor, the master is not liable for an injury to one employe by the negligence of another, even though the negligence be gross; but the engineer or fireman in charge of the engine of a railroad train and a brakeman on the train are not fellow servants of the same grade or rank, engaged in the same field of labor, and for an injury to the brakeman through the gross negligence of the engineer or fireman in charge of the engine the company is liable

2. Gross negligence—An instruction telling the jury that "gross negli-

gence is the failure to exercise such care and skill as one of common sense and reasonable skill in the business, but of careless habits, would observe to avoid danger under similar circumstances," conforms substantially in its applications to the facts of this case to the definition of gross negligence in the case of L. & N. R. R. Co. v. McCoy, 81 Ky., 413. In view of the evidence the jury could not have been misled by the omission of the words "to his own person or life" after the words "to avoid danger."

3. Contributory negligence—The rule that the plea of contributory negligence will not be allowed when willful neglect is alleged applies only to actions under the statute authorizing the recovery of punitive damages when the life of one is lost by the willful neglect of another person.

4. Contract exempting master from liability for negligence—A contract by a railroad company with an employe, whereby the latter, in consideration of his employment and the compensation to be paid him, assumes all risks of accidents from any cause while in its service and exempts it from any liability to him on account of such risks or accidents, is void as against public policy.

Breckinridge & Shelby for appellant.

Beckner & Jouett for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Barbour.

The appellee, who was in the appellant's employ as a brakeman in coupling cars, lost one of his hands, which loss he charges was the result of the negligence of the employe in charge of the engine. A verdict and judgment was rendered against the appellant. We can not, as we are asked to do, reverse the judgment upon the evidence, and it would, therefore, serve no purpose to discuss the evidence as bearing upon this contention.

In Volz v. C. & O. R. R. Co., decided in December, 1893,* and in the later case of L. & N. R. R. v. Raines, ante, 423, the Court of Appeals has held that even the gross negligence of a fellow workman, resulting in injury to another employe of the same grade or rank, and engaged in the same field of labor, does not render the master liable to the injured employe; but that court has, in the case of the L. & N. R. R. Co. v. Moore, 83 Ky., 675, and in other cases which are cited and approved in the Volz and Raines cases, held that the engineer (or fireman) in charge of the engine and a brakeman were not fellow servants of the same grade or rank, engaged in the same field of labor.

There was, therefore, no error in the instructions which authorized a recovery if the injury complained of was caused by the gross negligence of the engineer or fireman in charge of the engine.

Appellant complains of this instruction: "Gross negligence * * * is the failure to exercise such care and skill as one of common sense and reasonable skill in the business, but of careless habits, would observe to avoid danger under similar circumstances."

The objection is that the instruction omits, after the words "to avoid danger," the words "to his own person or life," as contained in the definition of gross negligence in the case of L. & N. R. R. Co. v. McCoy, 81 Ky., 413; but it seems to us that in its application to the facts of the case the instruction conforms substantially to the definition in the McCoy case.

In the movement of the engine by Armstrong, the fireman, one danger only was to be apprehended, and that was injury to the

* Now pending on petition for rehearing.

person of the appellee—the whole evidence was directed to that point—and the jury could not have but understood the court as addressing itself to this fact, this danger; but the court did err to the appellant's prejudice in telling the jury that if the person in charge of the engine was guilty of willful negligence, then the appellant should be held liable, notwithstanding the appellee, by his own negligence, contributed to the injury, and but for which contributory negligence the injury would not have occurred.

As held by this court in L. & N. R. R. Co. v. Walton, 13 Ky. Law Rep., 460, and by the Court of Appeals in Craddock v. L. & N. R. R. Co., 13 Ky. Law Rep., 18, the rule that the plea of contributory negligence will not be allowed where willful neglect is alleged applies only to actions under the statute authorizing the recovery of punitive damages where the life of one is lost by the willful neglect of another person. There was evidence of contributory negligence; and taking the first and second instructions in connection with the objectionable instruction, the latter was misleading and prejudicial to the appellant.

The appellant, in one paragraph of its answer, claimed exemption from liability for the negligence of its employe, by reason of a written contract with the appellee, whereby the latter, in consideration of his employment and the compensation to be paid him, assumed all risks of accidents from any cause while in its service, and exempted it from any liability to him for or on account of such risks or accidents.

With the exception of one or two States all the American courts hold that such a contract is void as against public policy. The reason, it seems to us, sustains this doctrine, and we are, therefore, of opinion that the court properly sustained the demurrer to the paragraph of the answer.

For the error in giving the instruction denying to the appellant the right to rely upon contributory negligence, if its employe in charge of the engine was guilty of willful neglect, the judgment must be reversed, and it is so ordered.

RICH v. SWETMAN, &c.

(Filed January 24, 1894.)

1. To constitute an equitable assignment of a debt or other chose in action no particular form is necessary. The assignment may be by parol, as well as by deed, and it is not necessary to consult the debtor.

Where it was agreed between mortgagor and mortgagee that the interest on the mortgage debt should be paid by a tenant of the mortgaged property out of the rent as it fell due, this was an assignment by the mortgagor of the rent for the whole term to the extent that it was necessary to pay the interest, and the equity thus acquired by the mortgagee must prevail over that subsequently acquired by a creditor of the mortgagor by process of garnishment served upon the tenant. It is not material whether the tenant agreed to the arrangement between the mortgagor and mortgagee as to the application of the rents.

2. Construction of pleading—Where no objection was made to a pleading in the lower court it must receive a liberal construction in this court to the end that it may support the judgment.

Simmons & Simmons for appellant.

C. G. Wallace and W. H. Mackoy for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Barbour.

November 26, 1888, Swetman & Scott executed to Hovekamp their promissory note of that date, by which they promised to pay him $9,000 three years thereafter, with eight per cent. interest, payable semi-annually until paid. For convenience six notes of $360 each for the several semi-annual installments of interest were executed. To secure the payment of the notes Swetman & Scott executed to Hovekamp a mortgage on certain real estate in Covington, Ky. The notes and mortgage provided that if the interest was not punctually paid when it should become due, the whole debt should become due and enforcible. The contract was made in the State of Ohio, where by law the parties may contract for eight per cent. interest. The notes and mortgage were assigned by Hovekamp to the appellee, Wallace. In March, 1889, Swetman & Scott leased the mortgaged property to Menninger for a term of three years, at an annual rental payment in monthly installments.

The lease provided that "the lessee may, at his option, pay the semi-annual interest on the mortgage given by the lessors to Hovekamp, and apply the same in the payment of the rent aforesaid," and further, "the lessors grant unto the lessee the privilege to purchase said real estate at any time during the three years next ensuing at a stated price." In the latter part of the year 1889 several of their creditors, among them the appellant, Rich, instituted actions against Swetman & Scott and sued out attachments, which were levied upon the mortgaged real estate. Rich also garnished in the hands of Menninger any rents which he might be owing to Swetman & Scott. Wallace, the holder of the mortgage debt, was made a party, and the various actions were consolidated and heard together. The only controversy in the case which we are called upon to notice is that between Rich and Wallace over the rents. The court below having adjudged that Wallace was entitled to these rents, Rich has appealed. In his answer and cross petition to Rich's action Wallace avers "that the rent, by an express provision of said lease, was to be applied by Menninger, if he should so elect, to the discharge of the installments of interest aforesaid, accruing or to accrue to this defendant upon said mortgage note, and that long before the action was instituted said lessee did so elect to apply said rents, and did so apply and pay said rents, and pay them in payment of said interest installments, falling due May 26, 1889, and November 26, 1889, but before the next following interest installment fell due, to wit, May 26, 1890, attachments were issued and served on Menninger, whereby he has been prevented from making any further payments to this defendant." Rich, in his reply, traverses these allegations and relies upon his attachment as having given him a prior right. It seems clear to us that Wallace's statement of the transaction between Swetman & Scott, Menninger and himself, if true, operated as an equitable assignment of the rents, so far as they were necessary to pay Wallace his interest—an assignment to which all were privies and in which all acquiesced. To constitute an equitable assignment of a debt or other chose in action no particular form is necessary. Any order, writing or act, which makes an appropriation of the fund, amounts to an equitable assignment of that fund. An assignment of a debt may be by parol as well as by deed, and it is not necessary to consult the debtor. (Newby v. Hill, 2 Met., 530.)

Wallace testifies that "shortly before the first installment note fell due Swetman requested us to notify Menninger, as Menninger had arranged with him to pay the installments as they be-

come due. Accordingly I had notice of the 6, 12 and 18 months installment sent to Menninger, and he paid the first and second, but not the third.

I had a conversation with him about the payment of the 18 months' installment, and he told me that he had expected and intended to pay that one also, but was advised, in view of the attachments, that it would not be safe to do so." Swetman testifies that Menninger "agreed to pay the interest notes to Wallace. I made the agreement for convenience, in order to secure the prompt payment of the note, as I was going to and did leave the State in March, 1889. I communicated to Wallace the agreement with Menninger before I left. I agreed with Wallace that the interest notes he held should be paid out of the rents that were to become due on the lease to Menninger. I did this that he might know his notes would be paid without sending to Chattanooga to find out about it. Wallace consented to the arrangement and agreed to notify Menninger. The agreement with Menninger was not confined or limited to the first two interest notes. I understood the agreement with Menninger to embrace all the rents that were to become due under his lease so far as Wallace's mortgage was concerned."

Menninger testifies that his agreement was confined to the first two notes, as he had expected to buy the property under the option he had allowing him to purchase it. But this was a question of fact which the chancellor has decided, and, we think, correctly. Morevoer, even though Menninger had not agreed to pay either of the four last notes, if Swetman agreed with Wallace to transfer and did transfer to him his claim upon Menninger for rents, that it might be applied to the payment of the interest notes, it operated as an equitable assignment. All that Rich acquired by the execution of his writ of garnishment was an equity, and, as Wallace's equity was the elder, it must prevail. Counsel seem to concede this, but insist that that issue is not presented by Wallace's answer, and, therefore, the judgment can not be affirmed upon that idea. The answer does not tender this issue as explicitly as it should, still it is not an unfair inference to draw from the facts alleged that Swetman & Scott had agreed with Wallace that the rents should be applied to the payment of the interest notes.

No objection was made to Wallace's answer in the court below, and in this court it must receive a liberal construction, to the end that it may support the judgment. And still further, the evidence which so unmistakably supports the assignment of the claim for rents by Swetman to Wallace was read without objection. True exceptions were filed to the deposition of Wallace and Swetman on the ground that certain questions and answers were "incompetent and leading." But these exceptions were abandoned—or at least they were not passed upon and must be treated as abandoned. Indeed the filing of the exceptions and their abandonment makes the case the stronger. Here the parties are in a court of equity settling up adverse claims to a fund in court. The evidence, which was admitted without objection, shows the right to be in the appellee. Neither of the parties were misled; neither was taken by surprise. In such a case this court will not reverse because the pleadings are not as full as they might have been.

The amount of the interest notes, with the interest upon each from its maturity, amount to as much as the rents paid into court and which are the subject of controversy.

The statute of frauds has no application to any phase of the case.

The judgment is affirmed.

SUPERIOR COURT ABSTRACTS.

WICKS v. LOUISVILLE & NASHVILLE R. R. CO.

Filed January 17, 1894. Appeal from Christian Circuit Court. Opinion of the court by Judge Yost, affirming.

A rule of a railroad company requiring passengers to purchase tickets before entering the train or to pay the conductor a higher rate of fare than that required of passengers who purchase tickets is reasonable; but in order to enforce such a rule the company is required to notify the traveling public of its existence, and to keep its ticket offices open for a reasonable time before the departure of trains. But actual notice to each passenger of the existence of the rule is not necessary; copies of the rule printed in large type and posted in conspicuous places in the several ticket offices of the company are sufficient notice to the traveling public of the existence of the rule to require them to comply with its provisions. And the fact that the passenger did not reach the station in time to purchase a ticket before the departure of the train furnishes no reason why the rule requiring the payment to the conductor of the higher rate of fare may not be enforced against him.

The plaintiff in this case having failed to purchase a ticket, the conductor had the right to eject him from the train upon his refusal to pay the extra fare required by the rule of the company, and no force being used by the conductor and no indignities or insults offered him, he has no cause of action against the company.

C. H. Bush and Harry Ferguson for appellant; Joe McCarroll for appellee.

ARTHUR v. WATSON.

Filed January 17, 1894. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

Verdict sustained by evidence—In this action by appellee against appellant to recover for sawing logs for appellant under a written agreement, fixing the rate of compensation, a verdict for appellee is sustained by the evidence.

John T. Hays for appellant; Golden & Davis and W. H. Holt for appellee.

HERSPERGER v. SMITH.

Filed January 17, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Judge Barbour, overruling motion to dismiss.

1. Appeals—Statement of parties—When a case is submitted only those whose names are mentioned in the statement will be treated as parties to the appeal, but the appellant will be allowed to amend his statement at any time before the submission.

2. Same—The failure to file the statement required by section 789 of the Civil Code is not ground for dismissing the appeal, but merely for striking the case from the docket.

Nat Gaither for appellant; Bell & Bell for appellee.

KING v. WALKER, SURVIVING PARTNER.

Filed January 24, 1894. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. Separation of conclusions—In this ordinary action in which the law and facts were submitted to the court, although the court stated separately

its conclusions of law and conclusions of facts, yet as there were no exceptions taken to the conclusion of law, the only question before the court is whether the pleadings support the judgment.

2. Clerical misprision—The failure of the court to give defendant a credit to which the pleadings entitle him was not a clerical misprision, as it does not appear at once upon a mere inspection of the record as a matter about which there could be no dispute. Therefore, the failure to give the credit is an error revisable here without a previous motion for its correction below.

Guffy & Ringo for appellant; Little & Son for appellee.

EVANS v. COMMONWEALTH.

Filed January 24, 1894. Appeal from Lawrence Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Statutes—Emergency clause—Failure of governor to return bill—Where a bill is passed by the legislature with an emergency clause and the governor fails to return it within ten days after it is presented to him the bill becomes a law at the end of that time, as if expressly approved by the governor, and its operation is not postponed until ninety days after the adjournment of the session because of the governor's failure to sign it.

Alexander Lackey for appellant; W. J. Hendrick for appellee.

BARTON v. CUMBERS.

Filed January 24, 1894. Appeal from Harrison Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Verdict sustained by evidence—The testimony being conflicting, the court will not interfere with the verdict of the jury in favor of plaintiff.

2. Testimony admitted without objection—Although the plaintiff did not plead payment as to one item of defendant's counterclaim, but merely controverted it, yet as the plaintiff did not object to evidence of payment, it is now too late to insist that the court can not consider such evidence.

J. T. Simon for apppellant; Ward & Kimbrough for appellee.

FORD, &c. v. REID.

Filed January 24, 1894. Appeal from Ballard Circuit Court. Opinion of the court by Judge Yost, affirming.

Jurisdiction—Estoppel—In an action upon an attachment bond the defendant will not be heard to say that the bond is void because the court in which he instituted the attachment proceeding had no jurisdiction.

J. B. Wickliffe for appellants; Nichols & Werden for appellee.

KATZ v. LAYCOCK.

Filed January 24, 1894. Appeal from Campbell Circuit Court. Opinion of the court by Judge Yost, affirming.

Presumptions on appeal—As the bill of exceptions shows that certain witnesses testified whose evidence as a whole is not copied into the bill, this court must assume that the lower court properly instructed the jury and that the verdict was authorized by the evidence.

W. B. Baker for appellant; T. M. Hill for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. PILKERTON.

Filed January 24, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Ejection of passenger from railroad train—Excessive verdict—In this action against a railroad company to recover damages for plaintiff's wrongful ejection from one of defendant's passenger trains, a verdict for $800 in favor of plaintiff was not excessive, the conduct of the conductor being utterly without excuse and intolerably insulting, if the plaintiff's testimony was true.

2. Same—Res gestæ—As the plaintiff and his father were traveling together and the plaintiff had tickets for both, and the conductor, after ejecting the father turned to plaintiff and told him to get off, the testimony of plaintiff and his father as to what took place in regard to the tickets between the conductor and the father in plaintiff's presence was so connected with the putting off of plaintiff as to make it competent as a part of the res gestæ.

3. Contradiction of witness—The father having denied upon cross-examination that he had made certain statements as to the reasons assigned by plaintiff for getting off the train, the court properly refused to allow defendant to prove that he had made such statements. This was a distinct collateral fact brought out on cross-examination, and the witness could not be contradicted in regard to it for the purpose of discrediting him.

W. H. Marriott for appellant; Hobson & O'Meara for appellee.

SANFORD v. CITY NATIONAL BANK OF CAIRO.

Filed January 31, 1894. Appeal from Carlisle Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Alteration of note—The obligatory force of a note executed for the purchase price of land was not affected by the insertion by the payee of the words "deed to be made when notes are paid," the alteration being altogether immaterial.

2. Interest—Where a note executed in consideration of land is made by its terms to bear interest at the rate of "8 per cent. from date," the payee can recover that rate only to maturity, being entitled to only 6 per cent. after that time.

Nichols & Werden for appellant; J. D. White & Son for appellee.

TAYLOR & WILLIAMS v. COLSON, &c.

Filed January 31, 1894. Appeal from Bell Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Judgment supported by pleadings—As this is an ordinary action in which the law and facts were submitted to the court and there is no bill of evidence, the judgment being supported by the pleadings must be affirmed.

A. K. Cook and Chas. H. Price for appellants; J. G. Fitzpatrick and Isaac T. Woodson for appellees.

ROUSE v. FORTUNE.

Filed January 31, 1894. Appeal from Grant Circuit Court. Opinion of the court by Judge Barbour, affirming.

Payment—In this action upon a promissory note, in which defendant pleaded payment, the verdict of the jury in favor of plaintiff upon this issue is sustained by the evidence.

H. Clay White for appellant.

DURHAM v. LEFEVERS.

Filed January 31, 1894. Appeal from Bell Court of Common Pleas. Opinion of the court by Presiding Judge Brent, reversing.

Pleading—Prayer for relief—Nonresident defendants having returned to the State and been duly served with process pending the action, a personal judgment against them was not void, the court having jurisdiction both of the subject-matter and of the persons. But as no such relief was specifically prayed for, and was manifestly not contemplated by the general prayer for relief, the judgment was erroneous and is revisable here without a previous motion to correct below.

J. L. Reeder and A. K. Cook for appellant; W. J. Weller for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. MARCH 15, 1894. No. 18

KENTUCKY COURT OF APPEALS.

MULLIKIN, EX'TX, &c. v. MULLIKIN.

(Filed September 26, 1893—Not to be reported.)

1. Judgment notwithstanding verdict—Section 386 of the Civil Code, providing that "judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him," applies only where a material allegation concerning the cause of controversy has been sufficiently and properly made and stands either confessed or not sufficiently denied.

2. Pleadings—Consideration for promissory note—There is a prima facie presumption that every promissory note, if genuine, is based on a valuable consideration. Therefore, a petition on such note need not allege the consideration, and a reply is not required to a plea of no consideration insufficiently pleaded in an answer.

3. Same—Failure to paragraph pleading—A failure to set out distinct causes of action or of defense in separate numbered paragraphs is not ground for a demurrer, but only for a motion to paragraph; and objection to a pleading by reason of a failure to paragraph is waived by filing an answer or reply thereto.

4. Same—Case—The answer to an action on a promissory note, alleged to have been executed by defendant's testator, denied "that the testator signed, executed or delivered * * * the note described in plaintiff's petition, or that said note has or had any consideration whatever to support it, or that plaintiff is the owner of said note, or that it is long or at all past due or owing to the plaintiff. Plaintiff moved to strike out the words in italics, and the motion being overruled, a reply was filed, but subsequently withdrawn. Verdict having been rendered for plaintiff, defendant moved for a judgment, notwithstanding the verdict. Held—The answer presented only a plea of non est factum, the allegation concerning a want of consideration being merely an argument in favor of the plea of non est factum, and the failure to reply to the allegation of no consideration was not, under the circumstances, a confession that the note was without consideration, and defendant was not entitled to a judgment notwithstanding the verdict.

5. Evidence—Transaction with deceased person—Statement of plaintiff that the consideration for the note was stock he sold decedent was incompetent, because it concerned a transaction with payor, who was then dead.

6. Same—Prejudicial errors—But the admission of such evidence was not prejudicial to defendant, since the other evidence on the trial showed satisfactorily the execution and delivery of the note by the payor.

Hargis & Turner for appellants.

T. L. Burnett and Lane & Burnett for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

T. B. Mullikin brought this action against Lillie T. Mullikin, executrix of the will and widow of A. D. Mullikin, for judgment on a promissory note purporting to have been executed to plaintiff by the testator July 17, 1890, and payable sixty days thereafter. To the petition the following answer was filed: "The defendant * * * denies that her testator, A. D. Mullikin, signed, executed or delivered to plaintiff, or any one for him, the note described in plaintiff's petition, or that said note has or had any consideration whatever to support it, or that the plaintiff is the owner of said note, or that it is long or at all past due or owing to the plaintiff."

Plaintiff moved the court to strike from the answer the words we have italicized; but that motion being overruled, a reply was filed, but subsequently withdrawn. And then defendant made a motion that so much of her answer be taken for confessed as denied the note has or had any consideration to support it, which was likewise overruled. Upon trial of the action verdict was rendered for plaintiff, followed by judgment in pursuance of it, although defendant interposed a motion for judgment in her favor notwithstanding the verdict.

Section 386, Civil Code, provides that "judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him." But that state of a case arises only where a material allegation concerning the cause of controversy has been sufficiently and properly made and stands either confessed or not sufficiently denied.

That part of the answer in this case evidently intended for a general plea of non est factum, and which we will treat as sufficiently stated, made the only issue that was actually tried by the jury, or in respect to which the court gave instructions. Of the two last clauses of the answer it is not necessary to say more than that the statement in one is a mere legal conclusion, and in the other surplusage. If, then, defendant was entitled to judgment at all, in virtue of section 386, it was because the plea of no consideration was properly and sufficiently stated, and, not being controverted by reply, stood confessed. But as a promissory note, if genuine, is prima facie evidence of consideration to support it, the plaintiff need not allege the fact in his petition nor reply to a plea of no consideration insufficiently stated in the answer.

Section 113 provides: "A pleading may contain statements of as many causes of action, legal or equitable, and of as many matters of estoppel and of avoidance, legal or equitable, total or partial; and may make as many traverses and may present as many demurrers as there may be grounds for in behalf of the pleader." But it is further provided in the same section that, if there be more than one cause of action or of defense, "each must be distinctly stated in a separate-numbered paragraph; and either which is intended to respond to part only of an adverse pleading must show to what part it is responsive." And, as evidence of the importance of these provisions, the court is in terms required, upon or without motion, to enforce them, and for that purpose to dismiss an action without prejudice, or to strike a pleading or any part thereof from the case, or to allow a new pleading.

This court, it is true, has held that the fact of distinct defenses not being set out in separate paragraphs is not ground for demurrer, but of a motion to paragraph (Williams v. Langford, 13 B. M., 560); and also that an objection to a pleading, because not properly paragraphed, is waived by answering or replying (Noel v. Hudson, 13 B. M., 205). But, inasmuch as the issue of non est factum had been already made, the plaintiff was not required to make a motion to have the answer paragraphed, nor to reply to another and distinct defense improperly set out in the same paragraph. He can not, therefore, be regarded as having, by failing to reply, waived objection that such defense was not set out in another paragraph. So that, it seems to us, the pleadings did not, in meaning of section 386, entitle defendant to a judgment in spite of the verdict of the jury; nor, having disregarded a plain and peremptory provision of section 113, was she in an attitude to move for judgment. For the court could not, under the circumstances, properly treat the statement the note was not supported by a consideration as more than a mere argument in support of the plea of non est factum, which had, without reply, made an issue to be, and that was, tried and determined.

On the trial plaintiff was asked by his counsel to state, as a witness, what the note sued on was given for, and was permitted by the court, over defendant's objection, to answer that it was for natural gas stock he sold to the payor, A. D. Mullikin.

Although the question whether there was a consideration for the note was not put in issue by the pleadings, nor was required to be done in order to complete determination of rights of the parties, still proof of the fact a consideration existed tended to show it was executed, and was, therefore, competent. But it was not proper for the plaintiff to state, as a witness, that the consideration was natural gas he sold to A. D. Mullikin, because he thereby, in plain violation of section 606, testified for himself concerning a transaction with and act done by the payor, who was then dead.

It, however, was, in our opinion, shown on the trial by other evidence so satisfactorily the note was executed and delivered by A. D. Mullikin the jury were bound to find for the plaintiff, and, consequently, defendant was not prejudiced by the incompetent testimony referred to.

No witness was able to state, with certainty, he saw A. D. Mullikin execute the note, but one of them testified he saw him sign a paper which looked like, and he believed to be, the note in question. Ten or twelve witnesses, all of whom had experience in judging of handwriting, were introduced by the plaintiff, who testified they were acquainted with the handwriting and signature of A. D. Mullikin, and that his signature to the note was, in their opinion, genuine. Some of them were cashiers of banks where he transacted a good deal of business; one of them tax assessor, who had seen him write his name often; one his own clerk and bookkeeper, and another auditor of the city of Louisville, who stated he had seen him write his name a thousand times. The business of A. D. Mullikin seems to have been buying claims against the city, by which he had accumulated a large amount of money, and that business brought him in frequent contact with officers of the city and of various banks, so that his handwriting and signature was unusually well known. Yet the defendant did not introduce a single witness who was acquainted with his handwriting; those who did testify in her behalf arriving at the conclusion the signature to the note was not genuine from a mere comparison of it with other genuine signatures shown to and seen by them for the first time. Be-

sides, these witnesses, four in number, do not satisfactorily show they were experts. There was also evidence, independent of the plaintiff's testimony, showing plaintiff and A. D. Mullikin, who were cousins, had dealings about natural gas stock. There was no circumstance shown by defendant that, in our opinion, when properly considered, tended to show the signature was a forgery; certainly none sufficient to break the force of the testimony of so many witnesses, who, having the means and ability to judge, gave their unhesitating opinion the signature was genuine. It seems to us the verdict was fully authorized by the testimony—in fact, inevitable.

Judgment affirmed.

Judge Pryor delivered the following response to a petition for rehearing:

In Evans v. Stone, 80 Ky., 78, an answer to the effect "defendant denies that said note has or had any consideration to support it" was held good, and a similar answer would have been held good in this case if framed so as not to mislead the court as well as the plaintiff. As it appears in direct connection with the plea of non est factum, it is merely argumentative or a conclusion by the pleader that no consideration exists because the note was not signed by the appellant's intestate. The paragraph or answer is inconsistent with itself and while inconsistent pleas may be filed, it must be done so as to enable the adversary to know what defenses are being relied on. As said in the original opinion, it was the duty of the court to require the defendant to paragraph the answer so as to enable the plaintiff to know what defenses were being relied on. This the court declined to do because the answer was regarded as presenting the one defense—non est factum.

The plaintiff, however, moved the court to strike from the answer the words "or that said note had no consideration," and the defendant objected. His motion was overruled and an exception taken. The plaintiff then moved the court and offered to file a reply, to which the defendant objected, and thereupon the plaintiff withdrew his motion and reply. Whether the motion withdrawn was that to file the reply, or the motion to strike out, is uncertain; but, as the record stands, it appears that it was the motion to file the reply. But, in either event, the defendant objected to striking out the paragraph, also objected to filing a reply to it, and his objections were sustained, and, by so doing, made the only issue, that of non est factum, and the court should not have granted a judgment non obstante veredictu, when it was plain the parties were trying the case upon the single issue.

It has been suggested that other testimony has come to light in this case that does not appear in this record. If so, there is a remedy, and parties should remember that such suggestions manifest the necessity of courts of justice adhering to the record.

A fair and an impartial tribunal administers justice alike to all.

Petition overruled.

HACKETT v. LOUISVILLE, ST. LOUIS & TEXAS PACIFIC RY. CO.

(Filed January 20, 1894.)

1. Action—Death by willful neglect—A father, suing as administrator and only heir of his child, can not recover damages for the death of the child through the willful neglect of a railroad company under section 8 of chapter 57 of the General Statutes.

Under said statute the action can be brought only by the children or widow of the deceased or by his administrator suing for their benefit; and if there be neither widow nor child no action can be maintained.

2. Same—Pleading—Where the petition alleged that the death of decedent was caused by the "gross and willful neglect" of defendant, that degree of neglect is alleged that brings the action within the third section of chapter 57 of the General Statutes, although "gross neglect" signifies a less degree of neglect than "willful neglect."

3. Same—Death by wrongful act—Where the wrongful acts of one person cause the death of another the right of recovery for the wrong done can not be severed by the representatives of the deceased so as to maintain one action for the suffering endured by deceased after the wrong and before his death, and another action for the death itself. Those entitled to maintain the action must elect to seek damages either for the death or suffering prior to the death.

4. Same—Pleadings—Where the original petition alleged that decedent's death was caused by defendant's "gross and willful neglect," the plaintiff will not be permitted to file an amendment alleging that the defendant, by its "gross negligence," caused the wrong complained of, and that deceased suffered thereby for fifteen days prior to his death, the amendment not containing any withdrawal of the original allegation concerning willful neglect or the prayer for damages for deceased's death therein set out.

Owen & Son and Sweeney & Son for appellant.

Helm & Bruce for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant brought this action under section 3, chapter 57, General Statutes, to recover damages for the death of his seven-year-old child, caused by the willful negligence of the appellee, consisting in piling some railroad ties on the commons in the city of Owensboro so carelessly and negligently that the ties, while the child was playing on the pile, rolled down on the child, injuring it, and from which it died sixteen days thereafter.

It is alleged by the appellant that he is the father of the child and its only heir. Now there is no principle better settled by this court than that no action can be maintained under section 3, chapter 57 of the General Statutes to recover damages for causing death to a person by willful neglect, except by the children or widow of the deceased, or by the administrator of the deceased for their benefit; and if there be neither children nor widow, no recovery can be had for such killing. (Henderson v. Ky. Central R. R. Co., 86 Ky., 389; Jordan's Adm'r v. Cincinnati R. R. Co., 89 Ky., 40; Newport News, &c. v. Dentzel, 91 Ky., 56.)

It appears that the appellant, as father, is the only heir of the child, and he sues as administrator of the child, which is in effect suing as administrator for himself as heir; but according to the rule established by the cases supra the appellant is not one of the heirs that is entitled to recover under the statute, the children and widow of the deceased being the only persons that are entitled to recover, and as the administrator can only maintain an action in their behalf, it follows the petition sets up no cause of action.

The expression in the petition is "gross and willful neglect." The expression "gross" signifies a less degree of neglect than the expression "willful" neglect. But, coupled as the expressions are, they signify that degree of neglect that brings the case within the third section of the statute, supra. The expression

"gross," coupled, as said, with the expression "willful," so far as determining the character of the action is concerned, is immaterial and unnecessary and does not tend to change the degree of neglect required to bring the case within section 3, chapter 57. (Bransom v. Labrot, 81 Ky., 641.)

Now the amended petition, filed on the 25th day of September, 1889, alleges that the appellee, by its gross negligence, caused the injury complained of, and that the child suffered therefrom for fifteen days. The appellant then prays as in his petition. The amendment does not retract the petition as to the allegations of willful neglect, but at most it only adds another count for gross neglect so as to have two counts—one for the suffering, caused by gross neglect, the other for the killing, caused by willful neglect. Now this court has decided and settled the question that where certain acts cause death they can not be divided so as to make two actions—one to recover for the suffering caused and the other to recover for death. The party must elect. (Conner's Adm'r v. Paul, 12 Bush, 147.)

Here, as said, the amendment and the petition make two counts which are, in effect, two causes of action, when the facts causing the death constitute but one cause of action, and, as they can not be divided so as to make two actions, neither can two counts, which are in effect two causes of action, be maintained on them.

The judgment is affirmed.

GOFF, &c. v. WILBURN.

(Filed January 28, 1894—Not to be reported.)

1. Pleadings—Where a demurrer to an answer is carried back to the petition and sustained as to it, and the plaintiff refuses to amend, the question as to the sufficiency of the petition can be considered on appeal, although no reply to the answer was filed. A reply is not necessary in such case.

2. Actions—Quia timet—Trespass—Plaintiffs filed an action in Powell county to quiet their title to land in Powell and Wolfe counties. Pending this action the defendants, it is alleged, entered upon the land in Wolfe county and began cutting appellant's timber. Plaintiffs brought an action in Wolfe county to recover damages for such trespass and to enjoin the further cutting of the timber. Held—The pendency of the action quia timet in Powell county did not prevent the maintenance of the action for trespass in Wolfe county. The latter court had jurisdiction to hear the last-named suit.

Beckner & Jouett for appellants.

J. B. White and Wood & Day for appellee.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Judge Pryor.

In this case the demurrer of the plaintiff to the answer of the defendant related back to the petition, and that pleading, the court held, was bad. The plaintiff (now appellant) stood by his demurrer, and did not file a reply to the answer, nor was it proper to do so. The court had said he was without a cause of action, and this ended the controversy, the plaintiff failing to amend. It seems to us, however, the petition presents a cause of action.

The appellants (plaintiffs below) owned certain lands, em-

braced in one tract, lying in Wolfe and Powell counties, and had filed a petition in equity in Powell county to quiet their title. After this was done the appellees, as is alleged, entered upon that part of the tract of land lying in Wolfe county and began to cut appellants' timber. The present action of trespass was brought in Wolfe county, where the alleged wrongful entry was made, seeking a recovery for the wrong and the value of the timber taken. They obtained an injunction to prevent further destruction of the timber, etc.

The action is an ordinary action in trespass, alleging ownership and possession in the plaintiffs, and the unlawul entry by the defendants. We perceive no objection to the pleading or any ground for sustaining a demurrer.

It is averred that a bill quia timet was pending in Powell to settle the question of title, and while this may be so the Wolfe court had the jurisdiction to prevent the wrongful entry and to award damages for the trespass, if any committed. Whether or not the court in Wolfe would withhold any further proceedings upon a proper state of pleadings until the question of title was settled in Powell is not before us.

The judgment is reversed and remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

CITY OF LOUISVILLE v. JOHNSON.

(Filed January 27, 1894.)

1. Taxes—Evidence—The section of a city charter providing that a tax bill authenticated by the signature of the assessor shall be prima facie evidence that all steps have been taken to make it a binding tax bill, etc., against the person assessed, is valid.

2. Same—Limitation—Where a city charter provides that city taxes shall, if not sooner paid, become a debt against the taxpayer on the 1st day of May of the year for which the tax is assessed, and that on and after August 20 of that year summary process by distraint or garnishment may be taken or issued against the delinquent, and that on the 1st of May of the second year a list of tax bills, wholly or partially unpaid, on lands or improvements, shall be furnished the city attorney, who shall, without delay, bring suits to recover same, etc., the statute of limitation begins to run as to such taxes on the 20th of August of each year, at which time a right to enforce payment first accrues.

Laf. Joseph for appellant.

Lane & Burnett for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The assessment of the appellee's property was made as provided by the charter of the city as of the 1st of September, 1884, for the taxes for the year 1885. The levy ordinance was passed also, as required by the charter, in the month of December, 1884, for the taxes of the succeeding year, 1885. The charter also allows a discount on the taxes if paid in the months of January, February and March, and all taxes not paid by the 1st of May become a debt. If the taxes due are not paid by the 20th of August of the year they are due summary process will be issued

or taken against the delinquent by distraint or garnishment, to be levied on the goods and chattels of the delinquent taxpayer.

Section 7 of the charter relating to this subject provides "that on the 1st of May of the second year, after the settlement of city taxes, the receiver shall make out a list of the bills still wholly or partially unpaid on lands or improvements, and furnish the list to the city attorney, whose duty it shall be to bring, without delay, suits for the recovery thereof in the Louisville Chancery Court," etc. The act further authorizes a personal judgment.

It seems that the city, through its receiver, failed to collect the taxes due by the appellee in the ordinary mode, and having reported the appellee as delinquent, the attorney for the city filed this petition on the 16th of March, 1891, to subject the real estate of the defendant, and for personal judgment.

The statute of five years was interposed as a bar to the recovery. The taxes were due on the 1st of May, 1885, and could have been collected under a warrant by the receiver under which the goods and chattels of the taxpayer, if he had any, were liable to seizure and sale.

The section of the act making the tax a debt provides that it may be enforced by all the remedies known to the law, as in cases of contract, in any court of the Commonwealth otherwise competent for that purpose, "aside from the other remedies hereinafter given."

The proceeding by action in equity is given in addition to the ministerial remedies provided by law, and where one fails the other remedy may be looked to.

It is argued by counsel for the appellee that at any time after the tax becomes due the action in equity to enforce the lien may be resorted to. In this we do not concur. It could not have been intended by the framers of this statute that the doors of the courts should be thrown open and courts of equity made tax collectors in lieu of the regular ministerial or executive officers, and it is only where the remedies given the collector fail that a court of equity can be resorted to, and the statute should be followed in this regard. Nor can the failure of the ministerial officer to enforce the remedies given him effect the right of the city to sue, for after the expiration of the time given him to coerce payment a failure on his part to collect will authorize the maintenance of the action in equity.

Counsel for the city has attempted to classify the property of the taxpayer in order to maintain his position, the result of which is to give the owner of real estate a longer time in which to pay his taxes than the owner of personal estate. The taxes on real and personal estate are due at the same time, and if limitation applies to the personalty it also applies to the realty. The fact that an additional remedy is given the city in the event the taxpayer fails to pay the taxes on his realty does not prolong the statute. Near six years had elapsed after the tax of 1885 was due, and the city had four years in which to adopt this additional remedy. This is ample time in which to begin an action, and the tardiness of tax officials in the performance of their duties often involve innocent purchasers in litigation, and while it can not affect the present appellee, it is a precedent that ought not to be established—that of making the time for the collection of tax on real estate greater than for its collection on personalty. The right of action exists when the summary process is allowed to go, and to have a limitation as to the collection of tax on one species of property different from that on another and distinct species was never contemplated by the statute.

While the construction of these tax provisions is not free from

difficulty, the law is made to harmonize by making the statute run from the time the tax can be coerced, and this rule should be applied to both real and personal estate.

The action in equity is at best an exceptional remedy, and was enacted to enable the city to reach the taxpayer in a particular way when the original mode of collecting by summary proceedings failed. It is analogous to a proceeding where an execution from an inferior court can not reach the real estate of the debtor, it may issue, upon proper steps being taken, from a clerk's office of a court having jurisdiction, and may be then levied on the realty; or to an action in equity to enforce a judgment upon a return of no property. The legal remedy having been exhausted, the aid of a court of equity is given. In neither of the cases cited will it be insisted that the latter remedy, in aid of the first, prevents the running of the statute.

This charter authorizes the receiver, where there is no personalty, to garnishee the tenant, if he is owing rents for the realty; and, where the receiver fails to collect, a court of equity is invoked to aid in coercing the money from the taxpayer. Such proceedings are only in aid of the original and familiar remedies for the collection of taxes, and the statute begins to run when the receiver is authorized to enforce the demand.

Counsel for the city has confounded the cause of action, or rather the duty to be performed, with the remedies to enforce it in his endeavor to avoid the operation of the statute. A cause of action, says Mr. Pomeroy, accrues where there is a right in the plaintiff and a duty on the defendant responsive to the right, or a failure by the defendant to perform that duty without any regard as to whether the subject-matter relates to person, character, property or contract. (Section 519, Pomeroy Rights and Remedies.)

The right to collect these taxes by distraint existed in August, 1885, and there is a plain difference between the right to be enforced and the remedies for enforcing the right. If there had been no provision authorizing a suit in equity there could have been no question but what the statute of limitation would bar the recovery, and for the reason that the right to demand the taxes existed, and upon the refusal to pay coercive measures by warrant were authorized, and the fact the legislature saw proper to give other and more effectual remedies did not stop the running of the statute. In fact the section under which the appellant brought this suit authorizes a personal judgment, showing plainly the framers of the act were providing a remedy and not an original right to demand and collect the taxes. It is true that property may be subjected that could not be levied on by a distress warrant to satisfy the demand, but, this being in aid of the original remedy for enforcing the right, leaves it, so far as the statute of limitation is concerned, as if no such remedy had been provided. This construction of the charter harmonizes its provision by making the statute run from the time summary process could issue and not from the time suit is brought or the receiver exhausted his powers with the remedies afforded him.

Another question has been suggested that arises from an amendment of section 8 of article 2, in relation to the tax bill. It provides "each bill shall be authenticated by the assessor by his signature or a stamp fac simile thereof, and when so authenticated it shall be prima facie proof that all steps have been taken to make it a binding tax bill for the amounts and purposes, and against the person and property therein named," etc.

We perceive no reason why such a tax bill may not be prima facie evidence of the liability, and place the burden on the de-

fense of showing its defects, if any. It is true the burden of showing that it was signed by the assessor might be placed upon the city by a plea denying that he ever signed such a bill, but, admitting its genuineness, other defects showing it to be invalid must come from the defense. (Cooley on Taxation, 297.)

We must affirm the judgment below.

In this case, on a petition for a modification of the opinion explanatory of its meaning, it is plain the statute begins to run on the 20th of August of each year. Then for the first time coercive measures may be resorted to.

BRIGGS' GD'N v. NEWPORT NEWS & MISSISSIPPI VALLEY CO.

(Filed January 30, 1894—Not to be reported.)

Railroads—Neglect—Injury to infant employe—Whether the infant employe (who had been employed with his mother's consent) fell from the hand car because his head commenced to swim, or jumped from the car because he became frightened by an approaching train, the railway is not liable for the injuries he received, since the evidence shows that he was not in peril, real or apparent, at the time he so fell or jumped from the car.

D. G. Park for appellant.

Smith, Robbins & Thomas and Holmes Cummins for appellee.

Appeal from Graves Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellant in this case, when about seventeen years of age, was hired by his mother to work upon the appellant's road. He had worked upon the road but once before, and then not under the section boss that hired him at the time the injury occurred for which he asks damages.

He was not remarkable for intelligence, and, as his mother testifies, was not possessed of a very showy mind. She states that when the section boss hired Sam he told her he would give him the lightest work that he had to do.

Her son went upon the road the next morning, and in going on the hand car to his place of work fell from it and was injured so seriously as to require his leg amputated. It seems when they started out the boy was between two other men, working the lever of the hand car, and hearing the approach of a coming freight, reversed the order of their running so as to go back at the crossing or switch.

A flagman had been sent ahead to warn the train of the presence of the hand car. In going back, with his face fronting the approaching train and working between the two men, he fell from the car and it ran over him.

He says his head commenced to swim, and he fell over. Another witness, in his behalf, says that he jumped off the car and fell, and this latter statement is no doubt true. He became frightened at the approach of the train and jumped, when there was no danger, real or apparent. The argument that he was placed in a perilous position, without being instructed as to the danger, is unavailing, because the testimony shows he was not

in peril, and if his head was affected by his position on the car, it was unavoidable or a result the employer had no right to anticipate. In our opinion the nonsuit was proper.

Judgment affirmed.

COMMONWEALTH v. BARNETT.

SAME v. HUTTON.

(Filed February 8, 1894.)

Indictment—Obtaining money by false statement—Appellees were conductors for a railway company and were paid according to the number of trips per month they were reported by the company's timekeeper to have made. By a conspiracy between appellees and the timekeeper a greater number of trips were reported by him as having been made by appellees than the true number. The company relied on such false report and paid appellees more money than was due them. Held—That an indictment alleging these facts is sufficient under the statute relating to the obtaining of money by false statement or token. The false report of the timekeeper was as much a false statement of appellees as if the false reports had been verbally made by them in person to the company.

C. W. Lester, W. J. Hendrick and O. H. Waddle for appellant.

George Denny and W. A. Morrow for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the ocurt by Chief Justice Bennett.

The appellees, Lon Barnett and H. A. Hutton, were indicted in Pulaski Circuit Court for obtaining money by false statement, pretense, or token from the Cincinnati, New Orleans & Texas Pacific Railway Co.

It is alleged that the appellees were conductors on the company's freight trains, and that George W. Hyde was in the employment of the said company and engaged as assistant timekeeper for it, whose duty it was to keep an accurate account of the amount of services rendered said company by the appellees and report to the company at the end of each month the number of trips made by the appellees during said month, and the amount of money due them therefor from said company.

It is also alleged that the appellees and said Hyde conspired, agreed and confederated one with another that said Hyde, as timekeeper, should report to said company more trips at the end of the month than the appellees had made during that month in order to enable them to get pay for trips that they did not make, and pursuant to said agreement and confederation said Hyde reported to said company more trips than the appellees had made as conductors, the pay for which amounted to several hundred dollars, and that the company relied upon said reports as true and correct, and in pursuance thereof paid said sums to the appellees, who demanded and received the same in pursuance of said false and fraudulent combination and confederation.

It is also substantially alleged that the company was induced to pay said sums by said false reports alone. A demurrer was sustained to these indictments.

The language of the statute under which these indictments are

drawn is as follows: "If any person, by any false pretense, statement or token, with the intention to commit a fraud, obtains from another money, property or other thing which may be the subject of larceny * * * he shall be confined in the penitentiary not less than one nor more than five years."

The facts necessary to constitute this crime are as follows: First, that the property, thing or money obtained must be the subject of larceny. (The money obtained was clearly the subject of larceny.) Second, that it was obtained without right and with the intention to commit a fraud. Third, that there was a fraud committed by the obtention.

The allegations of the indictment are that, by a fraudulent combination and agreement with the timekeeper, he reported more trips than the appellees had made for the company as its conductors; that it was intended by the appellees and the timekeeper that the report should be received as correct by the company, and to enable the appellees to fraudulently obtain, upon the faith of the report, more money than they were entitled to receive for their services, and that the company did rely upon the report as correct, and paid to the appellees, upon the faith of it, more money than they were entitled to receive.

It seems that if the appellees had made these false representations themselves for the purpose of defrauding the company out of more money than they were entitled to receive for their services, and the company, knowing nothing to the contrary, had paid them the sum claimed upon the faith of the representations thus made, they would be guilty of obtaining the money by false pretenses, etc. But instead they conspired with the company's timekeeper, whose duty it was to make the report of the trips made by the appellees, and upon which report the company relied, to make a false report of the number of trips that they made in order that they might receive more money than they had earned, and pursuant to the conspiracy the false report was made and the appellees were thereby enabled to defraud the company out of the money not due them. Now, it seems to us, that this combination and agreement made the appellees as much a principal and as much guilty of obtaining the money by false pretenses as if they had acted all the parts in person. The indictment in each case is clearly sufficient.

The judgment sustaining the demurrer is reversed, and each case is remanded or further proceedings consistent with this opinion.

COMBS v. COMMONWEALTH.

(Filed February 17, 1894—Not to be reported.)

Criminal law—Joinder of offenses in indictment—The Commonwealth may, in one count of an indictment, charge defendant with conspiracy with others to commit murder, and in another count charge the committing of such murder by one of the conspirators in pursuance of such conspiracy, which charge makes all the conspirators guilty as principals.

T. T. Cope and W. W. Vaughn for appellant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Bennett.

The indictment charges the appellant with the crime of murdering David Miller and with having conspired with Zack Moore and Robert Landrum to commit the murder. The appellant demurred to the indictment upon the ground that the conspiracy charged was a statutory offense which could not be joined with the common-law crime of murder. But we think the conspiracy to commit murder and the committing of it by one of the conspirators pursuant to the conspiracy makes all the conspirators principals and guilty of murder at common law. The demurrer was properly overruled.

The court instructed the jury correctly upon the subjects of murder, manslaughter and self-defense, and the evidence authorized the jury to believe that the appellant was guilty of manslaughter. As to the deceased conspiring to kill the appellant, that matter was before the jury, and the instruction upon the law of self-defense authorized them to consider that matter the same as any other matter of self-defense.

As to the appellant's retreating, the court did not instruct the jury that it was his duty to retreat, etc. We see no error to the prejudice of the appellant.

The judgment is affirmed.

MYERS, &c. v. WHITE.

(Filed January 30, 1894—Not to be reported.)

Fraudulent conveyance of property to wife of debtor—Evidence—The evidence shows that at the date the conveyance to the wife now assailed was made, and at the time the improvements thereon were made, the husband was not indebted to appellant; therefore, such conveyance or improvements can not be complained of by him as unlawful.

There is no evidence to show an intent by the husband to defraud any creditors in causing such conveyance to be made to his wife.

A. R. Burnam for appellants.

Smith & Moberly for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor.

At the date of the marriage of the appellants, or shortly after, the husband received from the wife near $3,000, and seems to have used it for his own purposes, but evidently, as the proof conduces to show, with the wife's consent and with the understanding that it would be secured to her, and as between the two it was evidently regarded as belonging to the wife.

It appears that the husband was an industrious and enterprising man, and his principal business seems to have been that of contractor for the building of houses and the purchase and sale of realty. He became unfortunate in business, and made an assignment for the benefit of creditors. He was indebted to the appellee at the date of the assignment, and the latter filed this petition to subject to his debt a house and lot that had been conveyed to the wife, on the ground that the conveyance was made to defraud creditors.

It appears from the proof that Amie Myers, the wife, pur-

chased the lot of ground of William R. Letcher, and upon it was erected a dwelling house that made the lots and the improvements very valuable.

It is equally as certain that the wife was speculating with the husband in the purchase and sale of realty upon the idea that it was her money that was being invested and reinvested, and finally we find her the owner, by deed, of the house and lot in controversy.

The first question to be determined is, was the husband indebted to the appellee at the date of the purchase from Letcher or at the time the improvements were made on this lot of ground?

We think the evidence shows the contrary, and that when this purchase and improvements were made the appellee was indebted to the appellant. The latter explains how he became indebted to the appellee, and this is uncontradicted. It was by accepting orders from others, made payable to the appellee, and after these improvements had been made. There is no evidence of an intention to defraud the appellee, or such a transaction between the husband and wife as would imply fraud as to subsequent creditors.

The appellant's statement as to the manner of indebtedness is not contradicted by the appellee, or, if so, the testimony of the appellant shows that it was an indebtedness assumed for others, and from which the appellant received no benefit.

Actual fraud must be established by testimony, and this case falls short of presenting a state of facts from which fraud may be presumed. In the first place the wife's separate estate, or her own money, seems to have enabled her to purchase this property, and in the second place the husband was not indebted to the appellee when the improvements were made.

Judgment reversed, with directions to dismiss the petition.

LEWIS, &c. v. CITIZENS NATIONAL BANK.

(Filed October 28, 1893.)

1. Trusts—Construction—The nature of a trust and the rights of the beneficiaries thereunder are determined by the provisions of the will from which the trustee derives his authority or has received the trust fund, and not from the deed made to him as trustee for real estate purchased with the trust fund.

2. Same—Wills—Remainders—A will bequeathed certain estate to a trustee "to be invested in his discretion * * * for the use of his (the trustee's) said three daughters." A codicil modified said will by substituting the word "children" for the word daughters, and explained the trust intended to be created as conferring power on the trustee to use the principal of the estate for his children, or any of them, equally or unequally. The trustee invested the trust estate in realty for his daughter, and one of them having died, Held—The trustee's children took a contingent and not a vested interest in the trust fund, subject to be defeated by the exercise of the power of appointment vested in the trustee by the will as construed by the testator; therefore, the father did not inherit any part of said trust estate as heir of his daughter.

Blanton Duncan and O'Neal, Jackson & Phelps for appellants.

W. O. Harris for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hazelrigg.

The question involved in this case is the right of the appellee to subject to sale an undivided one-fourth interest in two houses and lots on Main and Market streets, in the city of Louisville, in satisfaction of a judgment against Blanton Duncan, one of the appellants, for $1,750, with interest at 6 per cent. per annum from April 17, 1887, for two years, and with 10 per cent. interest per annum from that time on until paid.

The title to this property, as shown by deed of November 12, 1878, was in Blanton Duncan as trustee of his daughters, Kate B. Duncan and Georgette Duncan. Georgette having died intestate, her father and mother, appellees contend, inherited her one-half of the property—that is, one-fourth each—the sister, Kate, owning the other half. It is this undivided one-fourth interest of the father, the judgment debtor, the sale of which is sought. The conveyance in the deed spoken of was from Blanton Duncan, trustee of Mary T. Duncan, and Mary T. Duncan to Blanton Duncan, trustee of Kate B. Duncan and Georgette Duncan, and was in consideration of the payment of $9,000 cash paid the grantors by the grantee as such trustee, and $4,000 to be paid thereafter. The terms of the conveyance were such that the trustee of the daughters was empowered at any time, without the intervention of the Louisville Chancery Court, to sell and convey the property and reconvert the same into personalty. From the conveyance itself there is nothing to indicate the nature of this trusteeship for the daughters or the terms or conditions of the trust. But from the record it appears that Blanton Duncan, in 1875, had been appointed trustee for his children under the will of his father, Garnett Duncan, and from the funds of that estate, belonging to himself as such trustee, he had made the cash payment of $9,000. The character of the holding by the trustee, therefore, and the ultimate disposition of the interest of Georgette at her death, are matters to be controlled by the will of Garnett Duncan. The chancellor seems to have regarded this deed of November, 1878, as alone creating this trust, and from this premise correctly construed the holding to be in fee. But this instrument, though it declared, did not create any trust. The will of Garnett Duncan alone did that. The acceptance of the trust and its management are shown by the exhibits in the various chancery suits referred to, and the settlements in the Jefferson County Court made by the trustee.

Looking to this will we find the following provisions:

"Eight. I give and bequeath and devise to my three granddaughters, Mary, Kate and Georgie, all the shares that I may own at the time of my death in the East London Railway Co., and also my lands in Indiana, near Jeffersonville. * * *

"Ninth. * * * The remainder that may be left in the hands of my executors, together with the unpaid notes of Mr. Thompson, I give to my son Blanton, as a trustee, to be invested, in his discretion, in improving the Indiana land, or otherwise, for the use of his said three daughters. Signed, etc.

"Codicil. * * * In lieu of the eighth clause, I give and devise all my East London Railway shares, and all my land in Indiana, that may be owned by me at the time of my death, to my son Blanton Duncan, as a trustee, for his use and support for life, and at his death to be equally divided among his children and their descendants, such descendants to take per stirpes. * * *

"The ninth clause is thus modified: * * * In the latter part of this ninth clause I substitute the word 'children' for the words 'said three daughters,' so that any future child or children will

be embraced in this trust, which is independent of that created by the eighth clause, for this last trust gives him power to use the principal for his children, or any of them, equally or unequally."

Whatever doubts may have existed as to the power given the trustee by the language of the original ninth clause, we must admit the right of the testator to construe it for himself. That construction is a part of his will and is controlling. By it he enlarges the trust, or converts it into a power, by the exercise of which the son may use absolutely the estates—its body or principal—for his children or any of them, and by such a distribution as he pleases—that is, to them in equal or in unequal portions. This is a power of appointment which can be exercised at any time during the lifetime of the life tenant. The existence of this power does not destroy the limitation over to the remainderman after the life estate, but the power may be so executed by the life tenant, under this power of apportionment, as to substantially destroy the interest of any particular remainderman. The existence of this power and the possibility of its exercise is inconsistent with the view that the deceased daughter took a vested remainder. From the very nature of the case, her holding was contingent. Manifestly her death does not affect or circumscribe the power given under the will. The investment is only temporary. Whether, as a matter of fact, the trustee expended for her use largely more than her proportionate share of the estate, as contended by him, we need not inquire.

The chancellor conceded that if the property were held under the trust and power created by the will of Garnett Duncan, it could not be subjected to the payment of the plaintiff's debt, but it was thought that the evidence establishing this trust was secondary and incompetent and seemingly held that the deed itself must furnish the evidence of the nature of the trust.

The contrary doctrine is abundantly shown by all the authorities. (Perry on Trusts, sections 77-99; 1 Lewis on Trusts, 169-405.)

The judgment is reversed, with direction to dismiss the petition.

PADUCAH LAND, COAL & IRON CO. v. MULHOLLAND, JR.

(Filed January 16, 1894—Not to be reported.)

Corporations—Fraudulent issue of stock by directors—Bona fide purchasers—Where the directors of a corporation buy land for it at a certain price, to be paid for by an issue of stock of the corporation, and at the same time make a written contract with the vendee by which a part of the stock so issued is to be set aside and held for the benefit of themselves as directors, the stock so issued for the benefit of the directors is in fraud of the rights of the stockholders of the corporation; and one not a director, who accepts a certain part of such stock, with a full knowledge of its fraudulent character, for his services as a promoter of the venture of the corporation, must account to its stockholders for the market value of such stock at the date he received it.

The appellee received such stock, not as an innocent purchaser for value and without notice of its infirmity, but with full notice of its character, and hence must account to the corporation for it.

J. W. Bloomfield and W. D. Greer for appellant.

J. M. Quigley for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

In the case of the Paducah Land, Coal and Iron Co. v. Hays, decided by this court November 28, 1893, the issues involved were similar to those raised on this appeal, and we here restate the facts leading up to the controversy, so far as now applicable:

"In the spring of 1887 the appellant company was organized under the provisions of the General Statutes of Kentucky. The purpose of the concern was to deal in mineral lands, notably iron ore lands on the Cumberland and Tennessee rivers, to build blast furnaces, sell its stock and take sock in other enterprises, etc. Its authorized capital stock was $3,000,000; it had not, however, a dollar of paid-up capital. The promoters of the enterprise consisted of a dozen or more prominent business men in and about Paducah, Ky., and in Tennessee. Of these Messrs. Tharpe and three others were the owners of some 5,000 acres of valuable ore lands in the desired locality, which they estimated to be worth $100,000. The company eagerly took this land at this estimate. The stock was then put on the market and sold at the rate of $10 per share, and at that rate was taken by the owners of the land. It develops, however, that of the 10,000 shares thus coming to these owners 4,500 of them, by a private written agreement, were set apart to one Palmer in trust for these owners, themselves directors in the company, and a number of the other promoters, including a majority of the directory of the company. * * * The appearances would indicate that as directors of the company they were induced to make the purchase at the price of $100,000 by reason of a private agreement by which they were to get back for their own personal benefit a part of the purchase price paid out by the company. However firm the belief of these directors was that the lands were in fact worth the $100,000 paid for them —and it is by reason of this belief that their conduct is rendered less reprehensible—yet we think that good faith requires them to give the benefit of the transaction to the stockholders for whom they must be held to be acting. This would result in a return of these 4,500 shares and their cancellation." (Ante, 517.)

The appellee, Mulholland, became the holder and alleged owner of 100 of these shares, issued, as we have seen, in fraud of the rights of the stockholders, and unless he purchased them for a valuable consideration without notice of the fraud he must be held accountable for their value. Their market value at the time of his alleged wrongful conversion was $10 per share, for which sum this suit was brought by the company then under the management of a new directory. The petition was dismissed and the company appeals.

The fraudulent character of the scheme, in pursuance of which this block of stock was issued and divided, is patent. Fifty-five hundred shares at $55,000 constituted the agreed price of the lands put into the concern. But either before or after the organization, and the time is immaterial, the "promoters," including the directors, agreed among themselves to issue 4,500 shares of stock, to be divided up, on the principle of "division and silence," among themselves and those who had aided them in the consummation of their plans. The appellee was not then a director of the company, but that he was familiar with the whole transaction is evident. He was mixing with the directors and on close and intimate terms with them. The Superior Court, on this branch of the case, say that after a careful review of the testimony they are constrained to the conclusion that the appellee took the stock with notice of its fraudulent character. "All the circumstances in the case," say that court, "seem to us to point

with unerring fingers to the conclusion that he not only knew of the fraud, but was an active participant therein. He was present often, going in and out of the rooms where the directors were wont to meet, was actually present part of the time on the day when the agreement of division was reduced to writing and was taking an interest generally in the affairs of the company." (14 Ky. Law Rep., 861.)

The pretense on which is based the claim that this money was earned by the appellee is that he was sent with others to Louisville to induce an acceptance of the presidency of the company by Thos. H. Hays. The result of the negotiation was the selection of Hays as president at a salary of $5,000 per year, and the appointment of the appellee as his private secretary at $100 per month. We do not think that the appellee was a purchaser of this stock for value. It was a gift to him for the purpose of inducing his aid in talking up or "booming" the concern, and he took the stock with full notice of the scheme, in pursuance of which it was issued and divided.

He should be held to acount for it, and to this end the judgment is reversed.

ROBINSON v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 16, 1894—Not to be reported.)

1. Railroads—For an injury to a brakeman on a freight train by the negligence of its employes in charge of a passenger train the railroad company is not liable unless the injury resulted from gross neglect.

2. Same—A brakeman having been injured by a wreck of the freight train on which he was employed, sat down on the end of a railroad tie in a dazed and unconscious condition, and while sitting there was struck by a passing passenger train and hurt thereby. Held—The failure of those in charge of the passenger train to discover the presence of the brakeman on the track in time to stop the train, and thus prevent the injury, was not gross neglect, although a passenger on the train saw appellant on the track long before the train reached him. The engineer has other duties to perform besides looking ahead to discover objects on the track, and he owes trespassers there no duty to be on the lookout to discover their presence.

John & Wm. Carnes and M. D. Gray for appellant.

L. L. Tiller, H. W. Bruce and B. D. Warfield for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant, a brakeman on one of the appellee's freight trains, sued the appellee for damages caused, as is alleged, by the gross neglect of the appellee in running its passenger train over him and injuring his arm, etc.

The injury happened at a place called Maurice, which was a flag station for passenger trains. It seems that the appellant, a short time before the injury complained of, was hurt by a wreck on a freight train, and he got off of that train and after walking a short distance sat down on the end of a railroad tie. He was evidently rendered unconscious by the hurt received on the freight train. He sat on the end of the tie several minutes with his elbow resting on the rail and his head on his hand. There is a curve in the railroad track about 600 yards from the place

that appellant was sitting, and a crossing about 150 yards from where he was sitting, and nearer was the station.

The evidence is that the train blew its whistle for each of these places, but it did not arouse the appellant, and while he was sitting as described, he was struck and hurt. He sues for gross neglect, and, being an employe of the appellee in the same line of service but on different trains, he can not recover for an injury caused by another servant on the passenger train, except for gross neglect. Was there such neglect?

There is no proof of such neglect whatever. The only evidence relied on to prove such neglect is the evidence of a passenger who was sitting at the window in the ladies' car on the short side of the curve, which gave him a full view of the track beyond the curve, and he saw the appellant lying on the track. Another witness says that the appellant could have been seen by the engineer. Allow that the engineer could have seen him in time to save him, but the question is, did he see him? If not, was it gross neglect not to see him? It is to be observed that while the engineer must keep his eyes on the engine and on the track ahead also as well as he can to avoid injury to others, yet it is not expected that he can give the track the same attention in order to discover trespassers as other persons would that have nothing to do but look along it. Nor is he as likely to see them as such persons would who were looking along the track with a view to discover objects on it. Besides, the engineer is not bound to look out for trespassers on the track, but he can not shut his eyes to avoid seeing them, and if he fails to see them by negligence, in this case gross negligence, the company is responsible. The evidence wholly fails to show a case of gross negligence. Therefore, the court did right in giving a peremptory instruction.

The judgment is affirmed.

SMITH v. PERKINS, &c.

(Filed January 16, 1894—Not to be reported.)

1. Statute of frauds—Sale of five years' lease of real estate—While a lease of real estate for five years by a partnership is personal estate of the firm which, on the death of the partners, passes to their personal representatives, yet the statute of frauds requires a contract, by either partner, for the sale of his interest in such lease and in the buildings erected on the leased premises, to be in writing; a parol contract of sale of such interest by one of the partners can not be enforced.

2. Same—Evidence—The evidence shows that appellee did not purchase the interest of the appellant partner in such lease at the price verbally agreed upon, but abandoned the contract of purchase until after he found the lease could be sold to a third party for a very large sum; and the fact that he took possession of the leased premises and so used it as to create a nuisance and compel such third party to pay an exorbitant price for the lease, in order to abate the nuisance, does not create any equity in his favor entitling him to specific execution of the parol contract previously abandoned by him.

Bishop & Greer and John K. Hendrick for appellant.

J. C. Hodge and D. G. Park for appellees.

Appeal from Livingston Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellant, Wm. Smith, and George W. Landrum were the owners, by a writing of a five years' lease on a lot of ground in the town of Grand Rivers, in the county of Livingston. There was erected on this lot a small distillery, and for a time they made whisky and fed or slopped cattle and hogs.

While they were the owners a company known as the Grand Rivers Co. were engaged in what was understood at the time in booming the city, so as lots might be sold at fabulous prices. This distillery was so located as to interfere with the construction of a principal street then in contemplation, and called, or to be called, Cumberland avenue. The company was anxious to have the distillery removed as to location, and the stench from its slop and general management gave the embryo city such a smell as would have driven bidders from the contemplated sales as well as prevented the construction of this principal street.

The company made a written contract with the Oak View Distilling Co., the name under which it was operated by Landrum & Smith as partners, Smith affixing his signature thereto, by which it gave to the distillery company $4,500 for the lease, and the latter to remove the distillery from the premises.

The company paid the money, and there being a controversy as to whether Smith was entitled to any part of the purchase price, it was retained (the one-half of the entire sum) until the rights of Smith could be determined.

The appellee, J. H. Perkins, claimed that he had purchased the interest of Smith in the lease for $150 shortly before the contract with the Grand Rivers Co., and had, by the consent of Smith and under his purchase, which was in parol, been substituted as a partner with Landrum, and had purchased cattle and hogs jointly with Landrum, and in fact was operating the distillery at the time of the sale to the Grand Rivers Co.

He further alleges he paid a full price for Smith's interest, and that his conduct in the control of the distillery, by having the slop emptied into the streets, created such a stench as to compel the Grand Rivers Co. to pay this exorbitant price in order to have the nuisance removed; that he purposely created the nuisance in order to compel the purchase.

Smith denies making any contract with Perkins, but admits he agreed to take $150 for his interest in the lease if Perkins would pay him the cash; that Perkins failed to pay him, and the contract was abandoned, and no effort at a compliance until this sale to the Grand Rivers Co.

Landrum, who was an equal partner with Smith, the appellant, obtained his half of the $1,500. He (Landrum) and Perkins were partners in a saloon, and did run the distillery after Smith had declined to do so in conjunction with Landrum. It seems that Smith said to Landrum he could run it if he desired, and if he made nothing he would charge him no rent for his interest, and it is very persuasive, from all the facts before us, that the verbal contract to pay the $150 to Smith had been abandoned by both parties until it was ascertained, by negotiations with the Grand Rivers Co. on the part of Perkins, that the former could be forced to pay an enormous sum for this lease.

It was then that Perkins renewed his negotiations with Smith, the appellant, by offering to pay the $150, and failing at the same time to notify Smith of the great increase in the value of his

property, caused by the stench purposely created to injure the property of others and force the purchase of this nuisance. This act of Perkins is made the basis of an equity, by reason of his alleged parol purchase, for which it is insisted he must either have compensation or the parol contract enforced.

While the Grand Rivers Co. is not complaining, or those whose nostrils have been filled with the stench that caused the exorbitant price to be paid for that (or the one-half) which cost the appellee only $150, a court of equity will scarcely, in weighing testimony, give the same credence to the testimony of those participating in the transaction and coercing this purchase as to that of the appellant, Smith, who seems to have been ignorant of what was transpiring until the contract was fully consummated; and, besides, it is apparent to this court that the transaction with the Grand Rivers Co. brought to the appellee's recollection the offer to sell made by Smith, that had never before been executed, nor would it have been but for the large price for which the property was sold. If, therefore, the question alone was one of evidence, the judgment should be for the appellant. The statute of frauds is another obstacle preventing a recovery.

While the lease is a mere chattel and belongs to partners, and would pass to the personal representatives, it by no means follows that because of this fact one partner, or both, may sell the lease and buildings upon it by parol.

Such a contract is within the statute of frauds, that provides "no action shall be brought to charge any person upon any contract for the sale of real estate (or any lease thereof) for a longer term than one year unless the contract, etc., be in writing," etc. (General Statutes, chapter 22.)

The appellee is seeking to enforce this contract, which is claimed to be a verbal sale by one partner to him of his interest in this leased property, and we perceive no reason why the statute is not a complete bar to the recovery.

In Greenwood v. Strother, 13 Ky. Law Rep., 33, it was held that no action could be maintained upon a parol contract for the lease of real estate. (Green v. Hammock, 13 Ky. Law Rep., 145; Duncan v. Duncan, Id., 917; Carter v. Flexner, &c., Id., 608.)

The judgment below, adjudging the appellee entitled, is reversed and remanded, with directions to render the judgment in favor of the appellant.

WILLIAMSON, BY, &c. v. LOUISVILLE INDUSTRIAL SCHOOL OF REFORM.

(Filed January 27, 1894.)

An industrial school of reform, maintained by taxation and State aid, for the charitable purpose of reforming youthful criminals, is not liable to one of its inmates for an assault upon him committed by an employe of the school who was incompetent and unfit for the service required of him. The employe making such assault alone is responsible for the damages inflicted by him.

Samuel B. Kirby and Geo. Weisinger Smith for appellants.

T. L. Burnett for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellee, the Louisville Industrial School of Reform, was created a body-corporate by an act of the general assembly, in 1854, under the name of the Louisville House of Refuge. Its object and business was to take charge of such youths as might be committed to it, and care for their moral and physical training and education. It was a charity, and its purpose was reformation by training its inmates to habits of industry, and by instilling into their minds the principles of right living, to the end that they might become useful citizens of the State, rather than fill its prisons and poorhouses.

The incorporators and their successors are under the control and oversight of the legislature, and are mere instrumentalities of the Commonwealth. The State interposed in behalf of neglected and abandoned children within its confines in its capacity of parens patriæ, and assumed the guardianship of such children as were committed to the institution. It was an agency of the State and maintained by taxation and State aid.

The appellant, a boy of ten years, was committed to the care, control and restraint of the institution, and his petition, brought by his next friend, Thomas, alleges that, without fault on his part, one of the servants and employes of the appellee, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such cruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged, etc.

To this petition a general demurrer was sustained and the petition dismissed. The correctness of this judgment is the question on this appeal, and, while it has not been determined directly, the general principles are established. The functions of the institution are governmental. As said in Farham v. Pierce, 141 Mass., 203, "it is a provision by the Commonwealth, as parens patriæ, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost."

In Perry v. House of Refuge, 63 Md., 20, it was held that an action does not lie against a State house of refuge for an assault on an inmate by an officer thereof. It is there said: "Youths, in whom the seeds of vice have already germinated, are placed there under proper restraint so that the growth of crime may be arrested or eradicated in its incipiency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from municipal and State treasuries. These are the funds of the institution, controlled by the managers, not for their own profit and benefit, but solely for the charitable purposes designated by its organic law. * * * Several of the most eminent judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by fiduciary agents;" and the principle determined in a number of English cases, that "damages are to be paid out of the pocket of the wrongdoer and not from the trust fund," was approved.

It is contended that these cases followed the older decisions in England, and that the latter have been since overruled. Be this as it may, the principle announced seems entirely just and reasonable. If the funds of these institutions are to be diverted from their intended beneficent purposes by law suits and judgments for damages, caused by negligent or malicious servants, their usefulness, indeed, their existence, will soon be a thing of the past.

The judgment dismissing the petition is affirmed.

ASHER v. BROCK, &c.

(Filed January 30, 1894.)

1. A verbal sale of land confers no equitable interest whatever upon any party to it, although collateral equities may arise out of the transaction, such as the equitable lien of the purchaser for the purchase money paid if possession was transferred pursuant to the purchase.

2. Same—Written ratification of verbal sale—Where the vendee claiming under a verbal sale sues the vendor for specific execution of the contract, and the latter by answer admits the contract as alleged and disclaims any interest in the land, such written admission of the contract does not relate back to the date of the verbal sale so as to confer an equity on the vendee as of that date.

Therefore, where the vendor has by deed conveyed the land to another, after the verbal sale and before the filing of the answer, such deed vests the legal title in such other person, and the only equity the vendee under the verbal contract can assert is a lien on the land for the purchase price paid by him, provided he obtained possession of the land and the vendee claiming under the deed had notice of the verbal sale at the time he obtained his deed.

Wm. Lindsay and Edward W. Hines for appellant.

Thomas H. Hines for appellees.

Appeal from Harlan Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The land in controversy was granted by the Commonwealth to Hiram Brock and sold by him to Silas Saylor, and by him to John G. Saylor, and by him to Samuel Cadwell, and by him to George Griss.

All of these sales were by parol except the one by Hiram Brock to Silas Saylor, which was by title bond, but no deed was ever thereafter made by Hiram Brock to Silas Saylor. After the death of Geo. Griss, Rachel Griss, his only heir, sold the land to the appellant by title bond. Thereafter James Griss, who had been sued by Rachel Griss for cutting timber from the land, discovering that Silas Saylor had never conveyed the land by writing, procured from him a general warranty deed for the same. The legal title being still in the heirs of Hiram Brock and the equitable title being in Silas Saylor, James Griss also purchased their supposed interests, taking from some of them deeds and from others bonds for a title. At the time James Griss made the purchases from Silas Saylor and the Brock heirs he knew of the said verbal purchases, and that each of them was for a valuable consideration, which had been paid. The title being in this condition, the appellant, being a verbal purchaser, sued Silas Salyor and the Brock heirs for a conveyance. James Griss was made defendant, and the prayer against him was that he be compelled to surtender his title. To this petition Silas Saylor filed an answer, admitting that he made the verbal sale to John G. Saylor and admitting that he asserted no claim to the land after making that sale, but also admitting that he had thereafter sold the land by deed to James Griss. It is now contended that Silas Saylor's admission that he had verbally sold the land to John G. Saylor was equivalent to a written confirmation of that sale, and related back to its date, which overreached the intermediate written conveyance that was obtained by James Griss, with notice of the verbal sale. This con-

tention is sought to be maintained upon the old theory of this court that a verbal sale of land was not void, and that while no action could be maintained thereon to compel a conveyance it passed an equity for many purposes. But this court in later years has reviewed that doctrine, taken it back and announced in its stead that a verbal sale or division of land, even though held in partnership, is void, and confers upon neither party any equitable interest whatever, but only such collateral equities that may arise out of the transaction, such as giving the purchaser a lien on the land for the purchase money paid, if the possession has been transferred pursuant to the verbal purchase. (Usher, &c. v. Flood, 83 Ky., 552; Newburger v. Adams, 92 Ky., 27; White v. O'Bannon, 9 Ky. Law Rep., 334; Duncan v. Duncan, 14 Ky. Law Rep., 917.)

If Silas Saylor had made a deed to John G. Saylor after he had conveyed the land by deed to James Griss it would not have overreached James Griss' deed, even though James Griss, at the time he received his deed, had notice of John G. Saylor's verbal purchase, because as the verbal purchase was void and could not be enforced by either party at law or in equity, James Griss had the right to make his purchase valid by obtaining the legal title to the land from Silas Saylor, who held it, and from whom the verbal purchaser could not force the legal title. This view of the case does not interfere with John G. Saylor's right to assert a lien on the land for the purchase money that he has paid, provided he obtained possession of the land by reason of the purchase, and that James Griss had notice of the same at the time he purchased it.

The judgment is affirmed.

MAYSVILLE & BIG SANDY R. R. CO. v. SHOFSTALL, &c.

(Filed January 30, 1894—Not to be reported.)

Constitutional law—Appearance—The provision of the act of May 10, 1890, which provides that if certain defendants, after being served as provided in the act, shall appear and move to quash the process, such appearance and motion shall operate as an appearance in the action for all purposes, but that action shall not stand for trial until the succeeding term, is constitutional and valid.

Wadsworth & Cochran for appellant.

Wm. H. Holt and Geo. Doniphan for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant company is charged in the petition of the appellees with having so constructed its road along High street, where the property of the appellees was located, in the town of Augusta, as unreasonably to abridge the use and enjoyment of the street.

The appellant was served only with process delivered to an agent of the Chesapeake & Ohio Railway Company, a corporation operating the road of the appellant, no agent of the appellant being found in Bracken county. The appellant, at the October term, 1890, entered its appearance for the purpose of objecting to the jurisdiction of the court, and also moved to quash the return on the summons. The motion was overruled.

At the April term, 1891, it renewed its motion to quash the return, and the court adjudged that the appearance of the appellant had been entered by its former motion, and again overruled the motion. An answer was thereupon filed, and upon the issues presented under proper instructions of the court the jury found a verdict for the appellees for the sum of $500 in damages. On the appeal in the Superior Court it was suggested by counsel that the constitutionality of the act of May 10, 1890, was involved, and thereupon the appeal was transferred to this court.

The appellant has filed no brief, and we are, therefore, referred to no authority in support of its supposed contention that the act is not constitutional. One of the provisions of the act in question is to the effect that if a defendant, served as provided for in the act, appear and move to quash the process, it shall operate as an appearance in the action for all purposes, although the action shall not stand for trial until the succeeding term.

Without regard to other features of the act, it seems clear enough that the provision regulating the appearance of the defendant upon his making the motion in question, is not violative of any constitutional right. The question is one of practice, and is one of legislative discretion rather than of its power.

Here actual notice has come to the complainant as shown by the motion to quash. Ample opportunity was given to present such defenses as seem to have existed. The case was carefully tried out on its merits.

Judgment affirmed.

COMMONWEALTH v. THREE FORKS COAL CO.

(Filed February 3, 1894.)

1. The State may recover by action the possession of land purchased by it for delinquent taxes under the provisions of article 9 of chapter 92 of the General Statutes unless such land is redeemed by its owner within the time prescribed; but such right of recovery exists only where a substantial compliance with all the requirements and conditions of the statute is alleged and proven.

2. Same—Tax sales—Pleadings—The State as well as individuals is bound by the rule that places upon one claiming land under a sale for delinquent taxes the burden of proving that the taxes were duly assessed and a charge on the land, and that the successive steps were taken which led to a lawful sale thereunder, at which he or one under whom he claims became the purchaser.

Where the State seeks to recover possession of land under a sale for delinquent taxes, the petition must allege that the owner was possessed of no personal estate in the county where the land lies subject to distraint for taxes due, since a sale of the land could not be made legally where there was personal property out of which the taxes could have been made. Without such allegation the petition does not state a cause of action.

Wm. J. Hendrick for appellant.

G. W. Gourley for appellee.

Appeal from Lee Court of Common Pleas.

Opinion of the court by Judge Lewis.

This action was brought in the name of the Commonwealth of Kentucky and Lee county as joint plaintiffs against the Three

Forks Coal Co., a corporation, to recover possession of a tract of 1,004 acres of land previously sold as defendant's property for taxes of the year 1891, and purchased for the State. To the original petition both a special and general demurrer were filed; but there was to the amended petition only a general demurrer, the judgment on trial of which, being the only one rendered, is in these words: "The demurrer to plaintiff's petition being heard, the same is sustained, and plaintiff, failing to plead further, is dismissed."

Though Lee county does not seem to have any interest, joint or several, in the subject of action, and, as a consequence, there was a misjonder of parties, still, as only the general demurrer appears to have been passed on, we deem it proper and pertinent on this appeal to inquire and determine whether sufficient facts are stated in the pleadings to constitute a cause of action in favor of the Commonwealth of Kentucky.

The statutory provisions under which this action was brought are contained in article 9, chapter 92, General Statutes, and were readopted by "An act relating to revenue and taxation," which became a law November 11, 1892. Section 16, article 9, provides that if no one will bid for and purchase land exposed for sale to pay taxes, it shall be the duty of the sheriff or tax collector making the sale to purchase same for the State of Kentucky at amount of tax due and commission thereon; but the owner of such land has the right to redeem at any time within two years after the day of sale by paying purchase money, with interest at rate of 30 per cent. per annum, and in addition 15 per cent. on total amount of purchase price and clerk's cost, if any.

It is further provided in same section as follows: "The State shall have the right of possession of lands purchased by it at any time after the expiration of thirty days from the giving of the notice provided for in the next section; and the purchaser, other than the State, shall have the right of possession of the land purchased by him at any time after expiration of six months from the giving of the notice provided for in the next section." Section 17 makes it the duty of the county attorney, within fifty days after sale, to notify the owner of land so purchased by the State of such purchase; and if not redeemed within thirty days from such notification, to institute proceedings for recovery of possession, the owner being required to pay cost of proceedings. It is also therein provided that failure of a county attorney to give such notice and institute the required proceeding within the time specified shall subject him to fine for each offense.

The purpose of enacting such statute, which in no way oppresses the delinquent taxpayer, is simply to stimulate him to redeem his land by paying what is due under penalty, in case of failure to redeem, of losing possession and ultimately title to his land; and the language used plainly gives to the State, being purchaser at a tax sale, right to sue for and recover possession of land so purchased if not redeemed within the time prescribed. But to make a sale valid and to give as a consequence to the purchaser, whether the State or an individual, right to recover possession of land so sold for taxes, there must be a substantial compliance with all requirements and conditions of the statute.

In Cooley on Taxation it is said: "Whoever claims land under a sale of delinquent taxes must take upon himself the burden of proving that the taxes were duly assessed and a charge on the land, and the successive steps were taken which led to a lawful

sale thereunder, at which he, or some one under whom he claims, became purchaser."

That rule has been directly approved by this court (Whipple v. Earick, 14 Ky Law Rep., 35; Smith v. Ryan, 88 Ky., 636), and it seems to us it is applicable as well where the State, as an individual, has become purchaser.

It is substantially and fully enough alleged in the petition as amended that the land in question was assessed for taxation; what amount of taxes were due, and that prior to the sale payment thereof was demanded of defendant, a receipt therefor being tendered. It is further alleged that the county attorney of Lee county, where the land lies and was assessed, had, in the manner and time required by section 17, notified defendant of said sale and purchase for the State, and that proceedings would be instituted to recover possession of the land unless redeemed within thirty days, which was not done; but the statute provides in terms not only that personal property shall be first subjected to pay taxes, but in express language of section 15 makes a condition of a valid sale of land for such purposes that "there be no personal property the sheriff or tax collector can distrain for taxes due."

There is no allegation in the pleadings that defendant had no personal property in Lee county subject to distraint for the taxes due; and as a sale of the land in question could not be legally made, if there was such personal property out of which the taxes could be made, it follows there was a failure of plaintiff to state a fact essential to constitute his cause of action, and the general demurrer was properly sustained.

Judgment affirmed.

CHAPIN v. FULKERSON.

(Filed Feburary 3, 1894.)

1. A defendant enters his appearance to an amended or substituted petition who files a general demurrer to it.

2. Ejectment—Pleadings—Description of land claimed—Where the petition in ejectment sets out by metes and bounds a large tract of land of which plaintiffs claim to be the owner, and then alleges that defendant is in possession, without right, of forty acres of such land, the boundary of which forty acres plaintiff is unable to give because he does not know it, and that defendant does know such boundary, and is called upon to give it, the description of the land sought to be recovered is sufficiently definite.

3 Same—Failure to answer—Defendant's demurrer to the petition was overruled and he was allowed thirty days to file answer. At the second term thereafter judgment by default for failure to file an answer was entered against defendant. Two years thereafter defendant asked leave to file an answer. Held—No valid excuse for defendant's failure to file an answer when due is shown. His ignorance of his rights and duties in this respect is no sufficient excuse.

Alexander Lackey for appellant.

Wm. M. Fulkerson for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee was ruled to make his petition more definite. He attempted to do so, but failed, and on the 19th of September, 1889, he filed in court a petition as a substitute for the original petition and amendments. The substituted petition alleged that the appellee was the owner of 733 acres of land, giving its metes and bounds. It was alleged that the appellee had the possession of the survey, except the parcels that two the defandants held without right, which parcels were described by metes and bounds in their answers thereto filed in this case. It was alleged that the appellant also held the possession of a parcel of said land without right, containing 40 acres, but that the appellee was unable to give its boundary, and he called upon the appellant to give it. The appellee also asked that his title be quieted, and that he have judgment for the possession of said 40 acres of land.

The appellant filed a demurrer to the substituted petition, which was overruled, and the appellant was allowed thirty days in which to file an answer, but he made no answer, and at the August term of the court, 1890, the petition was taken for confessed and judgment was rendered in favor of the appellee for the possession of the 40 acres of land, giving its boundary. At the August term, 1892, the appellant tendered an answer controverting the allegations of the petition, and also tendering his affidavit, attempting to explain why he failed to make his answer in proper time.

The substituted petition set up an action of ejectment against the appellant for the possession of 40 acres of land; also an action to quiet his title to the remainder.

If it be urged that the 40 acres of land was not sufficiently described in the petition, it is sufficient to say that it is described as a part of a certain survey which was sufficiently described, and which, we think, is sufficient to support an action of ejectment; but if we are mistaken in this the petition alleges that the appellee could not give the boundary of the 40 acres, because he did not know it, and could not ascertain it; but that the appellant did know it, and he was called upon to give it, which he failed to do.

If it be urged that the appellant was not summoned to answer the substituted petition, it is sufficient to say that he filed and urged his general demurrer thereto, which had the effect of entering his appearance to the action, and was a waiver of the necessity of a summons.

The appellant says in his affidavit, as an excuse for not appearing and filing his answer, that at the next term of court after the demurrer was filed and acted on he was prevented from attending court by sickness in this family. It is to be observed that the judgment was not rendered at the next term of court, but at the term after that, and he gives no valid reason for not appearing at that term. Besides, the appellant had plenty of time to have filed his answer, and he offers no excuse for his failure to do so except that he did not know what his rights and duties were in that regard; but this excuse simply victimizes him to the old adage, "where knowledge is a duty, ignorance is a crime." But it is said that the appellant was advised by his attorney at the time the demurrer was overruled that he could go home. This advice was proper, but it did not mean that the case was finally disposed of, and if the appellant so understood it he was unfortunate.

The judgment is affirmed.

SMITH v. COMMONWEALTH.

(Filed February 17, 1894.)

Criminal law—Jurisdiction—Change of venue—After a defendant has jointly with others been indicted for murder in the county where the alleged crime was committed, and the case, by change of venue, has been transferred to another county for trial, and while such case is still pending in said county the circuit court of the county where the crime was committed has no jurisdiction over the subject-matter of the alleged crime; therefore, a second indictment returned by the grand jury of that county against the defendant for the same offense, while the first indictment is still pending as aforesaid, and all proceedings had under the second indictment are absolutely void for want of jurisdiction of the court over the subject-matter.

Appellant and others were, in 1890, indicted in Perry county for the murder of M. The case was by the Commonwealth transferred to Clark county and was there pending in 1893 when the grand jury of Perry county returned another indictment against the appellant for the same crime. The last-named indictment was transferred to Bell county, where appellant was convicted and sentenced to the penitentiary for life. Held—The second indictment and the proceedings thereunder are void. The Perry Circuit Court had no jurisdiction of the subject-matter after the transfer of the first indictment to Clark county.

J. M. Unthank and Warren Montfort for appellant.

Wm. J. Hendrick for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hazelrigg.

On this appeal from a judgment of the Bell Circuit Court consigning the appellant to the penitentiary for life for the murder of John McKnight in Perry county, the following facts appear from the record upon which the jurisdiction of the trial court is denied.

On August 25, 1890, the appellant, with a number of others, was indicted for the murder of John McKnight in the Perry Circuit Court, and thereupon the attorney for the Commonwealth, under the provisions of an act of the general assembly, approved 1880, giving the Commonwealth the right to change the venue of a case when there existed a state of lawlessness on the part of the friends and sympathizers of the accused preventing a fair tiral, filed his written statement and the cause was transferred to the Clark Circuit Court. Thereafter the defendant in that indictment, the present appellant, appeared in the Clark court and executed bond for his appearance there as required by law.

The regularity of his transfer and the constitutionality of the act under which it was made were determined by this court in the case of the Commonwealth v. Davidson, 12 Ky. Law Rep., 767, the appellee in that case, Davidson, being one of the defendants in the indictment with the present appellant.

On March 17, 1893, and while the former indictment was still pending and undetermined in the Clark Circuit Court, the grand jury of Perry county again indicted the appellant, Smith, for the murder of John McKnight, and, notwithstanding his protest against the jurisdiction of the court, made by demurrer plea of former jeopardy, and his affidavit and the record showing that the Perry Circuit Court had been divested of its jurisdiction over the case by the transfer mentioned, the court was about to proceed to a trial of the case when the appellant procured, by proper steps under the statute a change of venue to the Bell Circuit Court.

In the latter court the same questions were again raised as to the jurisdiction of the court, and the foregoing facts were shown by copies of the records from the Perry and Clark Circuit Courts. The court refused to set aside the indictment, overruled the demurrers, general and specific, and the objections of the appellant to the jurisdiction, etc., and the case proceeded to trial under the protest of the appellant, who pleaded former jeopardy and set forth the foregoing facts, and on the trial the evidence of the former indictment for the same offense and the pendency of the same case in Clark, etc., were shown, and the court was asked to instruct the jury to find the defendant not guilty.

The court overruled his motions and plea, and instructed the jury that if they believed from the evidence that the defendant had theretofore been acquitted of the offense charged in the indictment by a judgment of the Clark Circuit Court, and if they further believed from the evidence that said court had jurisdiction of his person and of the offense charged in the indictment, then they should acquit the defendant; and further, that it was admitted by the Commonwealth, and must be taken as true, that the defendant was the same person who was indicted in the Perry Circuit Court at its August term, 1890, for the murder of John McKnight, and who was then being tried for the murder of the same John McKnight, and that both indictments charged the same offense. The court also gave the usual instructions as to murder, manslaughter, etc.

It appears from the copy of an order of the Clark Circuit Court, filed by the appellant on his motions in this case and as evidence on the trial, that the Commonwealth's attorney, in the judicial district embracing Clark county, had filed a written statement on October 4, 1893, upon which the court ordered that the indictment against the defendant, Smith, the present appellant, be filed away with leave to redocket the same upon motion of the Commonwealth's attorney.

It is apparent that the finding of the second indictment, while the first one remained undisposed of, and all the proceedings thereafter had on it, are quite out of the ordinary. It is clear that by its transfer of the case to the Clark Circuit Court the Perry Circuit Court lost all jurisdiction over the subject-matter of the indictment.

The proceedings, therefore, thereafter had on the second indictment were void for want of jurisdiction in the court in which they were had, and this is true of the attempted trial in the Bell Circuit Court.

On motion of the defendant in the Clark Circuit Court, the Commonwealth not objecting, the venue might have been changed back to Perry, as decided in Hourigan v. Commonwealth, 11 Ky. Law Rep., 509, but not otherwise.

The so-called trial in Bell was, in legal contemplation, no trial at all, and the same would have been true of any attempted trial in Perry on this second indictment. The Clark Circuit had, at the finding of this second indictment and at the time of the trial in Bell, full and complete jurisdiction of the case, and upon redocketing it might yet proceed to try the appellant for the murder of John McKnight.

These principles are fundamental and elementary. It is but just to say that the learned attorney general, who, while quick enough, always zealously, to prosecute the just pleas of the State, yet concedes this case to be one "where it is to the interest of the Commonwealth that the law be vindicated by a reversal."

The judgment is, therefore, reversed, with directions to quash the indictment and discharge the appellant.

MENDENHALL, &c. v. TUNGATE, &c.

(Filed December 12, 1893.)

Wills—Testamentary capacity—Evidence—Testatrix, who was sixty-five years of age, had been a helpless paralytic since 1883, and was bedridden and speechless, except that she could utter three words, "yes," "no" and "well." She executed the paper in controversy in 1887; could see and hear, and some of her friends and neighbors think she was capable of making a will. Her wishes as to the disposition of her estate were ascertained by the draftsman from speculative questions on the subject asked her by those about her, to which she would reply "yes" or "no." Held—The paper by which she gave her entire estate to her four children, who were near her when it was executed, and by which she pretermitted an absent grandchild, whom only $100 was given, is not the last will of the decedent. She did not have sufficient testamentary capacity to conceive of her will, nor physical ability to dictate a will even if she could have conceived one.

H. Clay White and Joel C. Clore for appellants.

Dickerson & Willis for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Hazelrigg.

A paper, purporting to be the last will and testament of Sarah A. Tungate, dated May 14, 1887, was offered for probate in the Grant County Court in March, 1891. Its probation was contested by a granddaughter of the decedent—her husband joining with her—upon the ground of want of testamentary capacity on the part of the alleged testatrix, and because of undue influence exercised over her by the favored devisees.

After a thorough hearing of the testimony and a painstaking examination of the authorities on the subject, the learned judge of the county court, in an elaborate opinion, rejected the paper. The propounders appealed to the circuit court, and upon trial there the jury, under unobjectionable instructions, found a verdict "for the will," and from the judgment thereon the contestants have appealed to this court.

The facts, and they are most singular and interesting ones, are substantially these: In 1883 the alleged testatrix was stricken with paralysis, caused by the rupture of a vessel in the brain, or by a clot on the brain. It rendered her unconscious. She was completely paralyzed; was almost lifeless and remained in that comatose condition for some ten days or two weeks. A considerable portion of her brain—so testifies her attending physician—was involved, and she never improved much. She did regain the use of her left limbs and her general health was in a large measure restored; her appetite was good; she was speechless, save she could use the words "yes," "no" and "well," the usual form of their use being "yes, yes," "no, no," and "well, well."

She was sixty-five years of age—a hopeless, bedridden paralytic, requiring constant and patient nursing. In this condition she lived some seven years, and is said by some of the witnesses for the appellees to have taken a lively interest in what was going on around her. What was thought best for her by her attendants was done, though she managed to make her wants known by these monosyllables to a surprising extent. She never wrote a line after her paralysis, though she read some in her Bible. She could see and hear, and is said to have understood

what was told to her. Her husband died in the spring of 1887, and she appeared depressed for some time thereafter. Tears came to her eyes when some intimate friends called to see her for the first time after his death. She was consulted as to what food she wanted, speculative questions being asked her with reference to the various articles. She appeared to remember dates, and if those talking in her presence would fix the wrong date to the age of the children, or to any incident of which she was supposed to have some recollection, she would say "no, no," and when the right date was fixed she would say "yes," or "yes, yes." Several of her neighbors testified to the fact that they believed her competent to understand the making of a will, or other writing, when read to her, and none of them testify against her sanity. Her attending physician and an attesting witness to the will comes as nearly testifying against her capacity as anyone not interested. He says: "I am satisfied that she understood, in a measure, what was said to her in regard to that will; I think she had a will; I don't think her will power was entirely lost. * * * She could say 'yes,' and 'no' to interrogatories put to her by Mr. Dickerson, and she, I presume, understood them; I don't know. * * * She never improved very much mentally. Nature had to make a terrible struggle for her to live at all." When asked if she had mind enough to understand the will, he said: "I think she had an idea of the drift of it; a vague idea; I don't know."

As indicated, her husband died in the spring of 1887. He had written his will in 1873, and on March 9th of the year of his death it was probated. By it the testator gave to his wife one-third of his real estate in fee and such portion of his personalty as the law would give her. Prior to this she owned no property. She left four children and a grandchild—the daughter of a deceased son—to all of whom, before her affliction, she was much attached. A son and daughter, both unmarried, lived with her and a married daughter lived near by. These were with her constantly. A son lived in Texas. The granddaughter, recently married, lived some thirty miles away and visited her grandmother occasionally. The will of the husband was probated on the 9th of the month and the one in contest was written five days thereafter. After reciting that the testatrix was of sound and disposing mind and memory, it provided, first, for the payment of all her just debts and funeral expenses; second, for an equal distribution of her entire estate, real and personal, after the payment of her debts, among her four children, naming them, except the sum of $100, which was given the granddaughter, Ella Tungate; and it provided, third, that the granddaughter should not have any of the real estate, and only $100 of the personal estate, and this was to be paid to her as soon after the death of the testatrix as could be done.

It is a matter of interest to note just how the idea of making this instrument originated, and if it be supposed that this invalid could have originated the conception to note how she communicated that intention, and in this connection we quote the testimony of the son who was her constant attendant:

"Q. At whose request did I go down there; who notified me to come?"

This question was asked by the draftsman of the will, who was conducting the trial of the case for the propounders.

"A. I did."

"Q. How came you to do that?"

"A. Well, sir, by her request."

"Q. Now tell the jury how she communicated that request to you, and all about it, as near as you can."

"A. Well, after pa's will was written here, I talked there in the room in regard to the will—that is, what was in it—and she kept going on for several days after that, and I kept guessing and guessing and she kept pointing up this way and I finally guessed what it was. I asked her if she wanted to make a will; she said 'yes;' I asked her then if she wanted Dr. Lewis to write it; she said 'no;' I then asked if she wanted you to write it; she said 'yes;' I asked her if she wanted me to tell you so; she said 'yes.'"

The draftsman found the testatrix, who was a stranger to him, in bed and in the condition indicated by the other witnesses. He testifies that she could use only the three words, "yes," "no" and "well," but could see and hear. He says that he told her he had come at the request of Mason to write her will, and asked her if she desired him to do so, and she answered "yes." He then asked her if she could hear distinctly, and all that was said to her, and she said "yes," and whether she could see, and she answered the same way. He told her that if he wrote her will he didn't want to write anything except what she wanted, and until he got exactly what she wanted she must not agree to it. To his question whether she understood all this she answered "yes."

The draftsman then labored some two hours, and by a series of speculative questions produced the paper offered. That he labored faithfully and honestly we have no doubt. She did not undertake to read the document, nor was any effort made to have her read it. It is not clear that she could have read it, but it was read to her perhaps twice. Everything done was first conceived by those around her, and she was then asked a question, to which she could respond by the use of the words "yes" or "no." No other means were resorted to toward ascertaining her desires. It is evident at the start that the question of the integrity of those around the testatrix when the paper was written is a most important one in the case, and was probably the controlling circumstance on reaching the verdict obtained. The high character of the draftsman and of the attesting witnesses were apparently at stake, and evidently overshadowed the real question at issue. We can not bring ourselves to the conclusion, after a careful examination of the evidence, that this paper, providing without reason for the pretermission of this grandchild—the child of the first born—was the offspring of a disposing mind and memory—rational disposition, fixedness of purpose, capacity to know the natural objects of her bounty, and take a general survey of her estate, are terms wholly inapplicable to the mental condition of the physical wreck under consideration. The mind revolts at the thought of it. These required mental conditions were wholly and necessarily absent, and the paper can not be regarded as coming up to the requirements of the statute or in accord with any adjudications on the subject under consideration so far as we are advised.

The alleged testatrix, in our opinion, was not mentally competent to originate the conception of a will, and did not have the physical ability to dictate a disposition of her estate or communicate her intentions as the law requires.

The judgment is reversed, that further proceedings may be had consistent with this opinion.

LUCAS v. COOPER.

(Filed November 18, 1893—Not to be reported.)

1. Partnership—Evidence—One of two partners who had been living together on a farm left it in 1878, and took away with him a small part of the partnership personalty, leaving the remainder on the farm to be used or consumed by the other partner, who continued to use it until his death in 1887. In this action where the surviving partner is claiming to be the owner of a one-half partnership interest in the personalty left by the decedent it is held that all the facts of the case indicate a division of the partnership personalty in 1878, and that the surviving partner owned no interest in the personalty controlled and possessed by the decedent.

2. Same—Limitation—Statute of frauds—The evidence shows that when appellant and decedent moved upon the 220 acre farm there was a written agreement between them to the effect that they were to own it equally; that subsequently this writing was taken from the clerk's office by appellant and delivered to decedent, in whom was the legal title, but that after this decedent repeatedly declared that appellant owned half the land. Held—The land was partnership property and neither the statute of limitation nor the statute of frauds applies to prevent an action by appellant to assert his partnership interest.

3. Same—The fact that appellant qualified as executor of the will of decedent does not estop or otherwise affect his claim that he was a joint owner of the land as a partner of decedent, since the will merely devises the property of the testator and does not attempt to indicate what that property is.

J. C. Hodge for appellant.

J. K. Hendrick and W. D. Greer for appellee.

Appeal from Livingston Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The question to be determined on this appeal is whether the appellant, as plaintiff in an equitable action for that purpose, has established his right as a former partner in business with one John Davis, deceased, to one-half of Davis' "Hodge" farm, consisting originally of some 220 acres, and also to one-half the personal estate owned by Davis at his death in 1887. It is sufficient to say, with respect to the personal property, that the fact that Lucas left it as long ago as the year 1878, to be used, and indeed be, consumed by Davis in his support and maintenance, renders it improbable that the former was to have any further interest in it, and especially so as he carried away with him some portion of it, although that portion was comparatively small. The fact that there was a division of the partnership property, although not an equal one, must be taken as conclusive against the assertion of any further claim by the appellant to this perishable property after the lapse of so many years.

With respect to the partnership real estate the case is different. The proof is clear that when the appellant and Davis moved to the Hodge farm there was a written agreement to the effect that they were to own it equally. This writing was taken from the clerk's office, where it had been left and placed in Davis' care, who was afraid it would be in the way of a sale of a portion of the farm should he need the proceeds of the sale for his support after Lucas moved away.

The parties had been in business together for eighteen years. Davis' first wife was the aunt of the wife of Lucas and his second wife was the sister of Lucas. The men trusted each other

implicitly. Under ordinary circumstances, the fact that this writing was taken from the office by Lucas and placed in the hands of Davis would easily raise the presumption that the intention was to cancel it, but the repeated declarations of Davis, after Lucas had moved away and after this paper had been left with him, to the effect that Lucas was the owner of one-half the farm, is conclusive of the question of ownership. For convenience merely the legal title was left in Davis. The land was partnership property beyond a doubt, if the proof is to be believed. The chancellor held the plaintiff not to be entitled, probably because it was thought the plea of limitation or the statute of frauds determined the case against him. We think neither-pleas affect the question. Nor is the claim of appellant to one-half the partnership land affected by the fact that he qualified as the administrator, with the will annexed, of Davis. The will gave the property of the testator to the widow. It did not attempt to indicate in what his property consisted.

We see no reason for disturbing the amount fixed by the judgment of the chancellor as in the hands of Lucas as administrator and due to Mrs. Cooper, but its collection should not be enforced as a lien on the Ray farm. The judgment should direct an equal division of the 220 acres—the old Hodge farm. The $78\frac{1}{2}$ acres sold to Cooper by Davis should be set apart to the appellee, Mrs. Cooper, as that much of her share in the land, and the judgment against the appellant should be enforced against his half of this 220 acres.

The judgment is reversed, with directions to enter judgment as indicated herein.

GARNETT, SR., &c. v. THE FARMER'S NATIONAL BANK OF CYNTHIANA.

(Filed November 21, 1893—Not to be reported.)

Appeals—Mandate—Right to new trial on reversal—A verdict and judgment for two separate sums, one for $3,622.92 and the other of $1,000, having been rendered against the sureties of a bank official, this court held on appeal by the sureties that the court ought to have instructed the jury to find for defendants as to the $1,000, but found no error in the proceedings as to the $3,622.92 item. The case was reversed "for further proceedings consistent with the opinion." Held—The action of the lower court in setting aside the former judgment and rendering one for $3,622.92 against the sureties, without a new jury trial as to it, was in conformity with the opinion and mandate. The defendants were not entitled to a retrial as to the $3,622.92 because one fair and impartial trial was had as to it.

Ward & Kimbrough for appellants.

G. C. Lockhart for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hazelrigg.

The judgment of the lower court, prior to the former appeal of this case, was for $4,622.92. Of this the sum of $3,622.92 was for money converted to his own use by the clerk of the appellee by means of false entries in his individual deposit account, and the sum of $1,000 was appropriated and its taking concealed by a change of figures on the deposit blotter. The keeping of the deposit account was within the scope of the clerk's duty. The

keeping of the deposit blotter was not. Therefore, this court said on that appeal (91 Ky., 614): "In our opinion the evidence clearly shows that King, without any other opportunity or means than such as his office of clerk afforded, and while acting entirely within the sphere of that office, fraudulently converted the sum of $3,622.92, and the express terms and conditions of the bond being thereby and thus violated, without contributory fraud of the bank, his sureties are liable therefor. But we think it is just as clear they are not liable for the other sum, $1,000. * * * As the loss of the $1,000 resulted from the act of the bank in putting King in position where he could and did take it, and his sureties did not bind themselves to answer therefor, they can not now be held liable, and in that respect the judgment is erroneous, and reversed for further proceedings consistent with this opinion."

Upon a return of the case the lower court set aside its former judgment, and over the objection of the appellants rendered judgment against them for the sum of $3,617.92. The question on this appeal is whether there were "further proceedings consistent with the opinion."

The case, it will be observed, was not sent back with directions for a new trial, and it is evident that no error was committed on the trial in the opinion of this court, save that an instruction asked by the appellants and refused by the court, to find for the defendants as to the item of $1,000 should have been given. The liability of the defendants for the item of $3,622.92 was determined by a verdict and judgment free from error, and to the extent only that the item of $1,000 was embraced therein was the judgment deemed erroneous or reversed.

The mandate, based on this opinion, could properly have set aside the former judgment only as to this item.

As said by counsel for appellees, the two items were distinctly separable in the pleadings and proof. The issue as to one of them was properly submitted to the jury, and no error occurred on the trial of that issue. But as a matter of law, upon the facts presented on the issue as to the item of $1,000, the sureties were not liable. Why shall the parties be required or be entitled to retry an issue already once correctly tried?

We think the judgment below was in conformity with the opinion, and it is, therefore, affirmed.

CALVERT, &c. v. TOWN OF PEWEE VALLEY.

(Filed February 1, 1894—Not to be reported.)

1. Conveyance of lot for school purpose construed—A lot was conveyed to certain grantees "for school purposes and such other uses consistent with its use for school purposes as a majority in interest of the owners may determine," with the further proviso that its use for school purposes was not to be abandoned "except by the written consent of those who may own at least ten-thirteenths of said land," and when such consent was obtained the lot might "be converted to other uses or sold by the owners for any purpose whatever." Appellee, the owner of two-thirteenths of the lot, and a corporation duly authorized to create and maintain a graded school, claims the right to erect a schoolhouse on the lot, while appellants, the owners of seven-thirteenths of it, assert a right to its possession. Held—

The right to use the lot for school purposes is not lost or abandoned until the owners of ten-thirteenths shares of it so agree in writing, and the owners of a majority in interest of the shares have no right to and can not pre-

vent its use for such purposes, although they may determine to use it for other purposes consistent with school purposes, and, therefore, appellee has a right to erect a schoolhouse thereon without the consent of appellant, who is not entitled to possession of the lot.

2. Same—Pleadings—To an action by appellee to enjoin appellants from interfering with the erection of the schoolhouse on the lot an answer alleging the appellee had abandoned its purpose to erect the schoolhouse and had no right to prosecute the action, because the same had been compromised and settled, and that the owner of a majority of the shares of the lot had not consented to the erection of the schoolhouse, and that appellee had one schoolhouse and did not need another, was insufficient, and a judgment for appellee as prayed for was proper

Morris & Ladd for appellants.

M. W. Muir for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1873 Amelia M. Crawford, in consideration of the sum of $503.90, sold and conveyed to the appellee and others some two acres of land to be used "for school purposes, and such other purposes consistent with its use for school purposes as majority in interest of the owners may determine."

Its use for school purposes was not to be abandoned "except by the written consent of those who may own at least ten-thirteenths of said land," and when such consent was obtained, then the property might "be converted to other uses, or be sold by the owners for any purpose whatever."

To what use, if any, the property was put for some years after this conveyance does not appear, but in 1890 the appellee, the owner of two-thirteenths of it, and the representative of a majority of the owners, acting under a resolution of the board of trustees of the town, began the erection of a schoolhouse thereon. The corporate limits of the town constituted a common school district, and by its charter the appellee was authorized to maintain a common school for the district.

It appears that by purchase from the original grantees the appellant, Clara Calvert, became the owner of seven-thirteenths of this lot, and when the work of erecting the building began she and her father, her co-appellant, interfered with the workmen and in effect drove them off the premises. Thereupon this action was brought by the appellee, seeking to restrain the appellants from such interference and asking that the right to the use of the lot in question for school purposes be adjudged in it under the deed from Crawford. The defendants to the action, the appellants, not appearing, the cause was submitted and judgment rendered perpetuating the injunction and adjudging the plaintiff, the appellee, to be the rightful owner of the property for school purposes, and that the appellants have no interest in it.

On the second day after the judgment, and during the same term, the appellants appeared and moved to set aside the order of submission and file their answer. The court refusing to do so, they have appealed to this court, complaining of the order overruling their motion and of the judgment as well.

The only question we need notice is as to the sufficiency of the proposed answer. It is to the effect, first, that after the institution of the action appellee, by its board of trustees, abandoned

its purpose of erecting the schoolhouse, and directed the partly-constructed building to be torn down; second, that the appellee has no right to prosecute the suit because the claims set up therein have been compromised and withdrawn; that the action was to be dismissed under the agreement, and the suit is now being carried on in violation of the agreement; third, that a majority of the owners have not consented to or directed the erection of the proposed building; that the district already had or claimed to have a suitable schoolhouse, and also had one under lease and did not need another; that a heavy tax would be required to complete the work, etc.; fourth, that the appellants claim Calvert was the owner of seven-thirteenths of the lot in question, and was entitled to the possession of it.

It does not seem to us that the matters set up by the appellants offer any obstruction to the use of the property as provided for in the conveyance by Crawford.

The ownership of the appellant, Clara, is subject to the uses named in the deed, and that the appellee is proceeding in good faith to use the lot as it was intended to be used is apparent from the record. The interference of the appellant, J. W. Calvert, was unwarranted, and the proceedings against him for contempt seem to indicate that he is trying to divert the use of the lot from its intended service.

While chairman of the board, a position he seems to have attained after the institution of this suit, the appellant, J. W. Calvert, appears to have induced the board to take steps looking to the dismissal of the suit and the abandonment of the work.

He was soon "deposed," however, and his project failed. In the method of his retirement from the chairmanship he claims to have been the victim of a conspiracy, and that his successor unlawfully seized the office. Be all this as it may, these grievances afford him no right to interfere with the designated use of the property under the deed of Crawford.

The recitation in the judgment, that the appellants have no interest in the property, must be taken to mean no interest in conflict with the uses indicated in the deed. Before its use for school purposes could be abandoned the holders of ten out of thirteen shares must so agree, and while a majority in interest of the owners may determine such other uses of the property as may be consistent with its use for school purposes, the holder or holders of any number of shares less than ten of the thirteen can not frustrate its principal use as fixed by the express terms of the conveyance under which it is held.

Judgment affirmed.

KENTUCKY NATIONAL BANK v. MARTIN, &c.

(Filed February 3, 1894—Not to be reported.)

The maker of a note, which is not, under the statute, placed on the footing of a bill of exchange, may plead a want of consideration to an action on it by a bank which accepted and holds it as collateral security.

The maker executed a note for $4,000, secured by a mortgage, which the payee agreed to hold as collateral security for a loan or advancement he was to make of that amount. The payee gave the maker his check for $4,000 on a bank of Louisville, in which he had no money, and took the note and mortgage and pledged it to another bank as collateral security for a loan. The check for $4,000 was never paid. Held—The plea of no consideration is available by the maker of the note in an action on it by the bank holding it as collateral security.

Thomas F. Hargis for appellant.

D. W. Wright for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

H. P. Smith, a member of the firm of Wall, Smith & Co., engaged in the tobacco trade, obtained from Mrs. A. A. Martin her note for $4,000, executed on January 25, 1887, and payable in twelve months, with interest. She also executed a mortgage upon her real estate to secure its payment.

She was at the time a married woman, but empowered under the statute to trade, contract, etc., as a feme sole. Her husband, C. S. Martin, had been engaged in the purchase and sale of tobacco, and his venture resulted in loss, and to enable him to further speculate, with a view of retrieving his losses, H. P. Smith agreed with Martin and his wife that he would take the note thus secured to indemnify him and would give to the wife, A. A. Martin, a check for the $4,000 on the Louisville Banking Co.

He gave to Mrs. Martin a check for the amount on that bank, but told her not to send it on for a few days, the transaction having taken place in Bowling Green.

Smith, with the note and mortgage in his pocket, went from Bowling Green to Louisville and deposited those papers in the office of the partners. He says that while he was away Harris, one of his partners, took the note and mortgage and pledged them as collaterals for money borrowed of the appellant, the Kentucky National Bank.

The cashier of that bank says that Smith himself made the pledge, but, if not, learning, as he says, of what his partner, Harris, had done, he went to the bank and informed the cashier of the infirmity of the paper, but yet renewed the pledge for money. It is denied by the cashier that any such information was given him by Smith, and the facts and circumstances surrounding the transaction sustain the cashier, as no business banker would have accepted such paper when cognizant of its defects.

Smith was then pressed for money, and was willing to deceive both the banker and Mrs. Martin in order to prevent a disclosure of his firm's condition. The firm in fact failed within ten or fifteen days after this check was given to Mrs. Martin and the $4,000 note executed.

The check has never been paid, and neither Smith nor his firm had any money in the Louisville Banking Co. with which to pay it.

It is not pretended that any consideration ever passed to Mrs. Martin for this note, but the promise by Smith to have that sum placed to her credit in the Louisville bank.

It is argued that the note was given by Mrs. Martin to enable Smith to raise money on it, and the check held by her to show the bona fides of the transaction, if any trouble should originate from it; that Smith never intended to raise money for Martin, but for himself, and the ease with which fraud could be practiced in that way is pointed out. It is also insisted the note was executed to enable Smith to raise money, and whether for himself or Martin is immaterial. The trouble in this case for the appellant arises from the fact that no fraud is proven.

Martin and Smith both swear that the papers evidenced what in fact took place, and that Smith was to take the note to secure himself and deposit the money to Mrs. Martin's credit. That

Smith practiced a fraud is manifest by pledging this woman's note, when he had no right to use it until he had deposited the money as argeed on.

It is nonnegotiable paper, and the want of consideration, or the failure of Smith to comply, is a defense on the part of Mrs. Martin against the petition filed by the appellant (the bank) to foreclose the mortgage.

The appellant, when told by Smith that he had advanced the money on the note, believed his statement, and as it was false the bank must lose.

Judgment affirmed.

TOWNSEND v. BURTON.

(Filed February 1, 1894—Not to be reported.)

Pleadings—Where defendant is sued for the value of certain staves alleged to be wrongfully detained by him, an answer averring that he bought the staves from a certain person, and that "he is informed" said person "claims the land off which the staves were cut," is not sufficient to require proof of title by plaintiff to such land.

John C. Townsend for appellant.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant sued the appellee for the recovery of 7,800 bucked white oak staves, alleged to be wrongfully detained from him by the appellee.

In his answer the appellee put in issue the quantity and value of the staves, and then "denies that plaintiff was or is the owner of the land off which the staves were gotten, or was or is the owner of the staves mentioned in the petition."

He further says that he bought the staves from one Whittler, and that "he is informed" that Whittler, for himself and his wards—Sarah and Emily Whittler—"claims the land off which the staves were cut."

On the trial of the case the appellant exhibited the judgment of the circuit court in the case of Whittler's Adm'r v. Whittler's Heirs, &c., directing a sale of the land in question; also the commissioner's report of the sale as made to the appellant, its confirmation and the deed made in pursuance of the orders of the court; also the orders of the court showing the appearance of a number of the heirs of Whittler and the order appointing guardian ad litem for the infants, and the answers of such guardian.

The original papers in this old suit were lost, and the appellant was not able to show service of process on the defendants in the case. The court thereupon gave a peremptory instruction to the jury to find for the defendant, the appellee. The averments of the anwer substantially show the appellee to have been a mere trespasser. He does not allege that his vendor of the staves owned the land or had possession of it, either in his own right or that of his wards. He is simply "informed" that his vendor claims it. His allegations in this behalf are not sufficient to have put the plaintiff to the proof of his title, but if they were the title exhibited was sufficient. The case should have gone to the jury on the issues actually involved in the pleadings.

The judgment is reversed in order that the case may be retried on principles consistent with this opinion.

CARPENTER V. BELL, &c.

(Filed February 8, 1894—Not to be reported.)

Where a pleading is tendered but rejected, and is not made a part of the record by order of court or by the bill of exceptions, the correctness of the order refusing to file it can not be considered on appeal, and an appeal from such order must be dismissed.

Wright & McElroy for appellant.

Louis McQuown for appellees.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Lewis.

This action was brought by appellee, as guardian, for sale of land in which he has a life estate, his children, of whom he is statutory guardian, having remainder, and also for confirmation of a sale already made.

The appeal is by grandmother of the children from an order of court rejecting her petition to be made party defendant and overruling her motion to file it as an answer to petition of the plaintiff.

It does not appear from the transcript before us that the petition tendered and asked to be filed as an answer was ever in fact made part of the record by either order of court or bill of exceptions, and consequently, as has been often held, it can not be considered on appeal to this court. So that without reference to the right of appellant to file the petition and answer, or the merits of her defense to the action, the appeal must be dismissed.

CHENAULT v. GEORGE.

Filed February 3, 1894—Not to be reported.)

Opening of passway—Payment of damages—Injunctions—The county court, having established a passway over the land of C. for the benefit of T., appointed a surveyor to open it. When the surveyor commenced to open it C. enjoined him from so doing because T. had not paid the damages assessed therefor. Thereupon the surveyor tendered in court the amount of such damages and the court dissolved the injunction against him. Held—C. can not complain because the surveyor rather than T. tendered the amount of the damages; he is bound to accept same.

O'Rear & Bigstaff for appellant.

Z. T. Young for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

Tipton, who owned land located so as to cut him off from his place of business, applied to the county court for a passway to the Mt. Sterling turnpike. The road had to pass over a small strip of land belonging to the appellant, Chenault, and the latter having been notified, the county court, hearing the case, established the passway. The damages were fixed at $100. An appeal was taken to the circuit court and final order below affirmed.

It was then brought to this court and the appeal dismissed. The county court then appointed the appellee, George, a superintendent of the work in opening the road. He was about to commence the work when the appellant enjoined him on the sole ground the damages had not been paid, and that the county court had no power to authorize an entry on his land until he was paid. This is his only complaint.

George, the surveyor, is the only appellee or party defendant to the action. He came into court and tendered the $100, and the appellant refused to receive it. The court then placed the money in the hands of a receiver to loan out, and dissolved the injunction at the cost of George, and Chenault appeals. The parties were in a court of equity, the one claiming his money and the other willing to pay, and, in fact, tendering it into court, and why, when the appellant got all he asked for, he is not satisfied, we can not well see. Is it because George was a mere volunteer and had no right to pay the money for Tipton? If so, in what manner does it affect the appellant? If George loses his money and can not be substituted to the rights of Chenault, it is the loss of George and not that of the former. You have said to George you can not enter on my land until this money is paid, and when offered to be paid and tendered it is refused. Not only so, the chancellor says, as the money was not paid before this injunction was obtained, I will make George pay the costs.

The appellant is out nothing with his money in court and must take it, or at least, when tendered, the chancellor did right in dissolving the injunction at the cost of the defendant.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH v. FINLEY.

(Filed January 10, 1894.)

Obstruction of street—While a temporary, reasonable and occasional obstruction of the use of the street for any legitimate purpose is not a nuisance, yet any continued encroachment, it matters not for what purpose, is a nuisance, and punishable as such.

Upon the trial of appellee for creating a public nuisance by obstructing one of the streets of the town of Williamsburg, as the evidence showed that twenty-four feet of the width of the street had for more than forty days been occupied by stones placed there by defendant, and that travel along the street had for that length of time been impeded by this obstruction, the court erred in giving a peremptory instruction to find for defendant.

Wm. J. Hendrick for appellant.

H. F. Finley for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Yost.

While it is true that a temporary, reasonable and occasional obstruction of the use of a public street for any legitimate pur-

pose is not a nuisance, the right is subordinate to the public right to use the street for travel. A duty rests on the party to remove the obstruction as soon as possible, and any continued encroachment, it matters not for what purpose, is a nuisance and punishable as such. The public have a right to the uninterrupted use of a street to its full extent, subject to such temporary and partial obstructions as all streets must necessarily sometimes suffer.

The appellee was indicted for creating a public nuisance by obstructing one of the streets of the town of Williamsburg, and the evidence showed that twenty-four feet of the width of the street had been occupied by stones, placed there by him, for more than forty days, and that travel along this street had been, for that length of time, impaired by this obstruction.

That this was a nuisance, indictable and punishable as such, there can be no question, and it follows that the court erred in peremptorily instructing the jury to find for the defendant.

The judgment dismissing the indictment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

WILSON v. HOCKER & TABOR.

(Filed January 10, 1894.)

Taking of depositions in term time—Continuance—Where the defendant in an equity case waited for three months after the issue was made up before taking any steps to prepare the case, and then began the taking of depositions on the Saturday preceding the Monday on which the next term of court began, and the taking continued into the term, by reason of which the plaintiff and his attorneys could not be present, the one being on the grand jury and the other busy in court, the depositions, which were not filed until after the case was called for trial, were properly suppressed. And the court did not abuse its discretion in refusing a continuance which was asked, in order that the depositions might be retaken, no diligence having been shown.

Judge Yost, dissenting, holds that, as the depositions were taken after a sufficient notice, the mere fact that they were taken during the term at which the case was set did not authorize the court to suppress them.

J. Edwin Rowe and M. L. Heaverin for appellant.

J. E. Fogle for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Presiding Judge Brent.

In this case Hocker & Tabor having sued Ansel Wilson on a promissory note secured by mortgage, he answered, setting up that the note was by mistake executed for more than he owed, and that he was entitled to other credits besides those set out in the petition. A reply, filed in August, completed the pleadings. The burden was on the defendant. Court commenced November 28th. On the 26th, the Saturday before court began, the defendant commenced to take depositions. He took two, his own and Kenton's. The taking was continued into the term of court, and during part of the time the plaintiff, Tabor, and his counsel, Fogle, could not give it their attention, the one being on the grand jury and the other busy in court.

After the taking the depositions were not filed until December 2d, after the case had been called for trial and the plaintiff had

moved to submit. On motion of plaintiffs these depositions were suppressed, and we think properly, as the facts above stated show without argument.

The plaintiff then moved to submit the case. The defendant objected and moved a continuance, with leave to retake depositions, and in support of that motion he filed his own affidavit and that of his attorney. His affidavit states that he was unable to take depositions sooner than he did because his senior counsel, J. E. Rowe, was engaged until November 8th in canvassing for the Commonwealth attorneyship, and that as soon after the election as possible he took his depositions (the ones suppressed); that the affidavit was not made for delay, but that justice may be done.

We do not see how the court could continue upon such an application. The ground upon which defendant evidently bases his motion is the absence of evidence. The 315th section of the Civil Code says, in terms, "a motion to postpone a trial on account of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that diligence has been used to obtain it."

The defendant's affidavit discloses nothing as to the materiality of the evidence he expects to obtain during the continuance; but suppose we take it that the court can see it is material from the suppressed depositions, to which, however, no reference is made, it still remains that no diligence has been used to obtain it. For three months after the issue is made up, with more than one counsel engaged, not a single step in the way of preparing the evidence is taken, though counsel and witnesses are both at hand. We do not think the court abused its discretion in holding that the defendant has shown no claim to its indulgence and in overruling his motion for a continuance.

Upon a submission the court gave judgment for the debt and decreed a sale of the property for its satisfaction.

This judgment is affirmed.

Judge Yost delivered the following dissenting opinion:

The answer in this case, in so far as it pleaded a payment on the debt sued on, of certain sums which the plaintiff had failed to credit on the note, certainly presented a good defense to the action, and the depositions taken by the defendant established the truth of the plea.

The court, in my opinion, erred in suppressing the depositions on the ground that they were taken during the term of the court at which the case was set for trial.

There is no law requiring a party to take his depositions during the vacation of the court. He may take them at any time after due notice to the opposing party.

The depositions in this case were taken after a sufficient notice before an officer authorized to take them. They were by him duly certified and returned to the office of the circuit clerk. That the plaintiff was not present, because he was engaged in court, was his misfortune, if not his fault, for which the defendant was in no sense responsible. I am safe in assuming that, as a rule, parties take such times for the preparation of their cases as suit their own rather than the convenience of their opponents.

The court might have ordered the taking to be reopened in order to give the plaintiff an opportunity to cross-examine the witnesses, but certainly had no right to suppress their depositions for this reason.

The judgment, in my opinion, ought to be reversed.

SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. COVINGTON.

Filed January 24, 1894. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, affirming.

Prejudicial errors—Jury admonished not to consider incompetent testimony—In this action against a railroad company to recover damages for personal injuries the defendant could not have been prejudiced by the error of the court in admitting as evidence rules of the company which were so manifestly irrelevant they could not have affected the verdict, and, even though the admission of one of the rules might otherwise have been prejudicial, the subsequent admonition of the court to the jury that it was inadvertently read, was incompetent and must not be considered by them for any purpose, cured the error.

Dulaney & Mitchell for appellant; B. F. Procter and Edward W. Hines for appellee.

McGRAW v. HUTTON, &c.

Filed January 24, 1894. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Barbour, reversing.

Vendor and vendee—Interest—Set-off—In this action upon a return of "no property" to enforce satisfaction of a judgment in which defendant pleads as a set-off two notes executed to him by plaintiff for the purchase price of land, which notes were not to become due or bear interest until one and two years after the deed to the land was made, the defendant is entitled to no credit on the judgment, to enforce which this action is brought, until he makes the deed. The judgment should bear interest up to the time the deed is made, and credit should be given as of that date by the amount of the notes, less certain demands pleaded by plaintiff in his reply as a set-off to the notes, which demands it appears were intended by the parties to be treated as a credit on the notes. The defendant should be required to make the deed at as early a day as practicable, and if he fails to do so his answer, in so far as it pleads a set-off, should be dismissed without prejudice, which will necessarily carry with it the reply in so far as it pleads a set-off, as the claims so pleaded were intended to be treated as payments on the notes pleaded by defendant as a set-off.

John H. Barker for appellant.

FAIN, &c. v. TURNER'S ADM'R.

Filed January 24, 1894. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, reversing.

Compromise—Consideration—Statute of frauds—A former judgment of reversal in this case having been set aside upon the ground that one of the appellees had died before the submission of the cause and the cause had not been revived, and the case being again submitted, the court still adheres to its former opinion, and now adopts it as the law of this case. For abstract of that opinion see 14 Ky. Law Rep., 478.

R. P. Jacobs and R. H. Tomlinson for appellants; W. O. Bradley and Edward W. Hines for appellee.

BOGGS v. COMMONWEALTH.

Filed January 24, 1894. Appeal from Lawrence Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Statutes—Emergency clause—Failure of governor to return bill—The governor's signature to a bill containing "an emergency clause" is not

necessary to give effect to the "emergency clause." Upon his failure to return the bill within ten days it takes effect at once just as if signed by him. The retaining of the bill by the governor is, for legislative purposes, the same as signing it, and signing it, as used in section 88 of the new Constitution, is synonymous with approving it, as used in section 55 of that instrument.

2. Sale of liquor by distiller—The act of November 11, 1892, regulating the entire subject of licenses and the liquor selling, repeals the privilege of distillers to sell without license given by the act of March 20, 1876. (General Statutes, chapter 106, article 2, section 3.)

3. License to sell liquor—Where one, who has been engaged in selling liquor without license within six months before he applies for license, pays the increased license tax required by reason of that fact, he does not thereby become entitled to exemption from the penalty already incurred for selling without license.

Alexander Lackey for appellant; W. J. Hendrick for appellee.

O'BANNON v. COMMONWEALTH.

Filed January 31, 1894. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

To constitute a good indictment for the offense of using false scales the indictment must state that the defendant, knowing the scales to be false, used them in trade, with the circumstances of such using.

The indictment in this case charges that the defendant, being a dealer in leaf tobacco and purchasing from the farmers of Owen county, did "willfully, falsely and fraudulently" keep in his warehouse a certain pair of scales so deceitfully constructed as to cause every draft of tobacco weighed thereon and bought thereby to appear of less weight than the real and true weight by at least one-fifth, and did, on a certain day, willfully and falsely weigh the tobacco of a certain person in the course of his business, and caused said tobacco to weigh 1,200 pounds, when the real and true weight was at least 1,600 pounds. Held—That, as it is not alleged that the defendant used the scales in any actual transaction involving buying or selling, or that he knew that they were false, the indictment is not good.

J. H. Settle and Ira Julian for appellant; W. J. Hendrick for appellee.

STEWART, HENLEY & CO. v. PETTIT.

Filed January 31, 1894. Appeal from Powell Court of Common Pleas. Opinion of the court by Presiding Judge Brent, affirming.

Upon appeal from a judgment discharging an attachment, where there is anything like an equipoise of conflicting testimony, this court will not disturb the judgment.

J. B. White for appellants.

HOWARD, &c. v. MALONEY.

Filed January 31, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. Preference of creditors—Assignment of interest in decedent's estate—A written assignment by a debtor to secure his creditor of all claim to his interest in the estate of a decedent, which consisted of realty, is to be regarded as a mortgage, and, therefore, a recordable instrument. And a petition by creditors attacking the assignment as a preference within the act of 1856 having been filed within six months from the time the writing was recorded, was in time.

2. Same—The fact that property transferred by an insolvent debtor to his creditor with the design to prefer came to him by descent does not prevent the transfers from operating as an assignment under the statute.

Thompson & McChord for appellant; H. P. Cooper for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. MILLER.

Filed January 31, 1894. Appeal from Knox Circuit Court. Opinion of the court by Judge Yost, reversing.

Master and servant—Defective appliances—In an action by a servant against the master to recover damages for personal injuries resulting from the master's alleged negligence in furnishing defective machinery or appliances, there can be no recovery if the servant knew of the defect or might, by the exercise of ordinary care, have discovered it.

A section hand on a railroad, while assisting his fellow workmen in propelling a hand car, fell from and was run over by the car, his fall being due to the fact that the handle he was using turned in his hand. In this action by him against the railroad company to recover damages for the injuries in which contributory negligence was pleaded by defendant, plaintiff testifies that he had operated the car every day for five months prior to the injury; that the handle had come loose before and he had seen the foreman and other hands repair it and he was "well acquainted with the use of hand cars." Held—That the court erred in refusing to instruct the jury on the defendant's motion that if they believed plaintiff knew of the defect, "or could have ascertained that fact by the exercise of ordinary care," they must find for defendant.

Wilson & Rawlings and J. W. Alcorn for appellant; Dishman & Hays for appellee.

CHESAPEAKE, &c., R. R. CO. v. THIERMAN.

Filed January 31, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Master and servant—In an action by a railroad employe against the company for damages for injuries received no presumption of negligence on the part of the company arises from the injury alone, and, therefore, its negligence must be averred and proved in order to warrant a recovery; and these necessary averments should show wherein the agents of the company did anything which in the exercise of ordinary care and prudence they ought not to have done or omitted any precaution which they as prudent men ought to have taken.

The allegation of the petition in this case that it was plaintiff's duty to clean out the ash-pans of defendant's locomotive engines, and that while plaintiff was under a locomotive engine engaged in cleaning out the ash-pan thereof, which needed cleaning out, the defendant, "with gross and wanton negligence and carelessness, started and moved said locomotive engine upon and over the plaintiff," did not show negligence on the part of the defendant. The petition should have stated facts showing either that the plaintiff started to perform this duty at a proper time and an appropriate place or that he was ordered by a superior then and there to do it.

2. Same—Defect in petition cured by answer—Although the petition was defective in that it did not state such facts, yet, as the defendant alleged in its answer, that the plaintiff, "without being required or directed to do so, of his own carelessness and negligence, went under said locomotive engine without the knowledge or consent of defendant, and same was thereupon moved by some person to defendant unknown and not thereto employed by defendant, and not knowing that plaintiff was under said engine," and that but for this contributory negligence the accident could not have happened, the defect in the petition was cured, the allegation of the answer being controverted by reply.

Hallam & Myers for appellant; Wm. Goebel for appellee.

SANDY RIVER CANNEL COAL CO. v. CAUDILL.

Filed January 31, 1894. Appeal from Johnson Circuit Court. Opinion of the court by Judge Yost, reversing.

Special damage—Pleading—Where damages are special and not necessarily the result of the act complained of, they must be specially averred in the pleading.

In this action to recover damages for personal injuries the court erred in instructing the jury that they might consider as an element of damage the expenses incurred by plaintiff in securing medical attention, as there was neither pleading nor proof to authorize such an instruction, the only allegation as to that matter being that plaintiff had been compelled to expend for medical attention "the sum of $—," which can not be regarded as a statement of the facts as to the special damage.

John P. Wells and Walter S. Harkins for appellant; Stewart & Stewart for appellee.

BOARD OF INTERNAL IMPROVEMENTS OF MERCER COUNTY v. MOZIER.

Filed January 31, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Judge Yost, affirming.

Turnpike roads—Failure to erect barriers—It is the duty of a turnpike company to make its road reasonably safe, and if it is constructed along a precipice, or if on account of fills it has high embankments, with sharp descending surfaces, it is the duty of the company to erect such barriers as will protect travelers from danger; and where a traveler is injured by reason of his horse becoming scared and running or backing over the declivity, the company, having erected no barrier, is liable.

Phil. B. Thompson, Sr., and Thomas H. Hardin for appellant; W. C. Bell for appellee.

CINCINNATI, &c., R. R. CO. v. KERN.

Filed January 31, 1894. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Railroads—Shipment of live stock—Burden of proof—Carriers of live stock are not insurers, but in case of injuries to such stock the legal presumption prima facie is that it was caused by the negligence of the carrier, and while this presumption does not exist when, under the special contract, the shipper or his agent accompanies the stock and it is in their actual charge; yet the mere fact that the special contract provides that the shipper or his agent shall accompany the stock does not prevent the presumption of negligence from arising if neither the shipper nor his agent does in fact accompany the stock, and it is understood by the company that neither of them will do so.

In this case the defendant by its answer alleged that plaintiff, "in violation of his agreement, failed to send any person with said stock to load, unload, feed and water and take charge of said stock, and that by reason thereof the injury complained of was occasioned." The plaintiff by his reply "denies that he failed to load, unload or feed or water or take any care of said stock or failed to send any person to take charge of said stock." Held—That the denial in the reply is bad, as it was necessary, in order to make an issue, that the reply should have averred that plaintiff did go with the stock and take charge of it, and set out the facts showing this to be true; therefore, the allegation of the answer that plaintiff "failed to take charge of said stock" stands admitted, and the burden was on defendant to rebut the presumption of negligence.

C. B. Simrall and R. A Thornton for appellant; Bronston & Allen for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. APRIL 1, 1894. No. 19

KENTUCKY COURT OF APPEALS.

STRUTTON v. YOUNG, &c.

(Filed February 8, 1894—Not to be reported.)

Conveyances—Fraud—The grantor of a deed made in 1863 will not be heard in 1891 to claim against it and assert that the deed was executed for the purpose of defrauding his creditors, and is, therefore, void. Even his creditors could not assail the deed at this day.

C. B. Butner and W. P. Marsh for appellant.

J. I. Felix for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Lewis.

In 1863 Thomas J. Young, for stated consideration of $400, sold and conveyed to his brother, W. M. Young, his interest in a tract of land known as the Sarah Young tract, being one-seventh thereof, amounting to 21½ acres, more or less.

In 1890, several years after death of W. M. Young and subsequent to death of their mother, who seems to have had a dower interest, Thomas J. Young sold and conveyed the same interest to L. B. Sutton. And this action was brought in 1891 by William and Thomas Young, heirs at law of W. M. Young, to recover of Sutton possession.

It would be now too late for even creditors of Thomas J. Young to attack the deed of 1863 upon the ground it was made for the fraudulent purpose of cheating and delaying them. And certainly neither Thomas J. Young nor his vendee, Sutton, can now make that an available ground for setting it aside. The deed of 1863, having been duly executed and recorded, must be, therefore, treated as being at its date valid and effectual to pass title of the land in dispute from Thomas J. to W. M. Young, and unless the latter has since divested himself, or been divested, of title, plaintiffs, his heirs, now own and are entitled to recover the land.

There is no evidence W. M. Young ever reconveyed the land to Thomas J. Young, nor does the latter appear to have held it adversely long enough, if at all, to acquire a valid possessory title.

As a consequence, the plaintiffs were entitled to recover, and the judgment in their favor is affirmed.

FLOOD v. THOMMASSON'S EX'OR.

(Filed February 8, 1894—Not to be reported.)

Contract of married woman—Devise—Specific performance—A married woman and her husband sold her land to appellant by an executory contract. The wife died, having by her will directed her executor to sell her real estate and invest the proceeds for the benefit of her husband and children. The executor of the will of the married woman, in conjunction with her husband, made another sale to appellant of the same land. In this action by the executor and the husband against the purchaser for specific execution of the contract, Held—Under the will the executor had power to sell the land, and the husband also being before the court and a party to the sale, the contract should be specifically executed, and the purchaser obtains a perfect title.

J. C. Beckham for appellant.

W. G. Bullit and George Nicholas for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

Jennie Thommasson, the wife of Wm H. Thommasson, died in Shelby county on October 7, 1893, on the same day she made and published her last will, by which she devised or directed her executor to sell her real estate that she had inherited from her father and invest the proceeds for the benefit of her husband and children.

Her son, Samuel Thommasson, was appointed her executor, and, the will having been admitted to probate, qualified as such in the Shelby County Court, that county being the residence of the testatrix.

Prior to the death of the testatrix herself and husband had sold her land by executory contract to the appellant, Flood, and after her death, in order to perfect the title or to execute fully the contract of the testatrix, the executor of the will, in conjunction with the husband of the testatrix, made another sale of the land (or ratified the contract made with the married woman) on the same terms contained in the original executory agreement. The parties are in a court of equity seeking to enforce the contract, and the appellant is willing to comply with its provisions if the title is such as he should accept.

The chancellor below adjudged a specific performance, and we perceive no reason for reversing his judgment. It is needless to determine the effect of the original contract, as the executor of the will is fully empowered to sell, and by the act of May 16, 1893, the wife is empowered by will to dispose of her real estate, and the husband being before the court and a party to the contract of sale, the fee passes to the purchaser, he taking all the interest and title of both husband and wife.

Judgment affirmed.

COMBS v. COMMONWEALTH.

(Filed March 8, 1894—Not to be reported.)

1. An instruction that if the accused "brought on the difficulty" with deceased, then he could not rely on the plea of self-defense unless he had abandoned the difficulty before the homicide, ought not to be given where the circumstances are such as the jury might deny the right of self-defense to a defendant who innocently and unintentionally "brought on" the difficulty. But in this case such an instruction could not have been misleading or prejudicial, since the purpose and intent of defendant in provoking the difficulty, if he did provoke it, is clear and unmistakable.

2. Criminal law—Evidence—Evidence as to shouts of those standing around defendant, and who seemed to be acting in concert with him at the time of the homicide, were competent.

3. Same—Venue—Although there was no evidence, in so many words, that the murder was committed in Jackson county, the proof showed that it was committed at the "mouth of Buckhorn" and at "Jones'" and "Field's" storehouses, and this was sufficient as to the question of the venue.

J. B. Marcum for appellant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was indicted jointly with one James Miller for the murder of Shade Combs, and upon trial was convicted of manslaughter and sentenced to the penitentiary for five years. He complains that one of the counts of the indictment charged Miller with the killing and appellant with aiding, abetting, etc.; that incompetent testimony was permitted to go to the jury prejudicial to his substantial rights, and that misleading and improper instructions were given in behalf of the Commonwealth.

The proof shows that Shade Combs, afterwards killed by Miller, was going peaceably by the storehouses of Field and Jones with a team of oxen, near the mouth of Buckhorn, in Breathitt county, where some twenty-five or thirty men, some of them drinking, were engaged in a shooting match. One Fugate fired off his pistol near the deceased, and some angry words passed between them.

The deceased, however, passed on with his son and others traveling with him, and stopped at Jones' house, some twenty yards distant up the hill, and went in the house. The appellant then came up to the house, with a pistol in his hand, and pointed it in at the door, at which time Jones, the proprietor, came up from his store, went into his house, got his gun and ordered the appellant away, telling him that if he shot in his house he would kill him.

The appellant and Jones then left, and shortly afterwards the deceased and his friends went down to Field's store and were taking a drink when the appellant came in, holding his hand under his coat. Some unfriendly words passed, and appellant left the room. Shortly he was seen just above the store, when he fired his pistol down toward the house, the bullet coming in, according to some of the proof, while the crowd with him cried out "we have got him now," etc.

The deceased appears to have been unarmed, and doubtless expected an attack on the house. He left hurriedly and went into the other storehouse (Jones'), a few feet only away, and got a gun. On his return, and when he had reached the door of Field's store, the firing commenced between himself and the appellant,

the proof being conflicting as to whether the appellant or the deceased fired first. While so engaged, and after several shots had been exchanged, Miller shot the deceased from across the road.

The only instruction complained of in the argument is the one to the effect that if the jury believed beyond a reasonable doubt that the defendant brought on the difficulty with the deceased, in which the latter was killed by Miller or himself, and continued to participate in the difficulty up to the time of the killing, then he could not rely on the grounds of self-defense or apparent necessity unless he had abandoned the difficulty before the shooting. The form of this instruction has been condemned in some cases where the intent of bringing on the difficulty was not clear.

The expression "bringing on the difficulty" is so general that in cases where the conduct of the defendant, though innocent in itself, might be supposed by the jury to have brought on the difficulty, this court has said such an instruction should not be given, or at any rate the intention in bringing on the difficulty must be shown to have been unlawful or felonious, and the jury instructed accordingly; but if, as in this case, there has been no conduct which could be supposed by the jury to have "innocently brought on the difficulty," we can not see that the instruction is misleading or erroneous.

The purpose of the appellant is shown in his following the deceased up to Jones' house and pointing his pistol in at the door; his again coming into his presence and engaging in angry words, and finally in shooting into the house where deceased was. We do not approve the instruction, however, in the form it was given. We simply mean that it happens not to be prejudicial in this case.

A word or an act not intended to provoke or bring on a difficulty, or even an innocent joke, may, in some unforeseen or unexpected way, bring on a fatal rencounter. Therefore, the instruction that he who brings on a difficulty (the intent or purpose with which it is brought on being overlooked in the instruction), forfeits his right of self-defense, has been condemned over and over again by this court as one calculated to mislead the jury. Here, however, there are no misleading features, and the instruction could not have been misleading; nor do we think the court committed any error prejudicial to the appellant in the admission of testimony.

The proof as to the slight trouble between Fugate and the deceased was perhaps incompetent, as it was wholly immaterial in the case, but it could not have affected the accused. The shouts of the crowd outside of the house while the deceased was inside, that "we have got them now," etc., were made by those with whom the accused seemed to be acting in concert, and were made about the time the accused shot into the house. This proof was clearly competent.

There is no proof, in so many words, that the killing occurred in Breathitt county, but the instructions required the jury to so believe, and the proof that it occurred at the "mouth of Buckhorn" and at "Jones' and Field's storehouses," seem to have been sufficient evidence on that question for the jury.

Judgment affirmed.

COMBS v. COMMONWEALTH.

(Filed March 8, 1884—Not to be reported.)

1. Competency of witness—One serving a term in the penitentiary under a judgment convicting him of murder is a competent witness. The only

offenses that now render one infamous and incompetent as a witness are perjury, false swearing and subornation of perjury

2. Criminal law—Evidence—On the trial of appellant for the crime of conspiring to commit a murder with others, who actually did commit it, evidence as to the contents of a note alleged to have been sent by appellant to one of the conspirators, when the note itself was not produced or its absence accounted for, and there was no proof that it was written or signed by appellant, although his name was signed to it, was incompetent and prejudicial.

3. Same—Statements of what one witness for the Commonwealth said to a third party not in the presence of the acoused were incompetent and prejudicial.

M. A. Phillips and A. T. Wood & Son for appellant.

W. J. Hendrick for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Combs, was indicted for conspiring with three others to kill and murder John A. Rose, and, in furtherance of this conspiracy, two of the parties, James Combs and Jesse Barnett, did take the life of Rose. He was convicted and sent to the State prison for life.

Charles Nall, James Combs and Jesse Barnett had been tried and convicted of the murder and were in the penitentiary when the appellant was being tried. They were taken from the prison and testified to facts connecting the appellant with the conspiracy, and, in fact, upon their testimony the conviction is based.

One of the grounds for a reversal is the alleged error committed by the court in permitting those guilty of such an infamous crime to testify against the accused.

This court, in the case of the Commonwealth v. McGuire, 84 Ky., 57, held that the common law doctrine had been modified by our statute, and that it was only where the conviction was for perjury, false swearing or subornation of perjury that the party convicted was disqualified from testifying.

Subsequent legislation has been had since the opinion in the case of the Commonwealth v. McGuire was delivered on the same subject, and the statute then construed re-enacted, and we must adhere to the former construction as an expression of the legislative will.

What motive the appellant could have had in encouraging or aiding in the assassination of Rose does not appear, except perhaps his intimacy with one Hall, whose brother had been killed by Rose. There is some testimony conducing to show that the parties who shot Rose believed he had money, and their purpose was to murder Rose and rob him, while their own statements show they were bribed to murder Rose by Hall, but as the case must be retried, it is not proper that this court should discuss the effect or weight of the testimony adduced by the State, as this has already been done by the jury, whose province it was to pass upon the sufficiency of the evidence.

During the progress of the trial one Ernest Combs testified to the delivery of a note by the witness to Patsy Hall, the mother of James Hall, that was handed him by the defendant, with the request that he deliver it to James Hall.

The witness was then eight years of age, and it seems that on his way to deliver the note two persons, introduced as witnesses

for the State, read the note. They state the name of the defendant was to the paper, and he wanted, as appears from its contents, James Hall to send him $25, or $2,500, the witnesses could not tell which. The boy says James Hall was not at home, and he delivered it to his mother, Patsy Hall.

The note itself was not produced, or its loss accounted for in any way, nor is it shown that it was written by the defendant or that he signed it, and, this being the only testimony corroborating the statements of the felons who had testified only to circumstances from which guilt might be implied as to the defendant, it should have been excluded from the jury, or the objections made by counsel for the defendant to the competency of its contents sustained.

The testimony of Wilson Combs was also incompetent, for that portion of it detailing what Nall told him (the witness) the defendant, Combs, had brought to Stanton for or to Jim Hall's. The defendant was not present, and is at last only what Nall, the convict, told the witness for the State of defendant's connection with the killing, and that, too, when the defendant was not present. In other words, the felon is being corroborated by his own statements made to others in the absence of the accused. The numerous affidavits filed by the defense were, no doubt, carefully considered by the trial judge, and, if not, this court can not reverse for the failure to grant a new trial upon such grounds.

We feel, after a careful reading of this record, that the ends of justice would be but subserved by a retrial of this case, and that the jury attached much importance to the contents of the note, as proven by the State, we have but little doubt, and this testimony being incompetent, a new trial is ordered.

Reversed and remanded for that purpose.

OLIVER v. COMMONWEALTH.

(Filed March 10, 1894.)

An indictment must be indorsed "a true bill" as well as signed by the foreman of the grand jury when returned into court, and in the absence of such indorsement ought to be dismissed upon demurrer by defendant.

Johnson, Hurst & Eversole for appellant.

W. J. Hendrick for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was indicted, tried and convicted of the statutory crime of cutting and sawing off the brands of sawlogs.

The indictment was signed by the foreman of the grand jury and returned into court and received by it. But it was not indorsed "a true bill."

Section 119 of the Criminal Code provides that the "concurrence of twelve grand jurors is required to find an indictment; when so found it must be indorsed a true bill, and the indorsement signed by foreman."

The provision of the Code supra is mandatory, not merely directory, that the indictment shall be "indorsed a true bill and signed by the foreman," which indorsement is the only legal and

competent evidence that the paper filed is an indictment legally found; and unless it is so indorsed the paper is an indictment illegally returned into court, and which the accused is not bound to answer. It is not a valid indictment, and it should have been dismissed upon demurrer.

The case is reversed, with directions to dismiss the indictment.

[BULLOCK, &c. v. GRINSTEAD & CO.

(Filed January 27, 1894.)

Landlord and tenant—Option to renew lease—Married women—Liens—A married woman who owned as general estate a certain lot made a contract jointly with her husband, by which it was leased "for a term of twenty-five years, commencing June 1, 1867." The lessees were to make certain improvements on the premises and "at the end of the term aforesaid" it was to be optional with the lessors to take such improvements, their value being fixed by arbitration, or to renew the lease on the same terms and conditions for another term of twenty five years; and in the event of renewal of the lease the value of the improvements was to be ascertained in a different manner at the expiration of the second term. The contract was duly acknowledged and recorded. In this action concerning the rights of the parties under the lease, Held—

First. At the expiration of the term of twenty-five years, which was June 1, 1892, the lessors were bound either to renew the lease for another term of twenty-five years or to take and pay for the improvements put upon the premises by the lessees.

Second. As to the exercise of the option to renew the lease time was of the essence of the contract. That option had to be exercised at the end of the term on June 1, 1892, and if not exercised on that day the right to renew was lost, and the lessors were then bound to take and pay for the improvements according to the terms of the contract.

Third. The stipulation in the contract that a lien was created and reserved on the premises to secure payment for the improvement at the end of the term was not collateral to the contract of lease, and was not void as to the married woman.

Fourth—The stipulation of the contract creating such lien was equivalent to a mortgage to secure payment for the improvements, although not in express terms denominated a mortgage. The married woman was, therefore, bound by it.

Fifth—Even if the married woman was not personally bound by the contract to take the improvements at the end of the term her husband was bound by it, and she had the right and power to create a lien by mortgage on her estate to secure performance of her contract, therefore, the contract creating the lien on the premises is binding on the property and enforceable against it.

Richards, Weissenger & Baskin, W. G. Anderson and Grubbs & Morancy for appellants.

Blain & Kinkead and Helm & Bruce for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Bennett.

In 1867 Mrs. Mary Bullock, wife of Judge W. F. Bullock, owned as general estate a lot of ground in the city of Louisville, with power to dispose of the same by will.

Mrs. Bullock and her husband, on the 17th day of April, 1867, made and acknowledged and had recorded a contract with the firm of McKee & Cunningham, in substance as follows: They leased to said firm said lot "for the term of twenty-five years," commencing the 1st of June, 1867.

The firm was to pay therefor $3,000 per annum, payable quarterly, being six per cent. on the then estimated value of said property, and to pay all taxes assessed on the property. The property, at the option of either party, was to be periodically valued, and the firm was then to pay six per cent. per annum on said valuation. The firm was also to erect upon said lot a stone or brick building of not less than $8,000 in value, which was to be fully completed by the 1st of September, 1867, and to keep the same insured, and the building was to be liable for the rent reserved and all taxes assessed against the property. It was also agreed that "at the end of the term aforesaid it shall be optional with the lessors to take the improvements which shall be erected thereon at a valuation to be fixed by referees, * * * payable in four equal installments, a lien being herein created and reserved on said premises for the payment of the same, or to renew the lease for same on the same terms and conditions and stipulations contained herein for an additional twenty-five years."

It was also agreed that if the lessors should "renew" the lease "at the end of the second term of twenty-five years, they should take and pay for said improvements at a valuation to be fixed by referees, the payments to be made in cash or in five equal installments, etc., and the payment of the same is secured by a lien on said premises."

Said firm assigned the lease to the firm of Monks & Cobb, and that firm assigned the same to the appellees. The conditions of the lease have been complied with by the appellees. There is no dispute about that matter. The first term of the lease expired on the first of June, 1892, and both Mrs. Bullock and her husband having died some time before then, and Mrs. Bullock having, pursuant to the power, willed said property to the appellants, the appellees, on the 2nd day of June, 1892, notified them that, not having exercised their option to renew, they considered the lease at an end, and would like to confer with them in reference to making a new lease.

The appellants made no answer until several days had elapsed. They then denied that the lease had expired, or that their right to renewal had expired, and claimed the right then to renew. The appellees then brought this suit to recover the value of the improvements, etc. The appellants denied that the lease had expired, and that Mrs. Bullock was bound by said contract to pay for the improvements, etc.

By the terms of the contract of lease "the term was twenty-five years, beginning from the 1st day of June, 1867. At the end of the term aforesaid it was optional with the lessors" to renew the lease upon the same terms and conditions for an additional twenty-five years; and if the option to "renew" was exercised the terms of payment for the improvements were different from the terms of payment for the improvements, in case the lessors elected to take them at the end of the first twenty-five years. If the language used to express the contract is to be construed according to its common sense meaning (and there is no good reason why it shoud not be so construed), it means that the term of lease was twenty-five years, and at the end of which time the lease expired unless the lessors elected to "renew" for the term of twenty-five years more, in which event the lessees were bound to renew. And in case the lessors did not elect to

renew the lease at the end of the term they were to take and pay for the improvements upon the terms stipulated in the lease. We have no doubt that the foregoing is the correct interpretation of the lease. Also it seems clear that, as to making the election to renew, time was of the essence of the contract, and the lessors were bound to make the election to renew the lease if they wished to do so upon the expiration of the first lease, which was on the first day of June, 1892; and their failure to make the election on that day was an abandonment of their right to force a renewal, and an election to take and pay for the improvements, according to the terms of the lease, and which the lessees could enforce; and as the lessees were unconditionally bound by the lessors' option, it would seem to follow that the option should have been exercised upon the expiration of the lease.

But it is urged that the argeement to take and pay for the improvements was not binding on Mrs. Bullock, because it was collateral to the lease and stood upon the same footing as to its binding force as a covenant of warranty in a married woman's deed, which has been held by this court not to bind her; also that the lien reserved in the lease on the premises to secure the payment of the improvements was not binding on Mrs. Bullock, because it was an obligation to take effect in futuro and not in presenti, which was not binding upon her; and, second, she can only bind herself by a mortgage lien, and the lien created by the lease not being a mortgage lien, she was not bound by it.

But it seems to us that the obligation was not a collateral one, but a direct and positive one, to pay for improvements contracted to be put upon her property and to secure the payment for the improvements by lien upon the property. She had the legal right to sell and convey the title to her land, or such interest therein as she and her husband might choose, and she and her husband did choose to sell the exclusive right to the land for the term of twenty-five years. She and her husband also agreed with the lessees that they should erect improvements on the property worth not less than $8,000, which was to be paid for at a fair valuation at the end of the term, and a lien was given on the property to secure the payment. Now here was a direct and positive agreement to pay for the improvements to be erected on the property, and a lien reserved to secure the payment. Let us concede, however, for the sake of the argument, that she had no power, by simple contract, to bind her estate for the payment of the improvements. But what is to be done with the lien that she created on her premises to secure the payment? But it is said that she had no power to create the lien for such purpose, because it is not a mortgage, and that she can only create a lien by mortgage.

It is a fact that a mortgage is simply a lien created on property to secure the performance of a certain undertaking. It is also a fact that the husband and wife may execute a mortgage upon her landed estate that will bind it to secure the performance of his undertaking or obligation, or the undertaking or obligation of a third person, although she can not bind herself personally.

It is also a fact that as a mortgage is nothing but a lien created on an estate to secure the performance of an obligation which the wife may give upon the estate, a lien which she creates upon it by an instrument just as solemn and formal to secure the performance of an obligation, though not called a mortgage, is just as binding on her. The term "mortgaged" used in a writing indicates a lien; and is enforcible without the addition of other formal words, and the expression, a "lien," is created to secure the performance of an obligation, is equivalent

in meaning that the thing is mortgaged. Now, conceding that Mrs. Bullock was not personally bound by her contract to pay for the improvements, but it will not be denied that Judge Bullock was personally bound by it, and was bound to pay for the improvements the sum that the referees put upon them. And Mrs. Bullock had the power to secure the performance of his agreement by giving a lien upon her property, and as she did give such lien in due and legal form and manner, the estate is bound for the payment of the price of the improvements. We think that there is nothing in the talk about Mrs. Bullock not being bound by the contract in reference to a lien, because it was made to take effect in futuro, for the reason, as we have just seen, that Judge Bullock had the right to make the contract, and Mrs. Bullock had the power to secure its performance by giving a lien on her property. If he could make a binding contract upon himself to commence in futuro, and there is no doubt that he could in this case, she had the power to secure its performance by giving a lien upon her property.

The judgment is affirmed.

CAMPLIN, &c. v. EADS.

(Filed February 1, 1894—Not to be reported.)

Pleadings—Arbitration and award—The answer to a petition seeking to recover the amount of an award, which admits the arbitration and award but alleges that plaintiff had become indebted to defendant in an amount exceeding the award after it was rendered, is radically defective unless it sets out the origin and nature of such subsequent indebtedness.

J. W. Twyman for appellants.

W. H. Marriott for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellants conveyed to Isaac Eads, appellee, their real and personal estate in consideration that the appellee would support them during life and give them a decent burial. In the conveyance it was stipulated that if it should be impossible for the appellee to carry out the agreement that appellants should then pay him for his services thus far rendered.

The appellee alleged in his petition that, it having become impossible to perform the agreement, he and the appellant agreed to submit the matter of his compensation for his services to three disinterested housekeepers. He alleges that the agreement was in writing; that the arbitrators were selected by them and reported in writing, after hearing the evidence that the appellee was entitled to $209 for his services. He sues upon this award, which was in writing. The appellants filed an answer, which attempted several defenses, all of which were imperfectly stated. Amongst others, they stated that one of the arbitrators was not selected by the parties.

A demurrer was sustained to this answer and the appellants amended their answer, in which the arbitration was distinctly admitted. The appellants then proceeded to say that the appellee was entitled to nothing because he had received full pay by the use of the property, and also that he was indebted to the appellants in the sum of $290, occurring after the arbitration,

but the appellants are particular not to state the origin or nature of the indebtedness, and the allegation as to that matter is radically defective.

In the amended answer the arbitration is admitted, and that not being attacked on the ground of fraud or mistake, it must stand as presumptively correct, and, as said, the answer being radically defective as to the subsequent indebtedness, there was no proper defense presented.

The judgment is affirmed.

COUADEAU v. AM. ACCIDENT CO. OF LOUISVILLE.

(Filed February 3, 1894.)

1. Accident insurance—Evidence—Peremptory instruction—In an action on an accident policy the burden of showing that the death of the insured resulted from an accident is upon the plaintiff. Where the evidence shows that the insured was found drowned in a river, and there is not a circumstance pointing in the slightest degree to suicide, the question as to the cause of the death should be submitted to the jury, although the actual cause thereof is not proven.

2. Same—Where the plaintiff's evidence entitled him to a submission of the case to the jury and the defendant seeks to prevent a recovery by showing that the insured was in a drunken condition when he met death, and that, therefore, under the contract of insurance, no liability arises, it must establish such a bar certainly and conclusively in order to authorize the court to peremptorily instruct the jury to find for it.

When the defendant's evidence fails to show the exact cause or time of the death of the insured, but does show that he was very much intoxicated when last seen alive, the case should be submitted to the jury; the defendant has not established conclusively a bar to the recovery.

3. Evidence—Exceptions—Where exceptions filed to depositions before the trial of a common-law action disclose that the witnesses resided within twenty miles of the place of trial, the depositions are incompetent and should not be read on the trial.

4. Same—Practice—The plaintiff's evidence authorized a submission of the issues involved to the jury. The defendant pleaded certain facts that were a bar to the action, and attempted to establish its defense wholly by depositions. There was a verdict and judgment for plaintiff for $5,000 and on motion for a new trial the judgment was set aside as contrary to the evidence. On a second trial the court instructed the jury to find for defendants. On appeal from the judgment entered on the second verdict this court finds that all of defendant's depositions were incompetent. Held—The defendant had a right to assume on the trial that the action of the court admitting its depositions as competent evidence was correct, and to rely on such depositions, and it would be unjust to it for this court to order the trial court to set aside the second judgment and enter the first judgment without giving defendant an opportunity to produce the witnesses whose depositions it read. Another trial of the case should be allowed the parties.

O'Neal, Phelps & Pryor and Kohn, Baird & Speckert for appellant.

B. F. Buckner and Bullitt & Shield for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

Eugene Couadeau, the husband of the appellant, held an accident policy of insurance for $5,000 on his life in the appellee company. The petition of the appellant, filed in the Jefferson Court of Common Pleas, avers that on or about March 14, 1890, the exact time being unknown, her husband, "through external, violent and accidental means, fell into, or by some means got into, the Ohio river or canal and was drowned."

The answer consists of a denial of knowledge or information of any injury or accidental means causing death, or that the required notice of death and attending circumstances had been given, and alleged the existence of the conditions operating under the terms of the policy to exempt the company from liability, namely, that death happened to the insured while he was "under the influence of intoxicating drinks," and that his death was "the result of his intoxicated condition."

On the first trial of the case, which occurred in November, 1891, it was shown by the appellant that the insured left his home for his place of business, at the usual hour, on the morning of March 14, 1890, in sound condition, mentally and physically; that he was prosperous in business and happy in his domestic relations; that he went through the day in his usual good humor and spirits, and was always of temperate and industrious habits; that while not a "teetotaler," he was never known to get drunk or under the influence of intoxicants, and was not so on the day in question; that though he stated to his wife he would return at the usual hour, he had been missing for weeks, and his body was finally found in the river, without marks of violence on it and with his watch and some money in his pockets and a ring on his finger.

It was shown that the deceased resided with his family, consisting of a wife and four children, at Nineteenth and Baird streets, in the city of Louisville, and only a short distance from a canal, over which there was a bridge with low railings, and from the river, which, at the time mentioned, was very high and covered the lowlands in the vicinity of the home of the deceased.

The judgment of the coroner was that the deceased had come to his death from accidental drowning.

The appellee introduced proof to the effect that the deceased was in the habit of spending his Saturday evenings at Weber's saloon, on Market street, where, on the night of March 14th, he was first seen at 6 o'clock; that he remained there until about half-past 12 o'clock, engaged in playing cards for the drinks, and became very drunk, according to some of the proof, and moderately under the influence of liquor according to others; that before leaving the saloon he was assisted to a coupe, having first ascertained the price of his fare, and getting some money changed to pay the driver. He was driven to the corner at lower Nineteenth street and helped out, when the driver testifies he left him alone, holding to a lamp-post, in a helpless condition—not able to take care of himself and at some distance from his residence. Upon this state of fact the jury, after proper instruction, found a verdict for the appellant for the amount of the policy, and judgment was accordingly rendered in her favor.

Thereafter the court sustained the motion of the appellee for a new trial upon the sole ground that the verdict "was contrary to the weight of the evidence," the court saying the proof was clear that "the deceased was under the influence of inoxicating liquor when drowned, which, under the policy and instructions, entitled the defendant to a verdict."

A second trial was had, in June, 1892, upon the same proof

theretofore offered. It was in fact merely formal, because the court had already reached the conclusion that the proof entitled the company to a verdict. The jury were, therefore, peremptorily instructed to so find.

It is the contention of the appellant that the court erred in granting the new trial, and that, therefore, the court should reverse the judgment last rendered, with directions to enter the one rendered upon the first verdict. The appellee insists that the new trial was properly granted, and there being no error in the last one the judgment should be affirmed.

It seems to be conceded that the burden of showing the death of the insured to have been the result of an accident was on the appellant, and of showing that the insured came to his death while under the influence of intoxicating drinks was on the appellee.

That the first proposition was sufficiently established by the proof to require its submission to the jury seems reasonably clear. There is not a circumstance pointing in the least degree to the death of the insured by suicide, nor was there the slightest evidence of violence or foul play upon his body, even if such would prevent recovery under the contract. It can at least be said that it seemed to be a case of accidental drowning, and comes up, therefore, to the requirements of the contract of insurance.

In Trew v. Passengers Assurance Co., 6 H. & N. 838, Chief Justice Cockburn said: "It appears that the insured went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing, his clothes were found by the water side, but he himself was not afterwards seen.

The body was found in the water a distance from where he went to bathe. * * * If they (the jury) found that he died in the water, they might reasonably presume that he died from drowning," and the nonsuit ordered by the judge below was held to be error.

In Mallory v. Travelers Insurance Co., 47 N. Y., 52, it was shown "that the insured disappeared on Sunday evening when he was seen walking on the railroad track; the body was found in a creek which passed under the railroad through a culvert. A motion was made for a nonsuit on the ground that there was no evidence to go to the jury of death by accident; but this motion the court refused to allow, and left it to the jury to find whether death ensued by accident or not," and on appeal it was held "that the circumstances attending the finding of the body were sufficient to require a submission to the jury of the question whether the death of the insured was the result of accident or suicide, or of some cause not insured against."

Said the court further: "It is true that the actual cause of death is not certainly proved by the evidence in the case; but when considered in connection with the presumption that sane persons do not ordinarily commit acts, the probable consequence of which will be self-destruction, it was sufficient to justify the inference that the deceased fell off, or was hustled off by a violent blow, from the culvert into the stream below, and was drowned."

It is settled law that mere "circumstances sufficient to support a verdict should be submitted to the jury," and that "the plaintiff is not bound to prove his case so clearly that it excludes the possibility of any theory." (Allen v. Willard, 57 Penn. St., 380; Whiting v. Clifburn, 57 Wis., 157.)

In Winspear v. Accident Ins. Co., 6 L. R. & S. B. Div., 42, it was said: "When a man is found dead in the water, he may be

presumed to have come to his death by drowning, and not by fits or otherwise."

The rule, therefore, seems to be that when a man comes to his death by accidental drowning or by suicide, the presumption will be in favor of the accident rather than in favor of the suicide. (7 Am. Rep., 410.) But yet, with all this, the case put by the appellee is not met, for, with the conclusion reached that the plaintiff had so made out a case of accidental drowning as to entitle her to have it go to the jury, the question remains, did not the proof of the defendant so conclusively establish that the death of the insured happened while he was under the influence of intoxicating drinks as to require a nonsuit?

In such cases, where the plaintiff is held to have made out a case, the proof of the defendant, to entitle him to a nonsuit, must be conclusive, must destroy and wholly eradicate the case of the plaintiff. Thus if A sues B on a promissory note and is met with an admittedly genuine receipt against it, the bar to recover is complete.

If the plaintiff first make out his case, it is not within the province of the court to take its consideration away from the jury on the proof of the defendant unless such proof is in the nature of an absolute bar to the recovery. And now, while in the case under consideration, the appellant fails to show the precise cause of the death of her husband; so, likewise, was the appellee unable to show his condition precisely at the time of his death. This for the manifest reason that there is not a particle of proof as to when he met his death.

The circumstances, with all the sadly interesting features, are to be scrutinized by the jury. The body of this prosperous and contented man, once happily surrounded by wife and children, of temperate and industrious habits, of intelligent business forethought, when last described in the proof as preparing for his conveyance home, was found in the water. It is shown that on the night of the 14th of March, when last seen alive by any of the witnesses in the case, he was under the influence of intoxicating liquors. The inference, the probability, may be strong that he was in that condition at the time he met his death, but certain it is that the proof is silent on that supreme question. We know the dead body was found in the water; that it bore the evidence of an accidental drowning; that the presumption, without such evidence, is in favor rather of the conclusion that death was accidental rather than intentional, but we do not know that at the time of the accident the unfortunate victim was under the influence of intoxicating liquors. The case should, therefore, be heard and determined by the jury.

There is a question as to the competency of the proof offered by the appellee of the condition of the deceased on the night of March 14th. The proof was in the form of depositions, when the witnesses resided within twenty miles of the courthouse.

It can hardly be told whether the exceptions were filed before or after the commencement of the trial. We are inclined to think they are shown to have been filed before; and if so, they should have been sustained; and if sustained, then there is no evidence whatever in support of the defense that the insured was intoxicated or under the influence of liquors at the time of his death. For this reason it is insisted that this court should act in the case as if the depositions had not been read, and enter the first judgment; but manifestly, as forcibly put by counsel for the appellee, "if the court committed an error in overruling the exceptions to the depositions, and the defendant went to trial upon the supposition that the court was correct in its rulings, and this

court should decide that the lower court erred in overruling the exceptions, common justice would require that the defendant should not be prejudiced by the court's error, but should have an opportunity to produce the witnesses at another trial."

While in some cases this court has directed the entry of the first judgment, when it has erroneously been set aside, yet in a case where the defense is supported by strong probabilities, and in the opinion of trial judge presents an absolute bar to a recovery, we are not inclined to apply the rule contended for.

The judgment is, therefore, reversed, with directions to grant the appellant a new trial on principles consistent with this opinion.

KIRKPATRICK & WILLIAMS v. COMMONWEALTH.

GREEN v. SAME.

(Filed February 20, 1894.)

1. Local option—Repeal of statute—Under the act of May, 1884, and the election held pursuant to said act, the local option law governed the whole of that county in March, 1890, when an act was passed resubmitting the "local option question" to the voters of that county. This last act provided that where any magisterial district in the county voted in favor of a sale of intoxicating liquors therein, license to sell in said district might be granted, but that where the vote of a district was against such sale license to sell therein should not be granted. Held—The latter act was not intended to, and did not, repeal the former one, and unless an election has been held in a magisterial district of Hardin county, under the act of 1890, and a majority of the votes been cast in favor of such sale therein, the act of 1884 still applies to such district.

2. Same—But even if the act of March, 1890, repealed the act of 1884, the passage by the legislature of the act of May, 1890, amending the act of 1884, was intended to, and did, re enact the last-named act.

W. R. Haynes for appellants.

W. J. Hendrick and W. S. Chelf for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Bennett.

These three cases involve the same question, and will be considered together.

The appellants, as druggists, were indicted and fined for selling whisky in violation of the local option law for Hardin county, Ky., which was enacted on May the 5th, 1884. The appellants contend that the law of May the 5th, 1884, was repealed by the act of March the 15th, 1890.

If it be true that the act of March the 15th, 1890, repealed the act of May the 5th, 1884, and that the act of 1884 was not re-enacted, then the cases ought to be reversed; if not, they must be affirmed. On May the 5th, 1884, the legislature passed an act authorizing Hardin county, by vote, to prohibit the sale of whisky in the county. Pursuant to the authority given the county, by vote, did prohibit the sale of whisky within its boundary. The act also prescribed a penalty for violating its provisions, of not less than $100 nor more than $500. The appellants were fined for violating this law. The question is, did the act of March the 15th, 1890, repeal this act? The title of the act of

March the 15th, 1890, is as follows: "An act resubmitting to the voters of Hardin county the question as to whether or not spirituous * * * liquors shall be sold in said county."

The act then provides that the vote upon the question shall be taken by magisterial districts, and upon any magisterial district voting against prohibition the county judge of the court shall issue a license to applicants to sell whisky in the district upon their complying with the State law in that regard. It also provides that the districts voting prohibition the county judge shall not grant a license to sell whisky therein.

The said act does not provide any punishment or penalty for violating its provisions. It is contended that this fact should exercise no controlling influence in determining the question as to whether or not said act of 1890 repealed the act of 1884, or only amended it so as to allow a vote by districts as to whether or not prohibition should continue therein. It is true that if the prohibition law of the district fixes no penalty for its violation, then the penalty fixed by the general law for like offenses under the general law would be the criterion of recovery. But the act also provides that if the majority of the votes cast in any district shall be against prohibition the county judge shall grant license in said district to sell whisky. Now the act makes it essential to the right to sell whisky in any district of the county that the local option established by the law of 1894 be repealed by a vote of that district.

To illustrate, suppose there had not been a district election held under the law of 1890; can there be any doubt that the law of 1884 would have prevailed in such district, notwithstanding the act of 1890, because the act of 1890 authorizes the county judge to issue a license in that district upon the condition only that the people of the district vote to repeal the law then therein? Whereas, if the act of 1890 of itself repealed the act of 1884, licenses could be granted in any district that failed to vote on the question. But aside from this, we think the act of May 22, 1890, shows conclusively that the act of 1884 was only amended by the act of March 15, 1890, and not repealed.

The title of the act of May 22, 1890, provides that the act of 1884 be amended. Section 1 of said act provides that the act of 1884 be amended by adding thereto the following provisions, etc. It then provides that the provisions that are amendatory of the act of 1884 shall not be in force in any magisterial district which shall vote against prohibition under the act of 15th of March, 1890, resubmitting the question as to whether whisky should be sold therein. Now we think it is clear the act of 15th of March, 1890, was only an amendment to the act of 1884, the intention of which was to resubmit the matter of prohibition, which existed in the whole county, to the magisterial districts of the county in order that any district that desired the sale of whisky might vote for it, but in the districts that did not desire to make the change the law of 1884, with its penalties, remained in force. But if we are mistaken in this, we feel certain that the act of May 22, 1890 (passed at the same session), was an attempt to amend the act of 1884 and to continue the same in force. But if it be a fact that the act of 1884 was repealed by the act of March 15, 1890, the legislature had the right to thereafter re-enact the law of 1884, and the amendments of 22d of May, 1890, certainly had that effect. At the time the act of 22d of May was passed the legislature had the power to amend or re-adopt a previous act by its title. Here the title not only amends the act of 1884, but in the body of that act the act of 1884 is expressly amended by adding new provisions. Therefore, whatever we may think as to

the repeal of the act of 1884 by the act of 15th of March, 1890, we are bound to conclude that the legislature did not intend to repeal it, but only to amend it, and that the act of May 22, 1890, clearly expresses that intention; and in order to effectuate that intention, so clearly expressed, we should regard the act of May 22, 1890, as re-enacting the act of 1884 rather than defeat the expressed will of the legislature.

The judgment is affirmed.

SHINKLE'S ASS'EE v. BRISTOW.

SAME v. BISHOP, &c.

(Filed October 27, 1893.)

1. A deed executed by the wife alone, conveying to a trustee her potential right of dower in land that the husband had, by deed, previously conveyed or such trustee for the benefit of his creditors, passes the wife's inchoate tight of dower.

2. A conveyance to a trustee for the benefit of creditors passes the legal title to the realty described in it to the trustee, although the statute places a limitation upon the trustee's right to convey such title without the order of a court of chancery.

3. Same—Dower—Contract—A married woman and her husband agreed with the husband's assignee for the benefit of creditors, and with the creditors that the wife would convey to the assignee her inchoate right of dower in all her husband's real estate, except his dwelling house, and would pay a mortgage that existed on one piece of real estate so conveyed if the assignee would convey to them the dwelling house. The assignee, with the consent of the creditors, conveyed the dwelling house to the husband, and the wife released by deed her potential right of dower in the other property. The husband having died, the wife sued for her alleged dower interest in all the realty, on the ground that she did not understand the transaction when made, and that the agreement was that the dwelling house was to be conveyed to her. Held—No fraud was practiced on the wife. She knew how the transaction was carried out and is not entitled to dower in the realty, as to which she executed the deed of release of dower right.

4. Same—Trusts—Where the assignor for the benefit of creditors, for the purpose of releasing a lien on real estate he has transferred to his assignee, uses the proceeds of property he holds in trust for the benefit of his children to satisfy and discharge such lien, of all of which facts the assignee has notice, the court ought, when it comes to distribute the assets of the assigned estate, upon petition of the children, whose property has been so used for the benefit of the estate, to enter a judgment in favor of such beneficiaries for the full amount of their claim, with interest, to be paid by the assignee out of funds in his hands.

Chas. H. Fisk, O'Hara & Bryan. J. W. Bryan and Collins & Fenley for appellant.

James P. Tarvin for Bristow.

L. H. Noble for Champion Coal & Towboat Co.

Richard P. Ernst for Bishop, &c.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

These two appeals being involved in the same litigation, will be considered together.

Shinkle, in the month of August, in the year 1883, being largely indebted, and the owner of much valuable real estate in the county of Kenton, made a deed of assignment of all his property, real and personal, to Wm. Feesly and R. T. Miller, for the payment of his debts. The assignment was general in its character, and vested in his assignees the title to his real and personal estate.

The deed was put to record, and his assignees, upon investigating the condition of his estate, ascertained that one Linton held a mortgage upon his residence property in Covington and a vacant lot for a large sum of money.

Shinkle's wife had not united with her husband in the deed of conveyance to the assignees, and, therefore, had a potential right of dower in all the realty it purported to convey. Shinkle and his wife, being desirous of retaining their Garrard street residence, proposed to the assignees to take the Garrard street residence, subject to the mortgage of Linton, for $17,000, the household furniture, buggy horses, and certain stocks in insurance and bridge companies, and in consideration therefor would release the mortgage on the vacant lot, valued at $6,000, so as the assignees would hold it free of incumbrance and Mrs. Shinkle would also release her dower interest in all the real estate conveyed except the residence property, etc. The proposition was submitted in writing, signed by both husband and wife, and accepted by the creditors, the assignees being directed to make such conveyances as required upon the compliance by Shinkle and wife with the terms of their proposition. Shinkle and wife having released the mortgage on the vacant lot, or the one valued at $6,000, the assignees, on the 29th of August, 1883, reconveyed the Garrard street residence to Vincent Shinkle, subject to Linton's lien, and Mrs. Shinkle, on the same day, executed a conveyance, relinquishing her dower in all the realty but the family residence.

After the assignees had obtained a perfect title to all the realty but that reconveyed to Shinkle, they instituted an action to sell the realty and wind up the estate, filing with their petition the exhibits or evidences of title.

After the real estate had been sold under the judgment of the chancellor, Mrs. Shinkle filed her petition to be made a defendant, alleging the death of her husband, and asserting her right to dower in all the real estate conveyed by her husband to the assignees, and if not allotted to her in the realty, that its value be paid over to her from the proceeds of sale.

Her right to dower is claimed because, as she alleges, the deed to the family residence was, by the terms of the proposition, to have been made to herself and husband jointly, and that when the deed was executed to the husband alone she did not understand its purport; that it was represented to her when the written proposition was made that the residence property was to have been conveyed to her; While the written proposition was not binding on the wife when executing its provision by the deed relinquishing her potential right of dower, it passed her interest to the assignees and is irrevocable unless the parties to it practiced a fraud upon her in order to obtain her relinquishment. That she knew the manner in which the terms of the compromise or settlement were carried out and fully executed is apparent, and there is no pretense that any fraud was practiced upon her by any of the parties interested in the settlement, and the only question of such importance as demands consideration is the effect to be given the deed of the wife relinquishing dower, in

which the husband has not united. He had previously conveyed all this realty to his assignees by an absolute conveyance for the benefit of creditors, but it is argued this only vested in the assignees an equitable interest, with no power to sell or convey the title, unless empowered to do so by the judgment of the chancellor.

Article 1 of section 22 of chapter 63, General Statutes, is relied on by the wife, who obtained the judgment below as settling this question. It provides: "No sale of any real estate by a trustee, by virtue of a deed of trust or pledge to secure the payment of debts, shall be valid, nor shall the conveyance by the trustee pass the title to the property specified in such deed or pledge unless the sale thereof shall be in pursuance to a judgment of court, or the maker of such deed or pledge shall join in the writing evidencing the sale."

It is plain the trustee has no power to sell or pass the title except in the manner provided by this statute, and equally clear that but for the statute the trustee could sell and pass the fee.

The title, however, must be in the assignee or the grantor, and under the common law rule it is evidently in the assignee or trustee, but the statute intervenes and places a limitation only on the power of the trustee for the protection of the grantor and creditors, and prohibits a sale and conveyance by him unless by the direction of the chancellor or the consent of the grantor. It does not divest the trustee of the title, but says in effect you have the title, but shall not pass it except in the mode prescribed by the statute. It will not be contended that the trustee would be without power to convey in the absence of this statute, and the limitation placed on his right to sell by its provisions only requires the passing of the title from the assignee in a prescribed mode, for without this limitation, the trustee being invested with title, could sell and convey at his own will and pleasure.

Section 20 of chapter 24, General Statutes, in regard to the conveyance of real estate by married women, reads: "The conveyance may be by the joint deed of the husband and wife, or by separate instrument, but in the latter case the husband must convey or have theretofore conveyed."

The husband having conveyed to the assignee, the subsequent conveyance by the wife relinquishing her dower in the land previously conveyed by the husband passes her potential right.

In Cantrill v. Risk, 7 Bush, 158, the conveyance was held to have been in contemplation of insolvency, and enured to the benefit of creditors. The wife set up her claim for dower in the real estate conveyed, and this court held that it was a valid deed, and the fact that it was held to be an assignment did not restore to her the right to dower which had been alienated by it.

The law may step in and prevent the alienation of property by the grantee, although the legal title passes, when others become interested, by reason of the conveyance to him, and he holds it merely in trust for beneficiaries, and in this class of cases many reasons exist why the rights of creditors as well as the grantee should be protected against improvident sales and conveyances by those vested with the title, holding it alone for the benefit of others. In our opinion the conveyance by the feme passed her potential right of dower, and the judgment is reversed, with directions to enter a judgment dismissing the petition of the appellee.

In the other branch of this case is involved the right of the children of Vincent Shinkle to recover of the assignees the amount of a trust fund held by Shinkle in trust for his children, and was appropriated by Shinkle with the knowledge of the assignees in releasing the lien of Linton on the lot that Shinkle

and wife had agreed to release in the settlement already referred to, by which Shinkle was permitted to retain his family residence.

Shinkle, in the year 1872, subscribed for his children nine shares of stock in the Home Security Building & Loan Association in the city of Covington. Some of the dues were paid by Shinkle and some by the children.

In the year 1879 this corporation ceased to exist, and in payment of what was coming to these children handed over to their father two notes on one Leopold for $792 each, one due on the 1st of January, 1884, and the other on the 1st of January, 1885.

These notes are assigned to V. Shinkle in the following manner:

"Pay to the order of V. Shinkle ——.

"HOME BUILDING ASSOCIATION."

Shinkle held these notes until he made his assignment in August, 1888, and in order to release the lien on the vacant lot, valued at $6,000, and to enable him to retain his family residence under the contract between himself and his wife on the one part and his creditors, as stated in the opinion applicable to the wife's claim for dower, he pledged to one Collins both of these notes as collaterals, and obtained from him the money that was applied to the extinguishment of the Linton lien. Collins collected the notes on Leopold in satisfaction of the amount he had let Shinkle have, holding the notes as collaterals. The children sued Collins on the ground that he had notice of the trust when he secured the notes as collaterals, but the court holding otherwise, there was a judgment against them. The children of Shinkle, the appellees, filled a cross petition in the case against Collins, asking the chancellor, in the event that Collins was not liable, that they be allowed out of the proceeds of the sale of this lot the amount of the two notes, with interest. The assignees claim the notes as the property of their grantor and assignor, and deny the right of the children to the money.

It is evident from the facts of this case that neither the assignee nor V. Shinkle regarded the Leopold notes as a part of V. Shinkle's estate. Shinkle held the notes, and when endeavoring to raise the money to release this lien the assignees, or one of them, disclaimed any interest in them, and for that reason Collins took them as collaterals and advanced the money, as the assignee well knew, for the purpose of releasing this lot from the incumbrance upon it. The money obtained from Collins having been actually paid on the lien claim, and the assignee for creditors occupying no better position than Shinkle himself could, we see no reason why, when the proceeds of this trust fund have been applied in removing these liens, the beneficiaries of the trust are not, in equity, entitled to a judgment for the amount of these notes, with the interest, to be paid out of the proceeds of this sale of the lot. Shinkle paid the proceeds of the trust notes over to Linton. The assignee informed Collins that he had no claim on the notes. The fund realized from the two notes has been traced directly into the fund belonging to the creditors. It has been applied to the payment of the debts of the trustee, with a knowledge of and consent to its appropriation by the assignee. The money is in court, out of which this trust can be secured.

There has been no laches on the part of the children affecting creditors. But for the payment of this lien out of the trust fund the assignee would have been compelled to furnish the money out of the estate of Shinkle or submit to a sale by Linton to satisfy the lien. The fund is in court for distribution, and the claims of creditors must be held subordinate to that of the bene-

ficiaries of this trust. While it appears the grantee and father of these children paid the premiums or monthly dues, it is not claimed that he was insolvent at the time, but, on the contrary, the facts show that he was then in a prosperous pecuniary condition.

The judgment in the case of Bishop and others is affirmed, and reversed as to the widow, now Mrs. Bristow.

PALMER & BOWMAN, &c. v. HAMILTON, SR.

(Filed January 6, 1894—Not to be reported.)

1. Sales of personal property—Warranty—Evidence—On the issue as to whether or not the vendors made a warranty to the purchaser concerning the cow he bought, the evidence is conflicting and the jury has found for the vendors. Even if the preponderance of the evidence were not for the vendors, as it is, this court would not set aside the verdict where there is such a conflict of testimony.

2. Same—Pleadings—Party improperly joined as member of a partnership—Three persons were sued as members of defendant partnership and their attorneys filed an answer for each of them. After the case had been pending for two years, one of the defendants, who was a nonresident, offered to file an amended answer, averring that he was not a member of the firm and had just then learned, for the first time, that he had been sued as a member of it. On the trial the evidence showed that he was not a member of the defendant firm. Held—The court erred in refusing to permit him to file the amended answer and in refusing to instruct the jury to find for him.

4. Same—Prejudicial error—Reversal—Although the judgment must be reversed as to the defendant, who was not, in fact, a member of the partnership, the error as to him was not prejudicial to the rights of the other two defendants who constituted the partnership.

5 Same—Evidence—This court can not assume that the failure to dismiss such person as a defendant to the action was prejudicial to the other two defendants, in that they could not use their said codefendant as a witness to prove a certain conversation with their vendee, who was dead, concerning the alleged warranty, the deposition of such defendant having been taken, and neither it nor anything in the record shows that he heard the alleged conversation.

6. Same—Evidence—Where the issue is whether or not the vendors made a warranty to the vendees concerning a cow sold at public auction, evidence that the vendors made a warranty to other parties at the sale, who were lower bidders for such cow, is incompetent.

Wm. H. Holt and W. A. Sudduth for appellants.

H. L. Stone for appellee.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Pryor.

This action was instituted on a note for $3,100, executed by Palmer & Bowman for a short-horn cow, purchased by the firm at a public sale of blooded cattle by the administrator of James C. Hamilton and A. L. Hamilton. The defense is the auctioneer represented at the time of sale that the cow had been bred to an imported bull called the Grand Duke of Geneva, and was in calf by that animal; that like representations were made by the owners, and relying on the truth of these statements the purchase

was made at the price of $6,200, the sum divided into notes for an equal amount, payable to the respective owners for $3,100 each; that the cow was also sold as a breeder, and the representation made that she had dropped two calves, and was then in calf. It is averred that the cow was barren—was not in calf when sold, and was utterly worthless except for beef.

The reply puts in issue the averments of the answer by a general and special denial of the facts alleged, in so far as there was any representation or warranty made that the cow was a breeder or was in calf by the Grand Duke, etc.

It is further averred that the cow had dropped two calves and was supposed to be in calf at the time of the sale; that she was a blooded cow and the terms and conditions of sale, with the pedigree, were given in writing, and the cow sold as advertised.

On the issues of fact there was much testimony, the proof showing the cow had dropped two calves and was supposed to be in calf when sold.

The preponderance of the testimony on the question of warranty was with the plaintiff, and, if not, this court can not disturb the finding, where the testimony is so conflicting as to every issue made in the case, and will proceed to consider the legal questions raised and the main grounds of reversal relied on by the appellants.

When this action was instituted in December, of the year 1888, it was alleged that the firm of Palmer & Bowman consisted of Geo. W. Palmer, Chas. F. Palmer and A. M. Bowman. After the case had progressed for nearly two years and was prepared for trial, or in a condition to be tried, the appellants discovered, as is set forth in certain affidavits filed, that Charles Palmer had been sued as a partner, when in fact he had no interest in the firm. The defendants had long prior thereto answered, and the answer was filed for all the parties sued, which was an admission that Charles Palmer was a member of the firm.

The court refused to permit the answer to be filed, and the trial progressed. After the testimony was all heard and the fact disclosed by the proof that Charles Palmer was not a partner, the motion to strike his name from the action as a defendant was again renewed, and the attorneys stating they had no authority to plead for him. Charles Palmer was a nonresident, and although his deposition had been given in the case, there is nothing in the record showing that he knew his name had been used as a member of the firm, or that he was a defendant.

Under such circumstances the court below ought to have permitted the amended answer filed, and then instructed the jury to find for Charles Palmer, unless the plaintiff desired time to connect him with the firm by other proof. We can not, however, well see how this error can affect the liability of those who are members of the firm. They owe the note if the judgment below was otherwise proper.

It is argued that the error, if corrected at the proper time, would have enabled them to prove by Charles Palmer conversations had with A. L. Hamilton, one of the joint owners of the cow, in relation to the warranty, and A. L. Hamilton having died during the pendency of the action, and Charles Palmer, standing as a defendant, could not testify as to what transpired between himself and the dead man. This may all be true, but there is nothing showing what could have been proven by Charles Palmer—no avowal made or any fact in the record showing that he knew anything more than was contained in his deposition.

His deposition had been taken and he heard no conversation with Bowman (the partner purchasing the cow) and A. L. Hamilton. He saw Bowman approach Hamilton, who stood some distance from him, and when he returned Bowman commenced bidding, but what took place the witness does not pretend to state. Bowman, who made the bid, was examined as a witness, and no offer was made to prove by him what conversation he had with A. L. Hamilton, or any avowal made as to what could be proven by any one in regard to this conversation. Bowman does state that George Hamilton, the administrator, made the representations that the cow was about calving just before he made the bid, and this went to the jury.

It is shown by a witness for the appellee that when Bowman approached A. L. Hamilton the latter refused expressly to make the warranty, and we are satisfied no error existed in refusing permission to file this amended answer except in so far as it prejudiced the appellant, Charles Palmer; and this important discovery, made after the jury was sworn, that the son of one of the defendants had been sued as a partner, is coupled with too much laches to justify this court in reversing the entire judgment, that the son may testify when his deposition had been taken and no conversation with A. L. Hamilton proven.

Another objection made by the appellants can not avail.

A witness by the name of Anderson was asked by the appellees if he had not bid for the cow $6,100, and, responding in the affirmative, he was then asked on cross-examination if A. L. Hamilton had not given him a special warranty, and this was excluded. Whether competent or incompetent, the defendants had already proven that Williams and others had bid $6,100, and that Anderson himself had bid on the cow that led to the question asked by the plaintiff, and, if otherwise, what light a private guaranty made with Anderson could throw on the question as to the contract or representations made to the defendants we can not perceive. What those representations were had been proven by both Charles Palmer and Bowman, and controverted by testimony on the other side, and yet the appellant is insisting that the agreement between Anderson and the dead man is competent to show the contract between the latter and these defendants.

While the price paid for the animal may now be considered exorbitant, and certainly so in view of the fact the cow turned out to be worthless, this record does not authorize a reversal, and, besides, the proof clearly shows that others were ready to pay such prices for stock of noted herds that at that day were bringing fabulous prices.

This judgment is affirmed as to all the appellants except Charles Palmer, who is entitled to a new trial if the appellees desire to prosecute further.

Reversed and remanded for proceedings consistent with this opinion.

HARRIS, &c. v. ASH, &c.

(Filed January 27, 1894—Not to be reported.)

1. Fifteen years' continuous, adverse use of a passway as a matter of right creates a presumption of a dedication to such use; but mere permissive use of such way, however long continued, confers no right upon the party using it.

2. Appeals—This court will not reverse a judgment on a mere issue of fact unless it is clearly of the opinion that such judgment is against the weight of the evidence.

Chas. Carroll for appellants.

Fairleigh & Straus for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellants instituted this action to enjoin the appellees from obstructing their right of passway over their land, which they claim as a right established by adverse use for more than fifteen years.

The right to the use of the passway is denied. There is no new question of law involved in the case. The legal questions determining the rights of the parties are well settled. For instance, it is well settled that the use of a passway for fifteen years or more as a matter of right amounts to a dedication, and entitles parties to a continuous use of it, notwithstanding the objections of the owner of the land. And, on the other hand, if the passway is used by permission merely, such permission running for fifty or even an hundred years, does not confer a right of way, and the owner of the land may withdraw the permission and stop the use at any time. The lower court doubtless had these well-settled principles in its mind when it decided the case, and all it had to do was to apply the facts according to its judgment, which it evidently did.

We think that, while the appellants produced strong evidence that the passway was used as a matter of right for years, on the other hand there was decided and positive evidence that the use had been permissive nearly all the time. We think that the evidence to that effect authorized the judgment. Upon mere matters of fact decided by the court we will not reverse its judgment unless we are clearly of the opinion that it is against the weight of evidence. while we, if we were deciding the case originally, might come to a different conclusion from the evidence, yet it was the province of the lower court to pass upon the evidence, and we must let its judgment stand unless we are clearly of the opinion that it is against the weight of evidence. We the more cheerfully do so in this case, because if the appellants have a right of pass over the appellees' land in order to get to their land, the county court has power to grant it upon such terms and conditions as it may deem best. Then there will be no more questions as to the right.

The judgment is affirmed.

VERTREE'S ADM'R v. N. N. & M. V. CO.

(Filed February 18, 1894.)

1. A plaintiff has a right to dismiss his action without prejudice, even where the court has sustained the defendant's motion for a peremptory instruction, made at the conclusion of plaintiff's evidence, the motion to dismiss without prejudice being made before an instruction to find for the defendant had been given to the jury.

2. There can be no final submission of a case to a jury before all law questions have been disposed of by the court, the instructions and papers pertaining to the case having been actually delivered to the jury, and they have been authorized, without further interposition or control of the court, to proceed to a judicial examination of the issue of fact submitted to them.

3. Railroads—Willful neglect—Peremptory instruction—In an action to

recover damages for the death of a boy ten years old, caused by the alleged willful neglect of a railroad, where the evidence shows that the accident happened in the railway's switch yard, where the boy was a trespasser, and was brought about by the boy's incautious and reckless attempt to get upon the break-beam of a moving engine at a time when those in charge of the engine did not see him, a peremptory instruction for the defendant is proper.

H. T. Kendall and W. R. Haynes for appellant.

P. H. Darby for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

On trial of this action by a personal representative to recover damages for destruction of life by alleged willful neglect, the following proceeding occurred at conclusion of plaintiff's evidence: "Defendant moved the court to instruct the jury peremptorily to find for defendant, which motion was fully heard by the court and sustained, to which the plaintiff excepted, and then moved the court to allow plaintiff to dismiss his cause of action without prejudice to a future trial, which motion was overruled, and the jury was instructed to find for defendant, to which plaintiff objected and excepted at the time."

Thereupon a verdict was, in pursuance of the instruction, rendered for defendant, followed by judgment, from which plaintiff prosecutes this appeal.

The first question naturally arising in this case is whether the court properly sustained defendant's motion for a peremptory instruction; for if not, the judgment will have to be reversed for new trial of the present action if demanded by plaintiff, irrespective of the question of his right to dismiss the action without prejudice.

Plaintiff's intestate was a boy about ten years of age, and was killed in the following manner: The engineer had just made what is called a running switch, whereby two freight cars were detached from the train and placed upon a side track, and the engine and tender were moving back slowly upon the main track to reach other cars of the train that had been left upon the main track beyond junction with the side track, where deceased, of his accord, ran from the depot, passing across a pond of water frozen over, to the locomotive and tender, and passing around the latter attempted to get upon break-beam of the engine, but slipped or made a misstep, and, falling upon the track and being run on, was killed.

The place was within the private yard of defendant, where deceased had no right to go, and defendant's servants were not required to anticipate or look out for his presence. So deceased being at the time a trespasser, and his conduct under the circumstances extremely incautious and reckless, there would be no ground whatever for holding defendant responsible for his death, unless it be made to appear that the engineer discovered his peril in time to avoid running the engine and tender on him. But there is no evidence before us tending to establish that fact, or negligence of any kind or degree on part of those in charge of the engine and tender. Consequently, as the record now stands, the lower court was, in our opinion, bound to give the peremptory instruction. Whether it was error to overrule plaintiff's motion to dismiss the action without prejudice, notwithstanding failure to make out his cause of action, depends upon meaning of subsection 1, section 371, Civil Code, which provides that an action, or any cause of action, may be dismissed without preju-

dice to a future action "by the plaintiff before final submission of the case to the jury or to the court, if the trial be by the court."

This was a right that existed at common law, and it would in many cases be extremely oppressive and prejudicial to deny it. And it does not seem to us at all difficult to determine what is meant by the words "before the final submission of the case to the jury" as used in the section referred to. The Civil Code provides for, and makes a distinction between, a trial by a jury and trial by the court of an action ordinary, the latter being permitted by consent of parties to try an action even sounding in damages. But, as defined by section 311, "a trial is a judicial examination of the issue of law or of fact in an action or proceeding." The issue in this case was one of fact, to be judicially examined and determined by the jury under instructions by the court in regard to the law applicble. Now the bill of exceptions, which we have quoted, shows that, although the court had sustained plaintiff's motion for the peremptory instruction, there had not been any submission of the case, final or otherwise, to the jury before plaintiff moved to dismiss the case, for it is stated that the jury was not actually instructed to find for defendant until after the motion of plaintiff to dismiss was made. Strictly and properly there can be no final submission of a case to the jury until all questions of law have been disposed of by the court, instructions and papers pertaining to the case have been actually delivered to the jury, and they are authorized, without further interposition or control of the court, to proceed to a judicial examination of the issue of fact submitted to them.

In our opinion plaintiff had the right to dismiss his action without prejudice at the time he made the motion, and the court erred in overruling it.

Wherefore, the judgment is reversed and cause remanded that the motion may be sustained.

PARRISH, &c. v. ROSS.

(Filed February 15, 1894.)

Power of court to rent land in dispute pending appeal—Ratification of act of agent—Estoppel—Appellee sued to recover a one-third interest for life in a tract of land. Judgment was rendered adjudging that the two appellants each owned a one-third interest for life in such land, but denying appellee any interest therein. The appellee appealed from that judgment to this court, which decided that he was the owner of a one-third interest for life in said land. Pending this appeal the lower court divided the land and assigned one-third of it to each of the appellants, the other third being rented out through its commissioner to appellants. In this proceeding by appellee to collect the rents due by appellants, Held—

First. The lower court had the right to rent out the one-third pending the appeal.

Second. Even if it did not the appellee, the owner of said one-third, has ratified the action of the court in that respect, and, therefore, the appellants can not complain on that account.

Third. Appellants, having rented and used the land, are estopped to question the authority of the court to make the lease.

H. L. Stone for appellants.

Wood & Day and Wm. H. Holt for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee, John W. Ross, in 1886 sued to recover for life one undivided third of about 438 acres of land. The appellants, John S. Parrish and Mrs. Cordie E. Brawner, also claimed one-third each in said tract of land for life, and Mrs. Brawner also claimed absolutely the part that the appellee claimed. Upon final trial the court adjudged Mrs. Brawner and John S. Parrish one-third interest each for life in said tract of land, but denied the appellee's right to the other third interest therein.

The appellee appealed from the decision of the circuit judge denying him a life estate in a third of said land, and suspended the judgment by supersedeas bond. The case was reversed, and the appellee, Ross, was allowed one-third life interest in said land. (13 Ky. Law Rep., 858.)

Judgment was entered in the lower court in accordance with the opinion of this court. Upon the rendition of the judgment denying the appellee any interest in the land, the court continued the case on the docket as between John S. Parrish and Mrs. Brawner for "any necessary orders between them relative to the division of said land," etc. The land, pursuant to the judgment, was divided into three equal parts, and Mrs. Brawner and John S. Parrish were allotted a third each, and the other third, which the appellee claimed was not adjudged to either of the appellants, because neither had any right to it, and the court retained control of it during the pendency of the appeal and ordered the same rented out. Deeds were made to Mrs. Brawner and John S. Parrish to their respective thirds. They abided the judgment of the circuit court, and never thereafter set up any claim to the other third of said land. The court after the rendition of the judgment settling the right of Mrs. Brawner and Parrish to one-third each of said land, and denying to them, or either of them, any right to the other third, ordered said third to be rented out by its commissioner and that bonds be taken for the rent, etc. The commissioner did rent said third out, and the appellants, one or the other, were renters from year to year, and executed bonds for each year's rent. Executions were ordered upon these bonds. From the orders of renting and the order directing executions to issue on the rent bonds the appellants appeal. The appeal is prosecuted upon the ground that the appellee's petition having been dismissed absolutely, and the case having been kept on the docket for orders as between the appellants in reference to the division of said land, that court had no jurisdiction to rent the third not allotted to either of the appellants.

It is to be observed that the court by order kept the case on the docket for the purpose of taking all necessary orders in reference to the division of the land between the appellants; also the appellee superseded the judgment dismissing his petition, which kept the case on the docket in reference to him; also that there was no order disposing of the one-third of the land not allotted to either of the appellants, but the court retained control of the same. Now, in view of these facts, we fail to understand how it is that the court lost control of, and the power to rent out, this third of the land during the pendency of the appeal to this court when it expressly retained it and no one claimed it. But, independently of all this, we have this plain, honest and business transaction,

There is one-third of the land that belongs to the appellee. The appellants have neither right nor claim of right to it, but it belongs to the appellee. The court, on behalf of the appellee, rents it to the appellants. The renting is a voluntary action on their part. They have simply rented land that did not belong to them but to the appllieee, and he comes forward and says to the court that he accepts and ratifies its action and is willing to accept the rents. Now by what principle of fair dealing can the appellants say that the court had no power to rent them the land, and, therefore, the appellee must sue them for the rent, and recover it that way.

It seems to us that the power of the court may be left out of view, and the case may be put upon the principle of an unauthorized agent renting the land of the appellee to the appellants, and the appellee comes forward and says that he ratifies the act of renting and claims the rent bond. Now is there any court in this country that would deny the appellee the right to recover on the rent bond? We think not. Besides, suppose the order renting the appellee's land was erroneous, how can that fact hurt the appellants? They voluntarily rented the land; there was no compulsion resting on them; there was no interest to protect by renting under an erroneous order. The only person that could be affected by the erroneous order was the appellee, and he comes into court and submits to its action and asks the court to enforce its order, and the court did enforce it, which is affirmed.

MOYERS, &c. v. ARTHUR, &c.

(Filed February 15, 1894—Not to be reported.)

Conveyance—Title—Where a conveyance contained a stipulation that a part of the purchase price was to be retained until the vendors "perfected the title to the one-eighth undivided interest of the Hogan heirs in said land, and presented the vendee a good and sufficient conveyance from said heirs for said interest," in an action against the vendees, to which the Hogan heirs are made parties, the vendors are entitled to have the contract specifically executed and recover the purchase money retained, if they prove that they have claimed and held the land conveyed, adversely to the Hogan heirs and all the world, for fifteen years or more. Through the court a "good and sufficient conveyance" can be made in such case.

In such case, if the vendee has conveyed the land to others since the conveyance from his vendor, and has thus put it beyond his power to put his vendor in statu quo by a rescission of the contract, he must pay the agreed purchase price in full.

W. O. Bradley and M. F. North for appellants.

Chapman & Sampson for appellees.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellant, H. P. Moyers, sold and conveyed to the appellee, Arthur, for the benefit of the appellee, the Middlesborough Town Lands Co., a tract of land on Yellow creek, in Bell county, and stipulated in the deed thereto that the sum of $2,529.29 of the purchase price was to be withheld until the vendors, "H. P. and Cynthia Moyers, perfected the title to the one-eighth undivided

interest of the Hogan heirs in said land, and presented to the second party a good and sufficient coneyance from said heirs for said interest." It appears from the petition brought to enforce the payment of the purchase money so withheld that Hogan and wife have long since been paid for their interest, but, having died, no conveyance had ever been obtained. It is alleged, however, that the appellees and those under whom they claim have been in the peaceful, adverse possession of the lands since 1873, claiming and controlling them as their own, and we see no reason why, if this kind of title can be established, the appellants are not entitled to the purchase money. It may not be true that the lands have been so held, and, if not, the issue may be made by appropriate pleading. The demurrer to the petition was sustained upon the idea, we suppose, that the facts stated showed the holding to have been amicable, but this could hardly be in the face of the averments of the petition to the contrary.

It appears from the petition that the lands have been conveyed to others since the sale by the appellant, and it is urged that, as the appellees have put it beyond their power to put the parties in statu quo by a rescission of the contract, they must pay the agreed price in full.

The principle underlying this contention is well settled in numerous cases, but it does not sufficiently appear that the appellees have placed it beyond their power to rescind, even if such result is demanded by the equities of the case, and as yet this principle can not be invoked.

We see no reason why the appellants may not, in this action aginst the Hogan heirs and the appellees, establish a "perfect" title and through the court make to the appellees "a good and sufficient conveyance," as called for in the contract, the court, of course, controlling the question of costs on the final disposition of the case.

Judgment reversed, with directions to overrule the demurrer to the petition to the end that the issues, if any, offered by the appellees may be tried out, and, if none are presented, that the reilef sought be granted.

(Extension of opinion—Filed March 22, 1894.)

It is thought by counsel for the appellants that possibly, from the opinion in this case, Moyers and wife will be entitled to recover only in the event of showing fifteen years' adverse holding. Such was not the intention. They may recover whenever they establish a good and sufficient title—one that protects the appellees in the payment of the purchase price—and they may do this by establishing the allegations of their petition or by such holding It is true that a title, established by adverse holding, is not in literal compliance with the agreement to present a conveyance from the Hogan heirs, but the intent or the spirit of the contract is met when the title is so perfected as to bar the Hogans from further interest in the property. Nor does the agreement to permit such a conveyance estop the appellants from asserting such adverse holding. It is not inconsistent with such a claim.

ROGERS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 15, 1894—Not to be reported.

1. Railroads—Gross neglect—Evidence—While several witnesses state that the injury suffered by appellant, a brakeman, was due to the gross neglect of appellee's employes in backing certain cars rapidly and forcibly upon appellant, other witnesses state that the cars were slowly and carefully operated at the time of the accident, and the circumstances shown sustain the evidence of the latter in several important particulars, therefore, the verdict for appellee can not be set aside as contrary to the evidence.

2. Same—Instructions—The verdict of the jury for the defendant having been rendered because plaintiff failed to show gross neglect on the part of defendant as alleged by him, it is immaterial whether or not the instructions on the subject of contributory negligence were correct.

3. Evidence—The correctness of a ruling excluding a question will not be considered on appeal when the record contains no avowal of the answer expected from the witness to the question.

4. Same—Even if the evidence concerning the rule of the railroad requiring its brakeman to use a coupling stick when coupling cars was incompetent, its admission was not prejudicial in this case, since the uncontradicted statement of plaintiff was that the coupling he was attempting to make, when injured, coud not have possibly been so effected with a coupling stick as to prevent the accident.

B. F. Proctor, Geo. C. Harris and Edward W. Hines for appellant.

Jas. A. Mitchell for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was a brakeman on the road of the appellee, and sued the latter for injuries alleged to have been inflicted on him by reason of the gross negligence of the fireman, temporarily acting as engineer, in charge of the appellee's train.

The main issue of fact on the trial before the jury was whether the fireman, while acting as engineer, backed the cars so rapidly and forcibly up on the appellant as to cause the injury, he being engaged at the time in attempting to couple the "live" to the "dead" cars of the train.

He testifies that on the occasion of his injury he signaled the fireman (the engineer in charge) "to back up slow," and then went in to do the coupling; that the train came back "fast," and he failed to make the coupling. The "dead" train was knocked back about six feet, and he followed it to pull the pin up and couple the cars, when the train came back again "with another jam." He had put his hand in to set the pin, and his arm was caught and seriously mashed. He attributes the accident to the unskillful handling of the train, and says that if it had come back slowly and carefully he would not have been injured.

Harrington testifies that when the appellant gave the signal to come back, the train "came back against the dead part of the train pretty hard," knocking it several feet, and the appellant failed to make the coupling. Then the appellant turned and came up between the rails to the dead part, and was standing there "doing something with the drawhead," and, without further signal that the witness saw, the engineer came right back again, and that time "caught the appellant's arm and knocked the cars back several feet."

Touneyhill proved that the train came back twice, and knocked the dead part of the train about six feet back each time. Barbee testifies that the train came back with "right smart force," and knocked the train from him (appellant), and again it at once came back and struck the other one "pretty tolerably heavy," and he saw that the appellant was hurt.

The appellee then proved by Bracken, the fireman in charge; Stubbins, the associate brakeman of the appellant; Wilkes, a brakeman on another train, but standing close by the appellant when the accident happened; and Willets, a brakeman on the train with the appellant, that the engineer came back slowly and carefully, and not roughly, rapidly or forcibly; that the movement was the ordinary and usual one for the purpose at hand; and of these Wilkes proves that he was standing right by the appellant when he undertook the coupling, and saw from the way he went about it that he was in danger, and called out to him "to look out. He raised his arm up and got it caught," says the witness, "though the train came back very slowly, and it could not have been done easier."

In several important particulars, indicating the careful manner in which the train was handled and backed against the dead train while the coupling was being done, this testimony was corroborated by others. The jury found for the appellee, and from an examination of all the proof we do not see how they could have done otherwise.

It was upon a failure of proof showing negligence—certainly of gross negligence—on the part of the appellee that the jury must have found against the appellant, and, therefore, it is not necessary to consider the instructions thought to be erroneous on the subject of the appellant's contributory negligence. We may observe, however, that the instruction, to the effect that the defendant, the appellee, had the right to make and establish such rules and regulations as it deemed proper for the guidance and protection of its employes, is not open to the criticism that it makes disobedience to such rule negligence per se on the part of the plaintiff without regard to whether or not the rule is a reasonable one. The rule must be one, says the instruction, for the "protection" of the employe, and of this the jury may certainly be left to judge. The company introduced a copy of the rule requiring the use of coupling sticks on the part of brakemen when engaged in this hazardous work, and the appellant then sought to introduce proof, to the introduction of which the court sustained an objection, on the subject of whether such sticks were in use on the road of the appellant or whether the rule was enforced; but how the witness who is asked the question would have answered it we are not told, and without an avowal of his expected answer we can not say that the appellant was prejudiced by the rejection of the proposed testimony.

The failure of the appellant to use the coupling stick could not have been regarded by the jury as negligence on his part. He testifies most emphatically, and it is not contradicted, that "there was no way in the world" to have so used it when he was hurt as to have prevented the injury. It was, therefore, immaterial whether or not the appellant had notice of such a rule or could read or write, and it was not error to exclude testimony showing he could not read.

We think the jury were properly instructed, or at least the instructions were not prejudicial to the appellant, and the finding could hardly have been otherwise than for the company.

Judgment affirmed.

GLOVER, &c. v. BAUM, &c.

(Filed February 15, 1894—Not to be reported.)

1. Conveyances—Trusts—Reservation by grantee of power of sale—A father in consideration, among other things, of love and affection made a conveyance of a large estate, real and personal, to two of his children, with the condition annexed that he (the father) was to hold the property and its profits during his life for the benefit of his said children, and at his death the property was to go to said children for their lives, remainder to their children respectively, the father to have the right of management and control during his life. The deed also provided that said property might be sold, conveyed, exchanged and reinvested "as circumstances and exigencies of the life and interests of the party interested" might require, so that said property be secured for said children and their descendants as set out in the deed. Held—Under this deed the absolute right was reserved by the father to sell and pass title to the property embraced therein without the interposition of a court of equity, and without his children uniting in the conveyance.

2. Same—Section 23, chapter 68 of the General Statutes, forbidding a sale of property conveyed to a trustee as a pledge to secure the payment of debts without a judgment authorizing such sale, has no application to this case, since the deed in this case was in no sense a conveyance to a trustee to secure the payment of any debt.

Thos. H. Hines for appellants.

Tyler & Apperson for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

June, 1865, Charles Gilkey and wife, for the recited consideration that he had received a large estate from the father of his first wife, and deemed himself under moral and legal obligation to secure to his children by her an amount equal to the sum so received by him, and profits that had accrued therefrom, and the further consideration of love and affection and of his advancing age, bargained, sold and conveyed to said children, being Benjamin T. Gilkey and Maria L. Glover, a large number of promissory notes held by him, the dates, amounts and obligors being set out, sixty-two shares of bank stock and dividends accrued thereon; also all his stock of every kind and their increase, farming utensils, household and kitchen furniture, and "all his other property of every kind, species and description, and all his choses in action."

There was also conveyed various lots and parcels of land described, and, in the language used, "all his property, real, personal and mixed, including the growing crop for the present year;" but the conveyance was made subject to conditions and limitations, stated in substance as follows: First, all his existing debts and liabilities, together with a fixed sum allowed to his wife, were to be paid out of the property conveyed, and she was, beside, to have certain articles of household furniture, that had been set apart, delivered; second, he was, during his life, to hold the property conveyed and profits thereof in trust for use and benefit of B. T. Gilkey and M. L. Glover, and at his death to be paid over for their use during life, and then to their respective children; but the right to manage and control the property and receive the profits as long as he lived was reserved.

The deed contains this further condition: "Said property may be sold, conveyed and exchanged and re-invested as the circum-

stances and exigencies of the life and interests of the party interested may require, so that the same be properly secured to said B. T. Gilkey and M. L. Glover and their descendants in the manner set forth in the deed. All of said property and the profits and accumulations thereof, not expended by said Chas. Gilkey in management of the estate and in support of himself, to be at his death divided between parties of the first part and their descendants in strict accordance with provisions of this instrument."

In 1872 Charles Gilkey sold and conveyed to the vendors of appellees, with clause of warranty, one of the lots of land mentioned in the deed of 1865, and it was held and claimed, in virtue thereof, until 1892, when B. T. Gilkey and M. L. Glover, appellants, brought this action to recover it. In the meantime, that is, in 1880, Chas. Gilkey having died, his will was recorded, by which he directed all his property, which was the same mentioned in the deed of 1865, and increase thereof, except the land in question, to B. T. Gilkey and M. L. Glover, to be held in the same manner as provided in that deed.

The provisions of that will were carried out, and the devisors received the property devised in full, and without objection or complaint, and had and were enjoying the same when this action was brought, in 1892, to recover the land in question from appellees.

Waiving all questions thus arising, we will simply inquire whether Charles Gilkey had, in the deed of 1865, reserved the absolute right to sell and pass title to the lot sold in 1872, without interposition of a court of equity or B. T. Gilkey and M. L. Glover uniting in the deed. At the outset it is apparent they could not, by uniting in the conveyance, pass the title because, at death of their father, Charles Gilkey, they were, by terms of the deed, to simply take a life estate, remainder interest being conveyed to their children respectively, therefore, if Charles Gilkey could not have alone sold and passed title to the lot, it would have been necessary for a court of equity to intervene; but considering the purposes of and circumstances under which the deed of 1865 was made, the relation of the parties to it and the language used, it is very plain to us it was intended to reserve to Charles Gilkey the absolute power to alone sell and convey the land in question, and any other property embraced by the deed; and, consequently, the deed of 1872 did have effect to pass to vendees a complete title.

Section 22, chapter 63, General Statutes, provides that "no sale made of any real estate by a trutsee, by virtue of a deed of trust, or pledged to secure payment of debts, shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge unless the sale thereof shall be in pursuance to a judgment of court, or the maker of such deed or pledge shall join in a writing evidencing the sale."

But obviously that section has no application to this case for the deed of 1865 was not, in the meaning of that section, a deed of trust or pledge to secure payment of debts; but the property was conveyed by the absolute owner to his children for life, remainder to their children, upon condition and with limitation that he enjoyed during life all the profits and have power at any time to sell, convey or exchange any part of it.

As, therefore, the power to sell and convey was, by the deed of 1865, reserved to the grantor, it was not, according to a well-established rule that is unaffected by the statute quoted, neces-

sary, in order to pass the title, either that the sale be sanctioned by the court or that the cestui que trust unite in the deed.

Wherefore, the judgment sustaining the demurrer to petition and dismissing the action was proper, and is affirmed.

ALLEY, &c. v. HASTIE, &c.

(Filed February 17, 1894—Not to be reported.)

1. Vendor and vendee—The evidence herein is not sufficient to establish a sale or gift by the father to his son of the land in question. The continuous occupancy of the land by the son from 1849 until his death in 1887 does not of itself establish a sale or gift and is not inconsistent with the father's ownership. The circumstances of the case tend strongly to show that the son occupied the land as tenant.

2. Warning order—Affidavit—Where the verified petition contains all the averments required by the Code as a basis for a warning order against nonresident defendants, it is not material whether the affidavit for the warning order attached to the petition is defective or not.

Z. T. Young and Stone & Sudduth for appellants.

White & Brooks, R. Gudgell & Son and J. J. Nesbitt for appellees.

Appea from Bath Court of Common Pleas.

Opinion of the court by Judge Lewis.

Thomas Lewis having died in 1888, intestate and owner of several tracts of land, this action was brought in 1889 by some of his children and heirs at law for a sale and distribution of proceeds of his real estate, other children and heirs being made defendants.

To the petition an answer and cross petition was filed by children and grandchildren of Jonathan Lewis, a son of Thomas Lewis, who had died before death of his father, in which they set up claim to a tract of 117 acres in virtue of alleged purchase by their father of the intestate.

The evidence shows that Jonathan Lewis married about the year 1849, and soon thereafter took possession of the land in controversy and resided thereon until his death in 1887, except during an interval of about five years, from 1868 to 1873, when he was engaged in business at another place about five miles distant, though there is some evidence he, during that interval, leased the land to tenants.

The continued occupancy of the land by Jonathan Lewis does not seem to us, under the circumstances proved, inconsistent with ownership by his father, Thomas Lewis, for there is no direct or satisfactory evidence that the land was ever sold or given by the father to the son, or that the latter ever held or claimed it adversely.

There is some evidence of a promise on part of Thomas Lewis to convey the land to the first wife and children of Jonathan Lewis, and an attempt is made to prove he, about the year 1868, executed a bond by which he covenanted to so convey it upon payment of the purchase money. But there is no satisfactory evidence either that the purchase money was ever paid or that Thomas Lewis verbally or in writing ever agreed to convey the land without such payment; in fact the evidence is not sufficient to show a bond to convey ever was executed. On the other

hand, the evidence tends strongly to show that Jonathan Lewis occupied the land as tenant, agreeing to pay rent therefor, and never claimed it as his own; for if he had purchased or paid for it either wholly of his own means or in part, as is contended, with money derived by his wife from her mother's estate, it is unaccountable that he never demanded a conveyance, and that there is now inadequate proof of Thomas Lewis ever having agreed to convey. If Jonathan Lewis had, during his life, claimed the land as his own adversely to the title of his father, a sale or gift of it to him or to his wife and their children might be assumed. But there is no evidence of such adverse claim and possession.

The lower court did not, therefore, err in dismissing the cross petition.

The argument of counsel, that the warning order against nonresident heirs at law of Jonathan Lewis was based upon an insufficient affidavit, is not tenable; for it is expressly stated in the original petition, sworn to, that the defendants in question were not only nonresidents, but were then absent from the State, and every other fact required by the Civil Code in such case.

Judgment affirmed.

COLLINS v. COMMONWEALTH.

(Filed March 10, 1894—Not to be reported.)

1. The confession of a defendant will not authorize a conviction in the absence of other evidence that the crime has in fact been committed.

2. Discretion of court concerning order of introduction of evidence—While the court may, in the exercise of a reasonable discretion, permit either party to introduce evidence in chief out of the usual order, it should not do so except for good cause.

The court should not, except for good cause, permit the Commonwealth to prove, for the first time, an alleged confession of defendant after all the evidence for defendant has been introduced.

3. Where the Commonwealth is allowed to prove an alleged confession of the defendant in rebuttal, merely to contradict the accused, the court ought to instruct the jury that such confession could not be considered by them as substantive evidence to show guilt, but merely as impeaching or contradicting or discrediting the accused as a witness.

4. Criminal law—Confession—In this case all the circumstances show that the accused was induced to make the alleged confession by the hope that he would be "let out" if he did so, and such confession was not competent evidence against him.

W. W. Vaughan and G. W. Fleenor for appel'ant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was jointly indicted with one Armstrong for burning the dwelling house and residence of Reuben McQuinn, and on his second trial was found guilty and sentenced to the penitentiary for ten years.

McQuinn lived on Quicksand, in Breathitt county, in a two-story frame house, with log kitchen attached at the rear. In the

upper part of the building was stored the family bacon, and the theory of the prosecution is that the meat was stolen and the building fired, in order to hide the theft. There had been fire in the kitchen stove on the evening before the house was discovered to be in flames; but McQuinn testifies that there was no fire in the stove or house after dark. The house was discovered afire at about four o'clock on the morning of May 20th last.

The proof of the State connecting the accused with the crime, if one was committed, was wholly circumstantial, unless his alleged statements to the sheriff, Combs, be regarded as a confession of guilt. The Commonwealth proved that certain tracks found near the creek were made by a person wearing No. 11 shoes, or about that size, and the shoes of the accused, who wore that size, were attempted to be put in these tracks. According to some of the proof the shoes fit in precisely, but others proved that they missed fitting by at least one-fourth of an inch. All the witnesses agreed that the bottom of the sign was smooth, but that the soles of the shoes had a row of shot-head tacks in them, and when they were pressed down in the tracks the impression of the tacks were plainly visible. This was attempted to be accounted for by the Commonwealth upon the theory that the accused, after committing the crime, had driven the tacks in his shoes, and this contention was supported by showing only that the tacks looked new, but the shoes were also comparatively new. It must be admitted that this proof rather unsatisfactorily establishes the guilt of the accused, if it does so at all; and it is more than probable that but for the testimony of the sheriff, Combs, there could have been no conviction.

When the accused was on the witness stand he was asked by the Commonwealth if he had a conversation with the sheriff, Combs, at the jail during the last June term of court with reference to the burning of the house or the stealing of the meat. He answered that he did not remember; that at that time he was in a bad condition from having been shocked by the blowing up of a building close by the jail with dynamite and was under the treatment of two physicians.

The accused introduced other testimony tending to show that he could not have committed the crime, and after closing his proof the Commonwealth was permitted, over his objection, to call the sheriff for the first time and prove by him as follows: "One day at the jail during the June term, 1893, of this court, A. H. Howard and myself went down to the jail, and I think, in the presence of Hiram Centers, the jailer, we had a conversation with defendant Collins. I said to Jim, the defendant, that if you know anything about who burned the house or stole the meat you had better come out and tell it, if you did not have anything to do with it yourself. He went on and talked in a roundabout way and gave some names, but what he said did not amount to anything, and I said to him: 'Jim, they are not going to let you out on such stuff as this; if you know anything about who burned the house come out and tell the whole thing.' He then said that he did not have anything to do with it himself, but that he was knowing to it; that on Saturday Manford Armstrong came over to his house and told him that they were going to steal McQuinn's meat and burn the house, and that Armstrong tried to get him to do the work, but he refused. He then went on and gave the names of the parties—Manford Armstrong, Rufus Armstrong, some of the Rowes and one of the Lichens, and may be some others—I don't remember them all, but there were eight names given. He told me when the meat was divided

and all about it; said that the meat was carried upon a point above where the house was burned and divided. I never promised him anything or made him any offers or inducements except what I have told you. There was no promise to let him out."

Counsel for the defendant renew their objection to this testimony and moved to exclude it. The objection was overruled.

They then asked the court to instruct the jury that this evidence was not to be considered by them as substantive evidence to show the guilt of the accused, but only as impeaching, contradicting or discrediting the accused as a witness. This the court refused to do and overruled their motion, to which the counsel excepted.

As already indicated, it is evident that the conviction was obtained by reason of the testimony of the sheriff, and why he was permitted to testify after the close of all the testimony, both of the State and of the accused, does not appear.

In Williams v. Commonwealth, 90 Ky., 596, this court held that, while the trial court has a reasonable discretion in the matter of allowing either party to introduce additional testimony in chief after the close of his testimony, the court should not allow the introduction of testimony out of the usual order except for good cause. If it be said that the testimony was competent to contradict the accused, who had testified only that he did not remember whether or not he had made the statements imputed to him, then the error of the court is still more apparent in that it overruled the motion to instruct the jury as to the purpose of the proof.

In Fueston v. Commonwealth, 91 Ky., 230, we held that testimony introduced by the Commonwealth being competent only by way of contradicting other testimony, it was error to allow it to go to the jury without instructing them that it was to be considered only for that purpose.

It may be noticed in this connection that the State had introduced the jailer, who was present at the talk between the sheriff and the accused, and he had testified that "Combs told defendant that if he would come out and tell who all was in it and how it was done that the prosecution would let him out and use him as a witness," and the court thereupon properly refused to let the jailer testify as to the conversation.

The accused was an old man, very ignorant and quite poor. When he saw a chance, as he supposed, to regain his liberty, he begun telling a rambling and unsatisfactory story, when the sheriff interrupted him by saying, "Jim, they are not going to let you out on such stuff as this," etc.

It is noticeable that the sheriff does not contradict the jailer. He rather corroborates him, and it is evident that the accused was impressed by some one or more of these officers, the sheriff, the Commonwealth's attorney or the jailer, all of whom were present, with the belief that he would be "let out" on condition that he tell the whole story. The inducement offered to this old man in his enfeebled condition to manufacture "a cock and bull story" was very great, whether he told the truth, which, of course, was the sole object sought by the officers, or yielded to the temptation thus placed before him, we do not know. It is sufficient to say that the testimony of Combs was incompetent for any purpose. The testimony conducing to show Armstrong's connection with the crime was also incompetent. There was no conspiracy between the accused and Armstrong, charged or proven. Nor was it competent to allow the witnesses to give their opinions as to who made tracks, or their judgment as to whether the meat was stolen. One witness, and that the prosecutor, was

allowed to say: "I thought at the time, and believe yet, that the defendant made that track. In my best judgment the meat was stolen and carried away."

It may be that the presence of these tracks near the creek, and the fact that the fire in the stove had burned down or had gone out on the night of the fire, which is, perhaps, a mere opinion of the prosecuting witness, are evidences that the fire was the work of an incendiary. But the proof that a crime had been committed, rather than that the fire was the result of an accident, was not at all conclusive or satisfactory, and, therefore, if this alleged confession had been made competent in any way, the jury should have been told that it would not warrant a conviction unless accompanied with other proof that such a crime had in fact been committed. (Criminal Code, section 240.)

For the reasons indicated the judgment is reversed, with directions to award the accused a new trial.

OMER v. COMMONWEALTH.

(Filed March 8, 1894.)

1. Criminal law—Aiders and abettors—Instructions—The appellant, with others, started out to find one who had been abducted by a father and mother for the purpose of compelling him to marry their daughter, who had been ruined by him, as they claimed. The party, of which appellant was one, met the father and mother and their daughter and the person abducted; firing of pistols began, the father was seriously injured and the daughter killed. The evidence shows that appellant did not fire any of the shots and was not present immediately at the place of firing, but was in sight of it. On the trial of appellant for murder the court instructed the jury that if the appellant had no understanding with any of his alleged co-conspirators that the abductors, if overtaken or met, were to be assaulted with weapons or otherwise mistreated, and did not know of such understanding among the others, and had no purpose on his own part except a lawful and peaceful one, where some one, without his knowledge or assent, fired upon the abductors and killed the daughter, Held—The instruction was erroneous since a mere knowledge on defendant's part of the firing of the fatal shot did not constitute him an aider or abettor.

The words "knowledge of," "assent to," "approve of" or "consent to" are not suitable words to use in an instruction as expressing the idea of aiding and abetting.

2. Same—Evidence—The exclamation of one of an excited crowd, who were discussing the abduction immediately after it occurred, "go for Wm. Omer," not made in his presence or the presence of his alleged co-conspirators, was incompetent, and admission of it prejudicial.

3. Same—Evidence of what occurred when the parents took their daughter and the man abducted before the county judge to be married was incompetent, neither the accused nor any of the alleged fellow conspirators having been present.

4. Same—One indicted jointly with others for murder will not be allowed to prove the good character of the persons jointly indicted with him.

P. B. Miller and Yeaman & Lockett for appellant.

Wm. J. Hendrick for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Hazelrigg.

In the village of Sturgis, in Union county, at about 10 o'clock at night, on April, 4, 1893, Taylor Oliver and his wife, each well armed, entered the place of business of Henry Delaney and demanded that he go at once with them and marry their daughter Abbie, whose ruin they charged he had accomplished. He denied the charge, but upon being threatened with instant death he gave up his pistol and proceeded with the Olivers to a surrey, a short distance away, in which the daughter was waiting. During this time some three or four shots were fired by the Olivers. The parties at once drove to Morganfield, some twelve miles away, when the county clerk was aroused and a marriage license procured.

The county judge, found some two miles distant, was awakened and asked to marry the couple, but, upon Delaney detailing the circumstances of his capture and his unwillingness to marry the girl, the officer refused to perform the ceremony. Quite a scene ensued, and the prisoner was told that he would be given one more chance, but that if he made any objection to the next officer approached they would instantly kill him.

A minister was then found, who performed the rites while the parties remained in the carriage. They then started back, and upon reaching the Tur hill, some two miles from Morganfield, at about 2 o'clock on the morning of the 5th, they were met by a party of Delaney's friends, when a sudden firing began, in which Abbie Oliver was killed, and her father severely shot in the arm and face.

At the July term of the Union Circiut Court the appellant and some eight others were jointly indicted for the murder of the girl, and upon the trial of the accused at the November term he was found guilty and his punishment fixed at confinement in the penitentiary for life. Upon this appeal he insists that certain instructions given the jury were misleading and otherwise prejudicial to him; that much testimony for the State was admitted which was incompetent, and some offered by him was excluded which was competent.

For the purposes now at hand it will be necessary only to review briefly the appellant's connection with this tragedy. He appears to have been entirely friendly with the Olivers, and was a friend of young Henry Delaney, and prior to the night of the latter's capture was seen with him and other friends at various times.

On that night he was engaged in doctoring a sick horse, and went to the drug store at which Delaney was employed for medicine. He there learned of the kidnapping, and after a consultation with other friends it was decided not to apprise the relatives of young Delaney of the occurrence, but upon reflection, and after leaving the excited crowd, the accused and Tate agreed that they ought to let Holt, the brother-in-law of Delaney, know of his peril. They walked over to Holt's, about a mile out of town, and told him of the trouble. It was then agreed that Geo. Delaney, Henry's brother, should know the facts.

In a short while some eight or ten of the neighbors and friends of Henry Delaney, including the accused, the relatives named and others, gathered in the village, and it was agreed that they would go over to Morganfield to find out what had become of the parties. At this point the accused thus testifies:

"They were my neighbors, and I thought I would go with them to Morganfield, get breakfast, see what they had done with Henry Delaney and get back by dinner. We started to Morganfield. I didn't see Holt and Thomason until I got to Elijah Hughes. We didn't think that they could go to Morganfield

and be married that night, as it was twelve miles to that place and late at night when they left Sturgis. Tate and I rode together, and were behind all the parties until Thomason got out of the buggy at the Young hill, when we rode past them. I did not expect to meet the Olivers on the road. Frank Holt and Louis Land were in front, and George Delaney and Carter next; Tate and I were some distance behind. Just as Tate and I got to the top of the Tur hill I saw the surrey coming, meeting us at the foot of the hill. Geo. Delaney, Land, Frank Holt and Carter were some distance in front of us, and as they met the surrey I heard a pistol shot; don't know who fired it. The second shot was over the horses, came from right to left across the surrey and was a pistol shot. I was some forty or forty-five yards behind and couldn't tell who fired it, but think it was fired from the surrey; some seven or eight other shots were then fired. I had a 32-calibre pistol, but never fired it that night," etc.

Taylor Oliver, as to the occurences at the hill, testified as follows: "When about one-half way up Tur hill, two miles from Morganfield, four men rode upon horseback, and Frank Holt said 'hold up' or 'hold on there,' and immediately began firing; some fourteen or sixteen shots in all were fired. Frank Holt and another went on the right and George Henry and Geo. Delaney on the left side of the surrey. I was shot first in the arm with a shot gun by Frank Holt. As I turned my head to look behind me I was shot in the right jaw by a 32-calibre pistol. I don't know who shot me in the face," etc.

Mrs. Oliver testified thus as to the meeting: "At the Tur hill, about half way up, I was driving when four men abreast met us, two going on each side. I was on the left side and Abbie immediately behind me. Geo. Henry and Geo. Delaney were the men on my side. Some one said 'hold up there,' and immediately the firing began. Geo. Henry shot at me with a pistol, and Geo. Delaney rode behind and shot Abbie. He was right at the surrey. He rode a gray horse; positive that both Geo. Delaney and Geo. Henry were there; knew them both well," etc.

This was the whole of the testimony introduced on the trial as to the details of the killing. The accused, however, offered to prove by Tate and Geo. Delaney that he was some forty or fifty yards from the surrey when the shooting occurred, and that he did not shoot or incite or encourage any one else to do so, and that Carter, Land, Geo. Delaney and Holt were all in front of Tate and the accused when the firing commenced. This proof the court rejected upon the ground that a conspiracy had been made out against the accused and the witnesses offering to testify.

It can not be contended from the proof that the accused either killed the deceased or wounded her father, or indeed took any part in the shooting. His crime, if he committed any, must consist in his being on the ground, and by his presence aiding, encouraging or inciting others to kill the Olivers or do them bodily harm, and this is only possible if he were there in pursuance of an agreement to commit some unlawful act.

The testimony is clear enough, indeed is uncontradicted, that he said nothing and did nothing at the time of the immediate killing; nevertheless, if by his presence he gave aid or encouragement to the others engaged in the fight, he is guilty of murder, if they were so guilty, provided he was there in pursuance of a mutual understanding to carry out some unlawful purpose. His presence alone, without such an understanding, does not make him responsible for the acts of the others, therefore, the

case against him rests on the intent with which he was present, to be gathered from the proof and all the circumstances shown in the case.

In this connection we notice the instruction most seriously complained of, as it bears distinctly on the vital issue: "If the jury believe from the evidence that the defendant, Omer, had no understanding with any of the parties named that if overtaken, or met the Olivers, or some of them, were to be assaulted with weapons or otherwise mistreated, and did not know of such understanding among any of the others, and had no such purpose on his own part, but was going to release, or cause to be released, Henry Delaney in a peaceable and lawful way, when some one of said parties, without the knowledge or assent of the defendant, Omer, fired upon the Olivers and killed Abbie Oliver, they will find him not guilty, as charged."

Here the defendant, although assumed to be on a lawful mission and bent on the use of peaceable means only, having no notice or knowledge of a different intent on the part of others, is to be acquitted only in the event that the deceased was shot and killed by some one of the accompanying party without his knowledge or consent. Necessarily the jury understood from this, and were in effect told, that if she were fired upon and killed by some one other than defendant, with the defendant's knowledge or consent, the defendant was guilty.

This instruction was absolutely fatal to his defense. It would avail him nothing to show that he was along for a lawful purpose, or intended no harm to any one, or did not encourage or incite any one to do an unlawful thing, if he were to be held responsible for the firing upon the Olivers, simply because he had knowledge of such firing.

It can not be said that the knowledge attributable to the accused, in the meaning of the instruction, was previous knowledge of the assault to be made with weapons, or knowledge that the Olivers were to be fired on when met or overtaken, because the instruction expressly excludes this and is based on the hypothesis that the defendant had no knowledge or understanding in advance that the Olivers were to be fired on. The knowledge imputed in the instructions, therefore, is the knowledge of the firing at the time it occurred. In the late case of True v. Commonwealth, 90 Ky., 651, the words "approve of" and "consent to" were condemned as not suitably expressing the idea of aiding and abetting. The instruction was: "If they believe from the evidence that Samuel Sellars shot and killed Robertson, they should acquit the defendant, True, unless they believe from the evidence, beyond a reasonable doubt, that the defendant, True, at the time of said shooting and killing, was present, and did in some manifest manner encourage, incite, approve of or aid or consent to said shooting of said Robertson," etc.

The words "encourage, aid or abet," and "counsel, advise or assist," were said to be words in appropriate use "to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it done, and thereby becomes a principal or accessory," etc.; "but," say the court, "the words 'approve of' and 'consent to' do not, singly or combined, express the idea of willful contribution to or procurement of a felonious act which is necessary to constitute guilt."

We conclude, therefore, that not only was the use of the word "knowledge" in the instruction under consideration erroneous and misleading, but likewise the word "assent," the distinction

between the use of the words "assent" and "consent" being substantially imperceptible in this connection.

We perceive no other serious objection to the instructions, although the failure to use the word "feloniously" in the first instruction should be cured upon another trial. We are inclined to think that, owing to the peculiar nature of the facts set up by way of defense, the failure to use the ordinarily necessary words was not prejudicial, but the omission should be supplied in the future.

It seems to us that the testimony of O'Nan, that some one in the excited crowd, which had gathered about the drug store just after the abduction of Henry Delaney, cried out, "go for Wm. Omer," was clearly incompetent. The witness proving this also proves that neither Omer nor any of his co-defendants were present.

If the issue had been merely whether or not Omer had gone with the parties toward Morganfield, the proof would not have been misleading or even material because he in fact did go; but the issue was whether there was a conspiracy or mutual understanding, and we can see at once how the use of the words might, at the inception of the undertaking or in advance of the coming together of the parties who made the trip, indicate or strongly insinuate to the jury that Omer was the master spirit or ringleader of the enterprise, and who, upon the first appearance of danger, was to be sent for and consulted.

He is shown by the Commonwealth not to have been present, nor were any of the alleged conspirators present, when this declaration was made. In no aspect of the case, therefore, can it be held competent against the defendant.

We might not say that the graphic description of the exciting scene before the county judge, on the occasion of the attempt to consummate the marriage, was so prejudicial as to require a reversal of the case; but the accused was not present, nor were any of the parties there for whose acts or words he is sought to be made responsible.

What was said there was calculated to arouse the passions and inflame the minds of the jury, and should be excluded on any future trial. The appellant contends that he should have been permitted not only to establish his own good character among the people of the community, as he did do, but also the good character of each of the parties indicted with him.

At first blush it might seem plausible that, as it was sought to make the accused responsible for the acts of these parties, he should be permitted to show their good character as rebutting the idea of conspiring with such men; but the accused alone was on trial, and his own conduct and character were involved. The rule would have to work both ways, and a good man, caught ever so innocently in bad company, might be made to suffer from the establishment of such a rule, or if presumptions of guilt or innocence might be indulged in according as the party charged was in good or bad company.

We are not inclined to disturb the ruling of the lower court in refusing to allow the alleged co-conspirators to testify. For obvious reasons we shall not discuss the testimony on this point. The proof may be presented in an entirely different aspect on another trial, and we do not intimate what should be done under circumstances differing from those now before us.

For the reasons indicated the judgment is reversed and a new trial is awarded to be had upon principles consistent herewith.

CARROLL, &c. v. WARD'S ADM'R.

(Filed February 10, 1894—Not to be reported.)

Fraudulent conveyances—Evidence—A debtor, after receiving a considerable sum of money for property sold, refused to pay his debts, claiming that he had been robbed of the money so received. A deed of conveyance of land was then made to his son-in-law, who had no money, and who was an industrious but intemperate day laborer. Held—The evidence, while not direct, is sufficient to sustain a judgment subjecting such land to pay the debtor's liability on the ground that he furnished the money paid as consideration for it.

P. F. Edwards for appellants.

J. S. Lay, Edward W. Hines and W. E. Settle for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Lewis.

The evidence in this case, though not direct, in our opinion, is entirely sufficient to sustain the judgment of the lower court subjecting the land to satisfaction of appellee's judgment. Though the deed was not to Vanmeter, it is evident the consideration money was paid by his father-in-law, Carroll, who is the judgment debtor. The former is shown to have been a day laborer, and, while he may have been ordinarily industrious, was intemperate and wasteful, and we are satisfied did not, at the date of the purchase, have money with which to pay the large sum he pretends to have paid.

On the other hand, Carroll is shown to have sold at Evansville a large lot of sawlogs, from which he realized a considerable sum of money; yet immediately thereafter became insolvent, refusing to pay any of his debts, giving the flimsy excuse he had been robbed of that money.

We are satisfied the land was paid for by Carroll, while the title thereof was put in Vanmeter for the fraudulent purpose of defeating, hindering and delaying creditors.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

LOUISVILLE & NASHVILLE R. R. CO. v. MILLER.

(Filed January 31, 1894.)

Master and servant—Defective appliances—In an action by a servant against the master to recover damages for personal injuries resulting from the master's alleged negligence in furnishing defective machinery or appliances, there can be no recovery if the servant knew of the defect or might, by the exercise of ordinary care, have discovered it.

A section hand on a railroad, while assisting his fellow workmen in propelling a hand car, fell from and was run over by the car, his fall being due to the fact that the handle he was using turned in his hand. In this action by him against the railroad company to recover damages for the injuries in which contributory negligence was pleaded by defendant, plaintiff testifies,

that he had operated the car every day for five months prior to the injury; that the handle had come loose before and he had seen the foreman and other hands repair it and that he was "well acquainted with the use of hand cars." Held—That the court erred in refusing to instruct the jury on the defendant's motion that if they believed plaintiff knew of the defect, "or could have ascertained that fact by the exercise of ordinary care," they must find for defendant.

Wilson & Rawlings and J. W. Alcorn for appellant.

Dishman & Hays for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Yost.

When the Court of Appeals, in L. & N. R. R. Co. v. Foley, 15 Ky. Law Rep., 17, said that the rule requiring an employer to provide reasonably safe and suitable machinery and appliances for the use of employes and to keep them in repair while being used was a just and fair rule, and that "the limit of inquiry in such cases 'as this' is whether, as matter of fact, the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective," that court did not intend to do away with the old and well-established rule that a servant is presumed to know the conditions of the appliances which he has a constant opportunity to inspect and which his regular everyday duties bring under his notice. Nor did that court there hold, or even intimate, that in cases where the master and servant have equal means of knowing or of ascertaining the defects in machinery used by the servant that the latter, in actions against the former for damages resulting from such defects, must not show not only that the master had notice of the defect or ought to have had, and that he did not know thereof, but that he had not equal means of knowing with the master.

The fact is that every case of this sort must stand upon its own merits. Where no duty of inspecting the machinery rests upon the servant, or where he has had no opportunity to observe its defects, if any exist, he has the right to rely upon the judgment of his master as to its safety.

As the Court of Appeals says, in Bogenschutz v. Smith, 84 Ky., 330, "the master may have superior means of knowledge, and the circumstances may authorize the servant to rely on him because of want of equal opportunity. The servant may be ignorant without fault, while the master is negligently so. The law to be applied to a case must, therefore, depend upon the facts shown." In the case first referred to the court was governed by this principle. Foley was a brakeman and his injuries, received while coupling cars, were caused by certain defects in the drawbars and link. The court said: "In view of the fact that the trains had been recently made up in defendant's yard by other employes and he was unexpectedly called on near midnight to perform the service of coupling the two cars that had broken apart, it is manifest he had no previous opportunity, even if it had been his duty, to inspect the twenty-five cars composing the train in order to ascertain the condition of each of them."

In this case the facts are these: Miller was a section hand in the appellant's employment, and while assisting his fellow workmen in propelling a hand car the handle he was using turned in his hand and he fell from and was run over by the car, thus sustaining the injuries, to recover damages for which he brought this suit. In its answer the defendant pleaded contributory

negligence on the part of the plaintiff. The case went to the jury. A verdict for the plaintiff was returned, and from the judgment rendered thereon the defendant prosecutes this appeal.

Miller testified that he commenced working for the company in March and worked continuously for it until he was injured in the August following. "One evening," said he, "in August, after work was over, and we were coming in on the hand car, I was helping operate the car and was one of the men in front, with my back in the direction we were running, and while in that position the handle to which I was holding came loose and turned in my hand and I was thrown backward off the car."

He further testified that it was his duty to operate and handle the car, and that he had done so every day for five months prior to the injury; that the handle had come loose before and he had seen the foreman and other hands repair it, and that he was "well acquainted with the use of hand cars."

The defendant asked the court to say to the jury that if they believed that the plaintiff knew of the defect in the car, or could have ascertained this fact by the use of ordinary care, they must find for the defendant. Refusing to so instruct the jury the court limited the inquiry to the plaintiff's actual knowledge of the defect.

In this the court erred. Contributory negligence was pleaded, and the rule exempting the employer from liability to his employes for injuries caused by defects which the latter knew or ought to have known, is based upon the law of contributory negligence. Miller had used this car every day for five months; had notice that the handle had come loose again and again. The commonest instinct of prudence, the exercise of even the slightest care for his own safety, would have impelled him to keep a watch on this handle, and to have noted its defects, and in the light of this evidence the jury should have been charged that opportunities to ascertain defects, coupled with the want of ordinary care in attempting to do so, must count against the servant as actual notice of such defects. A servant is held to assume the ordinary risks of his employment so far as they are known to him, or readily discernible by a person of his capacity, by the use of ordinary care.

Mr. Wood, in his work on Master and Servant, page 791, says that in actions of this character the plaintiff is called to establish three propositions:

First. That the appliance was defective; second, that the master had notice thereof or knowledge, or ought to have had; and, third, that the servant did not know of the defect and had not equal means of knowing with the master.

In Thompson on Negligence, volume 2, page 1008, the following rule is laid down: That if the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observations or reasonable skill and diligence, he may discover that the appliance with which he labors is unsafe, and if, notwithstanding such knowledge or means of knowledge, he enters into or continues in the employment without objection, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him.

The Court of Appeals, in Bogenschutz case above referred to, adopt this doctrine, and this court, in Baird Bros. v. Deering, 13 Ky. Law Rep., 271, lay down the same rule.

For the error indicated the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. COOPER.

Filed February 7, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, reversing.

Transfer of equity—The court has no right to transfer to the equity docket an ordinary action properly brought as such, where there is nothing about the case which renders it impracticable for a jury to intelligently hear the evidence and decide the issues between the parties. Trial by jury is a sacred right which must remain inviolate.

W. J. Lisle and Thompson & McChord for appellant; H. P. Cooper for appellee.

GRAZIANI, ASS'EE, &c. v. GEBHART, &c.

Filed February 7, 1894. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Damages on appeal—Where an assignee for the benefit of creditors was ordered to pay to the master commissioner the amount shown by a settlement to be in his hands, and upon his failure to do so the chancellor issued a rule against him to show cause why he disobeyed, a response to which was adjudged insufficient, and an order made directing him to pay over at once the money in his hands, an appeal with supersedeas being prosecuted from this last order, the appellee is entitled, upon its affirmance, to 10 per cent. damages.

2. Assignee for creditors—Costs—As neither this appeal nor an appeal prosecuted by the assignee from the former order directing him to pay over the money in his hands was necessary to his protection in his fiduciary capacity, and he has by superseding the order of the court below delayed for four years the collection of the money, the costs should not fall upon the trust fund. Tarvin & Hall for appellants; Tisdale & Gray for appellees.

ROCHE v. LINK.

Filed February 7, 1894. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Yost, affirming.

Attachment—Damages for sale of property not belonging to defendant—While an officer who levied an attachment upon property which did not belong to the defendant was responsible to the owner in damages for the seizure and sale, yet as the plaintiff, with notice of the owner's claim, became an active participant in, and was the sole beneficiary of, this action of the officer, in that he directed the levy, procured the sale and pocketed the proceeds, he, too, was responsible.

C. Arnsparger for appellant; McMillan & Talbott for appellee.

LANCASHIRE INSURANCE CO. v. UTTERBACK.

Filed February 7, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Garnishment—Time for trial—In an action upon a return of "no property," a ganishee who was made a defendant having been served in time, the action stood for trial as to him, although it did not stand for trial as to the principal debtor, who had not been served a sufficient length of time; and

the garnishee failing to answer, an order directing him to pay into court an amount sufficient to cover the plaintiff's debt, interest and cost was proper.

2. Service of summons on corporation—"The Lancashire Insurance Company" being made a party defendant as garnishee, service of summons upon a person named by the officer in his return and described as the chief officer of the company in the county was sufficient, as the court could take judicial notice from the name of the company that it was incorporated, and there being nothing to contradict the statement in the return that the person served was the chief officer of the company in the county, the court rightfully presumed it to be true.

P. B. Thompson for appellant; Gaither & Vanarsdall for appellee.

HERRON v. DERMODY.

Filed February 7, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, reversing.

Civil action for assault—Self defense—It is a good defense to an action for assault and battery that the defendant was at the time acting in his own necessary self-defense, and the rule in criminal cases applies to the civil action as well.

In this civil action to recover damages for an assault the court erred in instructing the jury that they must find for plaintiff unless they believed that at the time the defendant cut the plaintiff he "was in danger, or apparent danger, of death or great bodily harm at the hands of plaintiff, then and there about to be inflicted." By this instruction the jury were told that the danger must be real or so appear to them, and the whole question of what the defendant believed, or had reasonable grounds to believe, was never given to the jury for their consideration.

W. E. & S. A. Russell for appellant; H. Philip Cooper for appellee.

TAYLOR v. DISMUKE, &c.

Filed February 7, 1894. Appeal from Ballard Circuit Court. Opinion of the court by Judge Barbour, reversing.

Mortgage of homestead—While a mortgage executed by a debtor upon land which is exempt as a homestead will not prevent the debtor from claiming the exemption unless his wife unites in mortgage, yet failure of the wife to join in its execution does not render it an absolute nullity, and other creditors of the mortgagor have no right to question its validity if the mortgagor chooses to waive this exemption.

W. G. Bullitt and J. D. White & Son for appellant; J. M. Nichols for appellees.

BALLARD v. CINCINNATI, &c., R. R. CO.

Filed February 7, 1894. Appeal from Boyle Circuit Court. Opinion of the court by Judge Barbour, reversing.

Railroads—Failure to stop train to take on passenger—In the absence of any express contract to the contrary a railroad company is not bound to stop its train to take on or discharge passengers at a station where, under reasonable rules of the company, the train does not stop; nor does the fact that the train is sometimes stopped for the accommodation of persons desiring to get on or off confer upon persons the right to require it. But it is the duty of a railroad company to stop its trains at way stations where it advertises to or is accustomed to stop, in order that persons may get on or off and any one who desires to take passage at such a station, and there presents himself at the proper time and is unable to take passage because of the failure of the train to stop, may recover of the company in an action sounding in tort for the damage he sustains in consequence of the company's failure to carry him.

In this action against a railroad company to recover damages for the failure of defendant to stop one of its trains at a station at which plaintiff pre-

sented himself for the purpose of taking passage, there being testimony tending to show that the station was one at which the train in question stopped regularly, the court erred in taking that question from the jury by giving a peremptory instruction to find for defendant.

Robert J. Breckinridge for appellant; C. B. Simrall and John W. Yerkes for appellee.

BROWNING v. KELLY, &c.

Filed February 7, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

Reversible errors—Failure to make motion for new trial—In a common law action, where the law and facts are submitted to the court, a motion and grounds for new trial are necessary in order to obtain a review by this court of the judgment. In their absence there is nothing before this court except the question whether the pleadings are sufficient.

H. W. Rives for appellant; S. A. Russell and L. S. Pearce for appellees.

CAMPBELL v. WILLIAMS.

Filed February 7, 1894. Appeal from Estill Court of Common Pleas. Opinion of the court by Presiding Judge Brent, reversing.

1. Transfer to equity—The defendant having collected a note which plaintiff had deposited with him as collateral, in this action by plaintiff to recover the balance of the proceeds of the note alleged to be due him after discharging his debt to defendant, the only issue being as to how much had been paid on the original debt to which the note was collateral, the court erred in transferring the action to equity over plaintiff's objection, there being no matter of equitable consideration.

2. Tender—Where one to whom money is tendered gives at the time as his only reason for rejecting it that it is not sufficient in amount, he can not afterward insist that it is not legal tender or required change. He must adhere to the ground of objection then made.

Grant E. Lilly for appellant; W. P. Smith and Riddell & Riddell for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. APRIL 15, 1894. No. 20

KENTUCKY COURT OF APPEALS.

MAY, &c. v. BLACKBURN.

(Filed February 6, 1894—Not to be reported.)

Right to passway—Evidence—The owners of the land over which the passway involved in this litigation runs state that its use by the public had been merely permissive. But disinterested witnesses say that the way has been used continuously and uninterruptedly by the public from nineteen to thirty-six years as a matter of right. Deeds of partition made of land which included appellee's tract reserved this right of way, which reservation the parties to the partition claim was for their benefit only. Held—The nature and character of the passway, the evidence of its long-continued use by the public, and the recognition of its existence in the deed of partition, all show that it was used as a matter of right and not merely permissively. Therefore, appellants ought to have been declared entitled to use it.

James Goble, Hugh Rodman and J. A. Scott for appellants.

Kirk & Kirk for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Pryor.

This case involves the right to the use of a passway over the land of the appellees.

There is conflicting testimony as to the claim of right on the part of the public to this user, and while those only who owned the land over which the road runs testify as to the right being merely permissive, others living in the vicinity speak without any qualification of the user as a matter of right for all purposes by the public for from nineteen to thirty-six years; that the use was continued and uninterrupted during the entire period.

It is well settled that a permissive use of uninclosed or inclosed land by the owner will not vest in the public such a use as to deprive the owner of the right to stop the passway and deny the right, but sometimes the character of the passway as well as the

constant use of it evidences the manner of the claim by the public and the owner's recognition of it.

In such a mountainous country as we find in many parts of Floyd county the passway between the elevation on each side is the only mode of ingress and egress to the land of the owner and especially with teams.

Nature seems to have created these outlets to enable the owners to reach their mountain homes, and when you close them up there is no passways for teams on the mountain sides, and no means of reaching those naviagble streams or places of business except the pathway that is made by the small streams, with hills on either side.

These appellants show a loss to them, with their logs in the ravine and no mode of getting them out. They saw the wife, who is the real owner of the land, and obtained her consent, and for some reason the appellee (her husband) denied the privilege of passing over this land to the appellants, and yet permitted others to travel over it. This he had the right to do, if there was no such passway as gave the public the right to travel down this branch.

As we have before stated, the testimony of those disinterested shows a constant use for over twenty years, and in the division of this land between the heirs of McCoy this particular parcel was allotted to the wife of the appellee, and in the conveyance to her of this land there is this reservation in the deed: "The right of way is reserved up and down the Kit narrow branch, with the run of the branch, the holder having the right to put gates across."

This reservation extends to the entire branch, and while the other heirs, or some of them, say this reservation was intended to apply to them only, as they owned land above on the branch, it is, nevertheless, persuasive that the passway was recognized as existing, and, when considered in connection with the testimony of those familiar with its use, it is clear that this injunction should have been sustained and the appellants permitted to haul their logs out.

The appellee placed obstructions in the road that were removed by the appellants, and claimed that his orchard and ground was damaged in consequence of the removal of the obstruction. He was not entitled to damages because he had no right to fence up his neighbor so as to prevent his passing, and all that was done was the removal of the obstruction, nothing more.

The judgment is reversed, with directions to enter an order enjoining the appellee from obstructing this passway that runs in the channel of the creek, and to so arrange his enclosure as not to interfere with this right of way.

WARD v. WARD, SR.

(Filed February 6, 1894—Not to be reported.)

Joint tenants—Adverse possession—Partition—Where two brothers jointly acquire title to an unenclosed tract of land, and one of the brothers enters upon and encloses thirteen acres of such tract and holds it for fifty years, it will not be assumed, and he will not be allowed to claim, that he held said thirteen acres adversely to their joint title, and when partition is made between the brothers of the entire tract, the brother holding said thirteen acres should be charged with its value without taking into consideration its enhanced value by reason of improvements he has placed upon it and the remainder of his interest in tract should be assigned him so as to adjoin said thirteen acres.

Stewart & Stewart for appellant.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Pryor.

The father of G. W. Ward and N. Ward had a patent issued in their names for 100 acres of land in the county of Martin. The father, after this, made to G. W. Ward a deed to some land adjoining this patent, and the deed embraces about 3 ½ acres of the patented land. G. W. Ward, the brother, took possession of 13 acres of this patented land, enclosing it and has had possession of it for near half a century and says it was a parol gift from his father. There is no dispute as to this 13 acres being within the patent boundary, and that only 3½ acres of the 13 is covered by the deed from the father to G. W. Ward.

It must be assumed from the proof that the patented land is unenclosed, except that part G. W. Ward claims to have derived by parol from the father. N. Ward died in the year 1865. The patent was obtained in the year 1847. The children of the deceased brother are seeking a partition, and the surviving brother (the appellee) is claiming that the 13 acres belong to him by reason of an adverse holding, and that he is entitled to that much more than his brothers' children. There never was any adverse holding, so far as this record shows, unless the enclosure of the 13 acres makes it so, while the fact of its use and occupancy would conduce to show that the brother had acquiesced in the use, still in the division the appellee should account for it—that is, he should have that much less of the 100 acres, and the partition, when made, should leave to the appellee the 13 acres, with the parcel allotted him, without reference to any improvements he has placed upon it. The land should be valued as the balance of the 100 acres, without taking into consideration its enhanced value by reason of the improvements by the appellee, as they should be given him. One tenant has no right to take possession of his half and claim, after the lapse of time the statute ordinarily runs, that he has been holding adversely, and then claim an interest in the remaining half. Nor will he be allowed to hunt up titles and claim an adverse holding under them, or have deeds made to him and claim under them hostile to his co-tenant, without knowledge of some sort brought home to his co-tenant as to the manner of his holding. Here is a plain title made to the two brothers, and one is claiming, after the creation of the joint tenancy, that he acquired title by parol to 13 acres of the land, or to 3½ acres by deed, without showing that the manner of his holding was made known to his brother and co-tenant, or that his claim was hostile in any particular.

The 13 acres in his possession being allotted to him, he must account for it—must get that much less in the division.

Judgment reversed and remanded for a division as herein indicated.

TRIMBLE, &c. v. HUNT.

(Filed February 8, 1894—Not to be reported.)

1. A widow is entitled to dower in land sold under a judgment by the assignee of her husband for the benefit of his creditors, which she has never relinquished in any manner.

2. Appearance of nonresident by filing exceptions to commissioner's report—The nonresident defendant filed exceptions to the report of the commissioner allotting dower to the widow, and on those exceptions evidence was heard. It is, therefore, too late for him to complain for the first time on appeal that the judgment was prematurely rendered, or that the warning order against him was defective.

Turner & Forman for appellants.

J. D. Hunt for appellee.

Appeal from Fayette Court of Common Pleas.

Opinion of the court by Judge Pryor.

This was a proceeding in the court below by Mrs. Hunt to recover or have dower in the land of her husband assigned her.

The land had been sold under a judgment in equity at the instance of John W. Crumbaugh, as the assignee of the husband of the appellee, and purchased by the father of the appellants. The wife had never relinquished her dower, and there is, in fact, no reason for controversy in regard to her claim.

The case is here, and a reversal asked upon two grounds. The first is, that one of the appellants, Robert Trimble, was a nonresident, and a judgment rendered when the case did not stand for trial, as the warning order had not been entered in time for judgment; second, that in assigning dower to the widow he obtained more of the land in value than she was entitled, etc.

Before the report of the commissioner making the allotment had been confirmed both the nonresident defendant and his brother, the latter having him actually served with a summons, filed exceptions to the report, and both testified as to the irregularity of the division. There was testimony pro and con on the exceptions, with a preponderance of the testimony in favor of the appellee, and the nonresident appellant, having been heard on the only question in which his rights were involved, it is now too late, after making his exceptions, to complain of a premature judgment that upon his own showing was proper. It is, therefore, not necessary to determine whether or not the warning order had been entered in time. There is no pretense of any defense to appellee's claim for dower, but, on the contrary, an admission as to the derivation of title from her husband, who was in the possession, owning the fee during the marriage.

Judgment affirmed.

BLANKENSHIP, &c. v. ROSS.

(Filed February 10, 1894.)

1. Descent and distribution—Inheritance from bastards—Under the statute concerning the capacity of bastards to inherit and transmit inheritance a mother may inherit from her illegitimate child, and her illegitimate children may inherit from her and from each other, but her illegitimate children can not inherit from her legitimate children or the legitimate from the illegitimate.

Therefore, an estate devised by a putative father to his reputed bastard child, who dies an infant, intestate and without issue, is inherited by the mother of the bastard and by her illegitimate children, and a legitimate child of the father does not inherit any part of such estate.

2. Same—Devise—The statute providing that if an infant dies without issue, having title to real estate derived by gift, devise or descent from one of

his parents, the whole shall descend to that parent and his or her kindred, etc., applies to real estate held by infants born in lawful wedlock alone; it does not modify or affect the law of descents as to land held by a bastard derived by gift or devise from his reputed father.

W. W. Marcum and Stewart & Stewart for appellants.

Alexander Lackey for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Lewis.

The third clause of the will of John H. Ross is as follows: "All the residue of my estate of every kind and description whatever, I give to my son, Thomas Granville Ross, and to my sons, Charley Bunster and John M. Ross, known as Blankenship, sons of Sarah A. Blankenship."

As may be readily inferred from the words there used, and otherwise appears, the two last-named devisees were born bastards, and one of them, John M. Ross, having, after the will was recorded, died an infant intestate and without issue, the question on this appeal is whether the real estate thus devised to him goes to his mother and bastard brother, or, as was adjudged by the lower court, to Thomas Granville Ross, the only legitimate child of the testator. Section 5, chapter 1, General Statutes, is as follows: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

According to the plain meaning of that section and uniform decisions of this court, Sarah A. Blankenship, mother, and Charley Bunster Ross, brother, take the real estate in question to the exclusion of Thomas Granville Ross and all others. For, as said in Remington v. Lewis, 8 B M., 606, in reference to the act of 1840, similar to section 5, "it must be limited by its own terms to the establishing right of the mother to inherit from her illegitimate child, and the right of her illegitimate children to inherit from her and from each other, and that it does not operate to establish a right either in the illegitimate children to inherit from the legitimate or in the legitimate children to inherit from the illegitimate."

If, then, as has been also held, the statute is to be so confined in its operation as that a bastard can not inherit from collateral kindred or even ancestor of his mother, or from a brother born in lawful wedlock of the same mother, nor any one of either of those classes can inherit from him, certainly a reputed brother of a bastard by the same father can neither inherit from nor transmit an inheritance to him.

The lower court does not, however, seem to have wholly ignored such construction of that section, but bases its judgment, as therein stated, upon supposed application to cases like this of section 9, as follows: "If an infant dies without issue, having title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there be any, and, if none, then in like manner to the other parent or his or her kindred," etc.

But that section was adopted in reference to the common law rule of descents and distribution, consequently the word "parent," as therein used, must be understood a legal parent, as the word

"infant" was intended to apply alone to a person born in lawful wedlock; for, in contemplation of the common law, bastards, being nullius filius, have no parents, and are incapable of inheriting or transmitting an inheritance to any person except to their immediate issue.

On the other hand, section 5, to the extent it makes a bastard capable of inheriting from and transmitting an inheritance to his mother and bastard brothers of the same mother, is in derogation of the common law, and was intended as an exception to the rule fixed in section 9, and to be unaffected thereby. So that real estate which an infant bastard may derive from his reputed father by gift or devise (he can not acquire any by descent), is no more subject at his death to operation of section 9 than if such real estate had been given or devised to a stranger in blood to the donor or devisor. But this question need not be further considered, for, in Stover v. Boswell, 3 Dana, 233, it was practically settled. There it was said of section 5, act of 1796, similar to section 9 quoted, that it was applicable only in those cases where the infant had living at his death brothers or sisters, or brothers or sisters of the father or mother, as the case may be, or any lineal descendant of either of them who were capable of inheriting from said infant.

Here neither Thomas Granville Ross nor any lineal descendant of him could have in any event inherited from the infant bastard, and, as a consequence, section 9 does not nor was intended to apply to a case like this.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

MERCER, &c. v. GLASS' EX'OR, &c.

(Filed February 10, 1894—Not to be reported.)

1. Joint executors—Settlements—One of several joint executors, who diligently and faithfully discharges his duties, is not liable for the wrongful acts of his co executors, and may plead plene administravit to an action against him, although his co-executor has committd a devastavit.

A will probated in 1847 appointed the three sons executors. One son managed the estate as such until his death in 1870; another son managed it as such from 1870 to his death in 1879, and then the third son managed it until suit was brought for a settlement of the estate. The chancellor required a separate settlement by the representatives of each son for the time he acted as executor. Held—Such mode of settlement was entirely proper, each son being responsible for his conduct while he was managing the estate.

2. Executors—Trusts—Limitation—Limitation begins to run against the claim of the beneficiary against his trustee from the time when the beneficiaries could have brought suit against the trustee for the fund sought to be charged to him.

A fund held under a will by an executor for the support of the testator's widow is held by him as a trustee and not in the discharge of his executorial duties.

3. Same—Sale—A will directed that no final settlement be made of the estate by the executors until the youngest child became of age, which was in 1867, when the interest of the daughters were to be assigned them in land, all advancements being accounted for. In 1867 the executor made a final settlement in the county court of his accounts, except as to a fund set apart by this will for the support of the widow. Thereupon the executor, by motion merely in the county court and not by petition, had commissioners appointed to divide the land among the daughters. The commissioners re-

ported their division to the county court, which confirmed it. The daughters took possession of the lands assigned them and have held ever since, except as to lands which some of them or their descendants have since sold. More than twenty years after such final settlement and partition, and after the death of the widow, the daughters or their representative instituted suit against the executors and their representatives for a settlement of accounts, claiming the division of the land was irregular and void, and that the land had been valued to them at an exorbitant price. Held—

First. By acquiescing in the partition ever since 1867 the daughters are now estopped to question its validity.

Second. The executors, when they made their final settlement in 1867, ceased to owe the estate any executorial duties—they held the fund for the widow as trustees merely. Therefore, the devisee's right of action to surcharge the settlement and collect any alleged balance due accused in 1867, and limitation then began to run. The right of action was barred against the executors by the lapse of fifteen years from that date and against their sureties by the lapse of five years.

4. Devise of rents to widow—Right to repair—A devise of one-half of the rents of real property by a testator to his widow was not a devise of one-half of the gross rents but of such gross rents after the costs of necessary repairs of the property to be leased.

Petree & Downer for appellants.

Knott & Edelen, J. W. McPherson and J. S. Phelps for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1857 Z. Glass died testate in Christian county, leaving a widow and eight children—three sons and five daughters.

By his will the three sons were made executors and all qualified, but John P. and W. A. only engaged in the active management of the trust until the death of the former in 1870, when the latter continued to manage the estate until his death in 1879. Thereupon Jas. C. assumed the duties of executor and was such at the institution of this suit. On the final hearing of the case the chancellor required distinct settlements of the accounts of each of these sons during the periods of time each managed the estate, and based his judgment upon the idea that each one was responsible for his conduct while managing the affairs of the estate, and not liable for the acts of each other. This was manifestly proper. There is nothing in this case to take it out of the well-settled rule referred to and approved by this court in Walker, &c. v. Walkers' Executors, 88 Ky., 625, where it is said "this court has always recognized the doctrine of the common law as to the liability of one executor for the acts of the other, and the personal representative who has been faithful to his trust may plead plene administravit, although his co-executor has committed a devastavit."

The separate settlements were, therefore, properly ordered. By the terms of the will there was to be no final disposition of the testator's estate until the youngest of his children should become of age, and upon the happening of this event, in February, 1867, the acting executor, W. A. Glass, made a settlement of the accounts in the county court, showing a considerable sum of money on hand for distribution, besides a number of tracts of land ready for partition among the daughters of the testator.

By the will the children were to have equal portions of the estate after an adjustment of advances, but the daughters were to be given their portions in land and negroes. The executors

were directed to allow any daughter, upon her marriage, before final distribution, property to the amount of $2,000, to be appraised by them or some one selected by them.

Just after this settlement in the county court in February, 1867, which was a final one, except so far as the executors retained control of the estate provided for the support of the widow, the executor, proceeding by motion merely and without a petition, applied to the county court to appoint commissioners to divide the lands among the daughters in accordance with the directions of the will. The court thereupon appointed three disinterested and discreet commissioners, then shown by the record to have been of high characters and business sagacity, to divide the lands, which, of course, required a valuation of them, and in March, 1867, after being sworn, they discharged the duty imposed on them, and in April following filed their report of division. This was left open for exceptions until the 2d of March, 1868, a period of eleven months, when, no exceptions having been filed, it was approved and confirmed by the court. The commissioners in allotting the lands found it necessary to take into consideration the whole estate then available for disposition, and found it to consist of cash on hand as per settlement, $17,512.67; cash notes, $15,756.20; land valued at $35,385.75; advances to legatees, $32,728.98; total amount, $101,383.60.

The valuation of the land, therefore, formed the basis of the apportionment. Thereupon the daughters and the children of one Mrs. Randolph, who had died shortly after the testator, took possession of their respective portions, and have used and enjoyed the same ever since. One of them, Mrs. Phelps, having sold one small tract, swapped another and still owns one. Mrs. Mercer, after signing an agreement to appoint the commissioners, took possession of her portion, and we believe still owns it. The Randolph heirs took possession of theirs, and upon reaching their majority sold all or a considerable portion of it.

Upon this state of case the three parties last mentioned, Mrs. Phelps, Mrs. Mercer and the Randolphs, brought this suit in October, 1888, seeking to have a settlement of the executors' accounts and a sale of the real estate left for the heirs by reason of the widow's death occurring shortly before. And in the settlement sought the chief point contended for is the impeachment of the valuation at which the lands had been assigned to them in the former settlement and disposition of the estate. The chancellor thus stated his views on this contention in the judgment complained of: "The court, conceding that the pleadings in the county court not being accompanied by any petition, and no summons having been issued against any of the parties in interest, is void and of no effect, yet, as an act done by said commissioners at the instance of said executors of said estate in the division of same, accompanied by a settlement of the executors with the county court, done in good faith and without fraud, and accompanied from that day, March, 1867, to this, by the acceptance and possession of the parties respectively, to whom the same was assigned, accompanied also by the fact stated and conceded in a argument that the Randolph heirs, after becoming of age, have sold all, or nearly all, the lands assigned them, and that Phelps and wife, through a decree of this court, have, years since, sold the principal piece of land assigned them, the impossibility of placing said parties in statu quo, the court affirms and approves said decision and assignment of said land. * * * And as to all of said estate, and as to all of the land embraced in said settlement and division, this was an end of their (the executors) authority or control over same. There was no longer

any continiung, subsisting, express trust as to same that would prevent the application of the statutes of limitation to the transaction. * * * In addition to this it may be noted that said commissioners in 1867 had before them the valuation of part of the same lands made by the testator himself; as, for instance, the sale of 57 acres to James Phelps for $4,000, and of 18 acres to William A. Glass at $1,500, and of 15 acres to Mrs. Randolph at $1,500, all prior to the assignments by the commissioners."

It seems to us that the argument of the learned judge is irresistible. The apportionment of these lands, though accomplished through the instrumentality of an illegal commissioner, was at least the act of the executors in the exercise of a power conferred under the will, but whether a proper exercise or not, the acceptance of the result by the appellants must be regarded as a ratification of the act. The appellants can not say "we took the lands, and thus in part ratified the action of the executors, but we secretly reserved to ourselves the right thereafter to question the valuation placed on them." An open announcement, then—and notice is shown by their act of taking possession—would have given opportunity to dispose of the lands, presumably, at or near the valuation placed on them by these commissioners.

It seems to us, therefore, first, that the disposition of the estate, in pursuance of the settlement made in 1867, of which the apportionment of the land is to be regarded as a part, was an end of the executorial duties of the sons. They had fully executed their office and administered on the whole estate, save so far as they owed certain duties to the widow. Thereafter they held only certain designated property for the widow, and their duties were those only of a testamentary trust.

Thus, in the case of Warfield v. Brand, 13 Bush, 77, it is said in a case similar to this a "fund set apart for the support of the widow by the executor, as provided in the will, was thereafter held by him, and by whomsoever had control of it as a trust fund, not as executor in the discharge of his executorial duties, but as a trustee appointed by the will." Applying this principle here, we see no reason why the lapse of time does not bar the appellants' cause of action. It arose when the settlement and the division under it were made, and from that time the statute began to run, the limitation of fifteen years applying to the principal obligors and five years to the sureties. To this effect this court held in Hargis, &c. v. Sewell's Adm'r, 87 Ky., 63, and the fact that the complainant was a married woman makes no difference.

So, in Robinson's Committee v. Elams' Ex'or, 90 Ky., 300, it has held that the trusts excluded from the operation of the statute of limitations are those of an exclusively equitable character, where the trustee has a right to hold the estate, and the cestui que trust has no right to sue for it. In the settlement and division of 1867 the lands were charged at some $35,000. The appellants now say they were worth only some $17,000, and this action is in effect a suit against the executors to secure from the estate the amount of this excessive charge. The wrong, if any, occurred in 1867, and the injured parties, having full notice of it, could have sued at once.

So, in Berry v. Berry's adm'r,* this court said that limitation began to run in the case of a trust created by will from the time the beneficiaries could bring suit to enforce the trust. In the second place the appellants, as indicated above, are estopped by their conduct from setting up the claim of overcharge in

*The opinion in this case is not yet accessible for publication. The case will be reported subsequently in this volume.

the settlement and division. We have stated the facts fully showing this, and the principles controlling the case in this particular are enunciated by this court in a number of cases. Alexander v. Woodford Spring Lake Fishing Co., 90 Ky., 215; Bull v. Sevie, &c., 88 Ky., 515.)

It appears, in addition to the facts stated, that the Louisville & Nashville railroad was just being completed to the town near to which the lands were situated, and the prices of city and suburban property were greatly stimulated. A contest over this apportionment, then, if successfully made by the complainants, would have meant very little to the estate and affected the other devisees and legatees only slightly. It would now entail a loss to them of several thousand dollars by reason of the depreciation in the vaule of these lands. No fraud is shown, and the objection to the valuation comes too late.

On cross appeal it is contended that the court erred in allowing the widow only one-half the net rents of the store rooms, when she was to get one-half the gross rents. The will provides that she was to have "one-half of all the rents of any and all property" the testator owned in the town of Hopkinsville. The judgment only lessened the gross rents by the cost of necessary repairs, and allowed the widow one-half the balance. In fact the repairs were made by the tenants from time to time, and as upon the condition of the property depended its rental value, and the interest of the beneficiary was materially affected thereby, she was properly chargeable with her share of the cost.

It is further contended that the executors were wrongfully charged with $1,993.14, which they had paid to Mrs. West to equalize her under the finding of the commissioners in 1867.

Mrs. West died in 1888, and what she got under the will was to revert to the estate in case she died with no other issue than her daughter Alice. The sum mentioned should have been invested in lands under the plain direction of the will, and if this had been done it would have come to the estate upon the death of Mrs. West in 1888. And, besides, there is no proof that this sum was, in fact, paid to Mrs. West, and if retained by the executors it was, of course, a proper charge. Nor do we think the court erred in refusing to reduce the advancement charge of $8,500 against W. A. Glass by the sum of $892, the amount of a stale account claimed to have been furnished to Julia McCombs before her majority.

The court heard the proof on the questions of fact involved and we will not disturb his finding in that particuar.

Wherefore, the judgment is affirmed on the original and on the cross appeal.

Judge Pryor not sitting.

N. N. & M. V. CO. v. CAMPBELL.

(Filed February 15, 1894—Not to be reported.)

1. A verdict for $5,000 damages for the loss of a hand caused by the gross neglect of a railroad company is not so excessive as to authorize a reversal of the judgment.

2. Neglect—Failure to use coupling stick—The failure of a brakeman to use a coupling stick, as required by a rule of the railroad company, adopted many years ago, is not contributory negligence when the proof conduces to

show that the use of such sticks had been abandoned and was not required for safety.

3. Same—Instructions—Where the court fully and correctly instructed the jury in regard to the law of contributory neglect, the defendant was not prejudiced by a refusal to instruct the jury that "it was the duty of the appellee to take notice of visible circumstances affecting his safety when attempting to make the coupling, and if the engine was approaching with such speed as increased the danger of the appellee, it was his duty to refrain from making the coupling."

P. H. Darby and Wickliffe & Johnson for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted by the appellee to recover damages for the loss of the use of his hand, caused by the gross negligence of the engineer or fireman of the appellant in moving its train of cars. The appellee had been in the employ of the defendant for several years as a brakeman on its trains, and was injured while in its service.

The proof conduces to show that the employes in charge of the engine (and whether it was the fireman or engineer does not appear) caused the injury. The appellee was engaged in coupling the cars. The engine or tender was some four or five feet from the cart to which it was to be coupled, and was signalled to move back, and instead of moving back far enough to reverse the engine it was thrown suddenly forward with such force as to catch the hand in the act of coupling, and rendered it impossible for the appellee to avoid the injury.

The manner of the injury is established by the appellee and another witness, and a case of negligence made out unless there was such contributory neglect on the part of the appellee as prevents a recovery.

The failure of the appellee to use a coupling stick is relied on as showing this contributory neglect, and the rules of the company introduced as evidence for the purpose of showing that those engaged in coupling cars are required to use this stick to avoid such injuries as the appellee is now complaining of.

It seems that such rules had been adopted by the company many years prior to the accident, and at the same time evidence conducing to show that the use of the coupling stick had been abandoned, and it is plain from the proof that its use was not required for safety and so known to the appellant, and we might add the appellant is liable for gross neglect, whether the appellee coupled his cars with or without this stick. The instructions given by the court embrace the law of the case, and present every phase of the defense authorized by either the pleadings or the proof.

It is complained that the court refused an instruction offered by the defense, "that it was the duty of the appellee to take notice of the visible circumstances affecting his safety when attempting to make the coupling, and if the engine was approaching with such speed as increased the danger of the appellee, it was his duty to refrain from making the coupling."

The court had told the jury that although the appellant might haev been guilty of neglect, yet if the plaintiff was also guilty

of negligence, which contributed to the injury, and but for such negligence on his part he would not have received the injury, they must find for the company.

The jury was also in substance told that if the company required the use of the coupling stick, and had furnished the appellee with one, it was his duty to use it unless they believed the injury would have resulted with or without its use. What meaning the appellant attached to the instruction, with reference to the visible circumstances affecting the safety of the appellee, is difficult to understand. The testimony of the condition of the track, its location, the proximity of the tender to the car with which it was to be coupled, the speed of the engine, were all facts before the jury that they might determine the neglect of the one party or the other. These were the circumstances connected with the conduct and action of the appellee that had gone to the jury for their consideration, and the general instructions were all that should have been given, and were as favorable to the appellant as it was entitled to have.

We find nothing in the objections or exceptions to the testimony. It was competent to show the nonuser of the coupling stick, or the danger resulting from the failure to use it; that the appellee had been a brakeman for years, and knew the danger attending such a position and the care necessary to prevent injury in the discharge of such duties. All such matters were doubtless considered in making up the verdict complained of, and while the full measure of compensation was awarded the plaintiff, we are not prepared to say that the verdict for $5,000 is so excessive as to authorize this court to interfere.

Judgment affirmed.

GREENBAUM v. BURNS.

(Filed February 20, 1894—Not to be reported.)

Warehouse receipts—Evidence—Appellant sold whisky in his warehouse to A. and delivered warehouse receipts for same to him, which receipts A. pledged to a bank as collateral security for money theretofore and simultaneously borrowed. Appellee, being surety for A., and having paid the debts, took up said warehouse receipts before appellant brought this suit to subject the whisky to the payment of a debt due him by A. Held—Appellees' lien on the whisky is superior to that of appellant, and, there being no evidence of fraud in the transfer of the warehouse receipts, it is immaterial whether appellee paid debts for A. at the time or before he obtained possession of the receipts.

Wm. Lindsay and Lieber & Lincoln for appellant.

Dodd & Dodd for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

By this suit in the court below the appellant sought to subject to the payment of a debt due him from the A. Furst Distillery Co., a foreign corporation, forty-five barrels of whisky then in the appellant's warehouse, and for which he had theretofore delivered warehouse receipts to said company. The appellee, Burns, came into the action by petition, and claimed that for value the company named had sold and delivered to him the

warehouse receipts for the whisky in question, and that he was, therefore, the owner of it. His ownership was denied, and upon the hearing the court adjudged the whisky to belong to the appellee.

It appears from the proof that the appellant sold the whisky to the company, and in due course of business transferred to it the warehouse receipts therefor, which were in turn delivered by the company to the National Bank of St. Joseph, Mo., of which Burns was president, it further appearing that at the time of the transfer last mentioned the company either got $750 in cash or made arrangements to check for same on the bank, and was largely indebted to the bank for moneys obtained theretofore.

Burns seems to have been bound for this debt, and before this suit was brought had paid the bank a large sum for the company, some twenty-odd thousand dollars, and had taken the collaterals theretofore in the possession of the bank, including the warehouse receipts in question, and still held them when the action was brought.

It is contended by the appellant that the proof by which the appellee seeks to show that at the time of the transfer of the receipts to the bank the company got any money is conflicting and unsatisfactory, and this may be conceded; but it is clear that before the suit was brought the appellee, Burns, became possessed of the receipts representing the whisky sought to be attached in the action, and held them as indemnity for the large sums he had paid for the company.

This is true even if we concede, as contended, that Burns was not the absolute owner of the receipts and the whisky. It follows that he was the equitable owner in possession. The lien of the appellant was inferior to that of the appellee, and the proof is clear that the debts for which the whisky was first pledged, and especially the Adler Bros.' notes for $3,000, had never been paid.

There is no pleading upon which the lower court could have required a statement of the account between Burns and the company, to the end that the property be sold and applied first to Burns' debts, if any remained unpaid, then to the appellant. No relief of this nature was asked, and upon the pleadings and proof no other judgment could have been rendered than the one appealed from.

There is no attack on the transaction as a fraudulent one in which Burns got these receipts, nor is there an attempt to show that their transfer operated as a fraudulent preference. It is immaterial, therefore, whether the debts paid by Burns for the company were paid at the time he got the receipts or before.

These warehouse receipts represented the whisky itself, and their delivery was its symbolic delivery (Greenbaum Bros. & Co. v. Megibben, 10 Bush, 419); but had there been a pleading authorizing the inquiry, there is no proof showing the appellant entitled to any relief.

Whatever may be said of the other debts paid for the company by the appellee, and we may safely say that they are shown not to have been paid, yet the six Adler Bors.' notes, of $500 each, are shown beyond question to have been unpaid, save the first one of $500; and to secure these notes the receipts were especially transferred by the company. Whether the transfer was in pursuance of any formal order of the company does not appear, but they were actually delivered to the bank, and were in the possession of the appellee when this suit was brought.

Judgment affirmed.

KELLEY v. TONEY, JUDGE, &c.

(Filed Feburary 24, 1894.)

1. Mandamus from the Court of Appeals is the proper remedy to compel a lower court to grant an appeal wihch has been refused without right.
2. Same—Final order—An order of a court enjoining a defendant "until the further order of the court" from prosecuting an action in another State for the purpose of having a receiver appointed for certain property and requiring him to dismiss said action, which he was prosecuting at the time, and to send a telegram to his attorneys ordering such dismissal, is a final order from which a right of appeal exists, although it is interlocutory in form.

Byron Bacon, C. B. Seymour, B. F. Buckner and Ernest McPherson for plaintiff.

Humphrey & Davie for defendants.

Opinion of the court by Judge Hazelrigg on motion for mandamus.

This case is before us on the motion of the complainant, Kelley, for a mandamus against the judge of the law and equity division of the Jefferson Circuit Court to compel him to grant an appeal from the following judgment

"John Mitchell v. Oregon Gold Mining Co.

"At a court held for the Jefferson Circuit Court, Law and Equity division, on the 8th of January, 1894, this cause having been heard on the motion of the plantiffs to enjoin and restrain the defendant, Clinton W. Kelley, from proceeding to interfere with the possession of this court, through its receiver, of the property of the Oregon Gold Mining Co., situated in the county of Union, State of Oregon, and the court being advised, it is ordered that until the further order of this court the said defendant, C. W. Kelley, be, and he is hereby, enjoined and restrained from further prosecuting, or permitting to be prosecuted, any motion or proceeding to which he is a party in the State of Oregon, having for its purpose the taking of the possession of the property of said company in Union county, Oregon, or its mines, mills, machinery, equipment or other property near Cornucopia, Oregon, or elsewhere in said State, and from further refusing or failing to cause his suit, now pending in said State of Oregon against said company, to be abated and dismissed so far as it seeks the appointment of a receiver of said property or the taking possession of said property by a receiver, and from refusing and failing to withdraw his motion and proceedings in said case; and from taking, or allowing to be taken, any steps in said case in carrying into effect any motion or order for a receiver, or for the taking possession of said property by a receiver; and the plaintiffs paid into the court herein the sum of $5, and on motion of plaintiffs leave is given to defandant, C. W. Kelley, to immediately withdraw said sum from the court herein, to be applied by him in paying for the sending of a telegram at once to his counsel in said suit in Oregon, directing the withdrawal or dismissal of the proceeding for a receiver of said property, and directing that all efforts on the part of any receiver appointed on his motion to take possession of said property shall cease; and he is enjoined from failing or refusing to forthwith send such telegram."

On the 9th day of Febiuary, after this judgment was entered, Kelley, by his attorneys, moved the court to grant him an appeal

from the order and judgment of January 9th. This motion was objceted to by the counsel of the plaintiffs; the court sustained the objection, overruled the motion for an appeal, and hence this motion and petition for a mandamus.

In the case of the Louisville Industrial School of Reform v. City of Louisville, 88 Ky., 584, it was held that a motion in this court for a mandamus was the proper remedy to compel the lower court to grant an appeal in cases where the party complaining was entitled to it.

The appropriateness or legality of the remedy we do not understand counsel of the appellees to dispute, but it is urged that the order appealed from is not a final one, and hence from it no appeal lies. It may be admitted that in form the order may be regarded as preliminary, but in effect it terminates the right of Kelley to prosecute an action in Oregon, whereby he may obtain possession of certain property alleged to belong to the company; and further, it requires Kelley to dismiss an action then being prosecuted by him for such possession, and to send a telegram to his attorneys to that effect. It can not be said that upon complying with this order the complainant will be left in statu quo. His substantial rights are clearly affected. It is an order to surrender a right and determine against Kelley his right to prosecute an action for specific purposes. It is true that the order is made effective or operative only "until the further order of the court;" but this is true of the judgments of all courts during the term at which the orders are entered. Such orders may be set aide —nevertheless, they may be appealed from if final in their effect.

This judgment appears to have been entered in due course of the trial in a case then pending before the court, and judging from the order, which alone is before us on this application, is not merely preliminary or provisional in its character. We perceive no reason why the appeal should not be granted.

The complainant can not obtain an appeal from this court until after sixty days from the date of the judgment complained of, and if denied an appeal below he would be without remedy. After the appeal has been taken and the entire record brought before us, a clearer understanding may be had of the nature and effect of the judgment complained of. Upon its face it seems to affect and terminate certain rights of the complainant, and he should have the chance by appeal to test the correctness of the judgment.

The clerk of this court will certify this opinion to the judge of the lower court, who will conform his ruling on the motion for an appeal to the views herein expressed by sustaining the motion of the complainant.

The motion for mandamus is sustained.

SMITH v. MASON, &c.

(Filed February 24, 1894—Not to be reported.)

Sale of land under execution—Failure to have land appraised—A failure to comply literally with the provisions of the statute requiring that land be appraised before it is sold under execution will not necessarily render the sale void; but if there is a total failure to make any appraisement at all the sale may be treated as void.

Where a sale of the execution defendant's land was made without an appraisement, and the execution under which it was made was lost so that there was no record of such sale, and the owner remained in possession of such land for eight years after the sale, the purchaser at the sale will not be adjudged owner of the legal title. He will be allowed a lien for the purchase money paid by him, and the owner will be allowed to hold his land by paying the amount of such lien.

Weller & Hays and O. V. Riley for appellant.

J. M. Unthank and M. J. Holt for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Bennett.

In 1881 the appellant obtained a judgment in the Bell Quarterly Court against Wm. Mason, Sr., father of the appellees, for about $28. Execution issued from said court for that sum against said Mason, which was returned "no property found." Thereafter a transcript of the judgment was filed in the Bell Circuit Court, and execution was obtained thereon from that court, which was placed in the hands of the sheriff of Bell county. He testifies that he levied the execution on about 50 acres of land as the property of said Mason, and after duly advertising it he sold the land and the appellant became the purchaser for the amount of the debt.

It is admitted that this execution is lost, and that no memorandum appears in the clerk's office showing what was done under the execution and by virtue of it. In 1889, the execution being lost, and the appellant desiring a deed to the land, the circuit court ordered the lost execution to be supplied, and upon that being done the court ordered a deed to be made to the appellant for 100 acres of land. In 1892 the appellees, as heirs of said Mason, instituted an equitable action against the appellant to enjoin him from cutting and carrying away timber from said land and to quiet their title to the same. The appellant claimed that he was the owner of the land by virtue of said sale and deed, and was in the possession of the same, and asked that the title and possession be adjudged to him. The court, upon final hearing, adjudged that the land belonged to the appellees and that they were in the possession of the same and cancelled said deed and sustained the injunction, but it allowed the appellant a lien on the land for the amount of said execution and interest thereon. From that judgment the appellant appeals.

It is conceded that the land was not appraised. It is also conceded that the statute requires sales of land by execution to be appraised, and that if the land does not bring at the sale as much as two-thirds of its appraised value the owner shall have one year from the date of sale to redeem the land; also that the appraisement shall be in writing and returned with the execution. This statutory provision is for the protection and benefit of the owner of the land in order that his land may not be sacrificed absolutely, but that in case it does not bring as much as two-thirds of its appraised value, which the law deems a sacrifice, he shall have one year in which to redeem by paying the sum for which the land sold to the proper person and retaining his land, thus saving his property from sacrifice and restoring the purchase money, thus making honors easy all around.

It has been held by this court (Anderson v. Prescoe, &c., 12 Bush, 344) that a failure to comply with this provision "literally will not necessarily render the sale void," but it is not intimated

what would be the effect if there was a total failure, as in this case, to appraise; nor is it necessary now to decide the question, for the reason that it is expressly held in that case that equity will allow the owner to redeem in such case after the expiration of the statutory period. The court in that case refers to Reid v. Heasly, 9 Dana, 324, as sustaining its position. Here, according to the weight of evidence, the appellees were all the time in the possession of the land, claiming it as their own. There was no written evidence that the land had been sold by execution, nor that the same had been appraised, nor that the owner was entitled to redeem.

It seems to us that it is but equitable and just in such case that when the purchaser undertakes to disturb the possession of the execution defendant, and to deprive him of the land by the authority of his execution purchase, the execution defendant should then have the right to redeem, else he would be deprived of his statutory right by no fault of his, but by that of the sheriff, and the purchaser would be permitted to profit by this fault, when each party could be restored to his right by allowing the owner to redeem. It is not necessary, in view of what has been said, to notice the other questions made.

The judgment is affirmed.

HOUSTON, &c v. LONG, &c.

(Filed October 26, 1893—Not to be reported.)

Mechanics' lien—Fraud—Corporations—B., who owned 998 of 1,000 shares of stock of an incorporated hotel company, contracted with the company to furnish a lot and erect a hotel thereon and convey same to the company, free of all incumbrances, for $100,000 of the capital stock, paid up, of the company, and $100,000 of its first mortgage bonds, the stock and bonds to be delivered as the work progressed. After the work commenced, and before it acquired title to the property, the hotel company executed a mortgage on it to secure said $100,000 of bonds. B. pledged $50,000 of such bonds to W. to secure a certain indebtedness, and conveyed the lot to W. Subsequently he conveyed said lot to H., the secretary of the hotel company. B. having failed before completing the hotel, H., the secretary of the company, obtained said $50,000 in bonds, and a conveyance for the lot and hotel from W., and executed his note for $25,000 for same, which has not been paid.

In this action by the contractors and material men, who built the hotel for B, and certain attaching creditors, who seek to subject the hotel and lot as the property of B., Held—In equity the property must be treated as B.'s, and the liens enforced against it, since it is evident he owned it all the time. If H. has expended anything for the benefit of the property, he should be given a lien upon it to secure him.

Wm. Lindsay and T. G. Poore for appellant.

Quigley & Quigley, W. D. Greer, Bloomfield & Bloomfield and Chas. K. Wheeler for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Pryor.

The Paducah Hotel Co. was chareted by the legislature of the State in the month of April of the year 1884. It was empowered to purchase a lot or lots in the city of Paducah upon which to erect a hotel. Its capital stock was $100,000, in shares of $100, all

of which was subscribed, as will hereafter appear, but no part of any subscriptions were ever paid. It had the power to issue bonds to pay for the lots and the improvements, and to execute a deed of trust to secure the bonds when issued, the corporation having the power to sell or pledge the bonds to raise the money necessary to complete the enterprise.

In March, 1887, this corporation, without any means whatever, either in money or property, entered into a contract with S. R. Bullock & Co., by which the latter agreed to furnish the lots in the city and erect upon them a hotel, and when completed to turn over to the hotel company the property free of all encumbrances, and in consideration of this the hotel company was to issue to Bullock & Co. $100,000 of the capital stock paid up, and $100,000 of first mortgage bonds on the hotel property, secured by deed or trust upon it, the stock and bonds to be delivered as the work progressed. The hotel was to be completed by the 1st of July, 1888.

In April, 1887, the Paducah Hotel Co. gave a mortgage to the Farmers Loan and Trust Co. of New York on all its real and personal property then owned or which might be acquired, including its lands, situated in the city of Paducah, to secure the payment of the $100,000 first mortgage bonds executed, as the deed recites, by the hotel company to S. R. Bullock & Co.

At the date of this mortgage the hotel company had no title to the property, nor did it acquire any title until April, 1888, when Bullock made a deed to the company upon the alleged consideration of $20,000, and delivered it to the appellant, Houston, with directions not to have it recorded until ordered. Houston was the secretary of the company at the time, and also the business agent of Bullock, who lived in New York. This deed was put to record some time in the year 1889.

When Bullock made the deed to the hotel company he, long prior thereto, had conveyed the property to one Walter Wood, had obtained by some means $50,000 of said bonds issued by the corporation and pledged them, as is alleged, to R. D. Wood & Co., of Philadelphia, to secure some indebtedness that is alleged was owing that firm by Bullock.

In March, 1889, the appellant, Houston, purchased these bonds of R. D. Wood & Co. for $2,500, executing to that firm his note for the money, and in March, 1889, Walter Wood to whom Bullock had conveyed the hotel lot, made a deed to the appellant, Houston, in which it is recited that it was "for a valuable consideration."

Houston, who was secretary of the hotel company, became the owner of fifty bonds for $1,000 each, and the owner of a lot for a consideration not expressed. His note was out for $2,500 for these bonds, not a cent of which has been paid.

In the fall of the year 1888 Bullock failed, leaving the hotel building unfinished, having expended a considerable sum in its erection, so as to increase the value of the lot some $25,000 or $30,000.

The appellees, or the most of them, furnished materials in the construction or erection of the building, and are asserting mechanics' liens, having taken such steps as the statute requires in order to create them. Other creditors of Bullock have obtained attachments that were levied on this lot as the property of Bullock and for his individual indebtedness.

It is claimed by the appellants, Houston and the hotel company, that by reason of the contract with Bullock the company acquired in some way the equitable title to this lot and the building upon it, and that by the purchase of the bonds and the deed

obtained from Wood, the appellant, Houston, owns the lot, or at least has a lien upon it for his bonds, insisting that as the hotel company made no contract with the mechanics, they must look to Bullock and not to the company to make payment for the materials furnished. The chancellor could see but little equity in appellant's claim.

It is apparent that the hotel company never expended one dollar for this property, and that the appellant, Houston, has never paid any part of the $2,500, and equally manifest that Bullock was the corporation, and in fact the individual owner of the lot and the building upon it.

It seems when the corporation was formed that Bullock, who owned the lot in his own right, took 995 shares of the stock, leaving $500 dollars to be taken by others. Three shares were taken by strangers to the contract, and as soon as subscribed transferred to Bullock, leaving two shares of $100 each, one of them held by the clerk of Bullock and the other held by Houston, his attorney and business agent.

Bullock, being invested with the title, agreed to build the house and deliver it to the company for the recited consideration and free of all incumbrance, and if this corporation had in fact an existence it was under no obligation to receive the property until the contract was complied with, and to recognize the equity contended for the chancellor is asked to place Bullock in a dual position by which Bullock as an individual bargains with Bullock as a corporation, and by various devices secures to Bullock as a corporation this valuable property at the expense of those whose labor and material gave what value it has; and this is fixed at a sum exceeding $30,000. There can be no equity in such a claim.

It is argued that Bullock by some unfair means obtained these bonds and pledged them as collateral to Wood & Co., but this is not the question in this case. It was Bullock's property. He owned it, and was the sole proprietor, either as an individual or corporation, and he took charge of the fifty $1,000 bonds because they belonged to him, and if invalid he is responsible and no one else.

Bullock, at the date of the contract, was no doubt a man of credit, and perhaps of large pecuniary expectations, and for this reason the appellant, Houston, who was his business manager, confided in his honesty as well as his judgment, and, to the extent of the liability of the appellant, Houston, for him, he has been made secure by the chancellor by giving him a lien for the amount of his note and interest executed to Wood, as against the attaching creditors, and of this no complaint is made by those creditors, and, therefore, the judgment in this regard must stand; and certainly the appellant, Houston, has no higher equity in this case.

The attachments of Dennis Long and others were properly sustained, and property subjected as the individual estate of Bullock. Some complaint has been made, for the first time, in this court that the claims, or some of them, asserted by the mechanics were for too great an amount. No such exception was taken below, and we are not prepared to say that the court erred in this respect. Besides, the hotel company has no interest in this controversy, and Bullock, who is the party in interest, is not appealing, and the appellant, Houston, has been given all he is entitled to.

Judgment affirmed.

L. & N. R. R. CO. v. BATES.

(Filed November 25, 1893—Not to be reported.)

Location of boundary of right of way—Verdict sustained by evidence—The only question in the case was the location of the boundaries of appellant's right of way through appellee's land, and the evidence being conflicting the verdict must be sustained.

Winslow & Winslow for appellant.

J. A. Donaldson and Gaunt & Downs for appellee.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Pryor.

This was an action of trespass for a wrongful entry upon the close of the appellee, and involves the boundary of the right of way condemned by the appellant or its vendor for the construction of its railway over appellee's land.

It became necessary for the appellant to elevate its road at its approach to the Kentucky river so as to increase the height of its bridge across that stream, and to do this a borrow pit was dug, from which large quantities of earth was removed in order to make a fill. It is claimed by the appellee that this borrow pit was outside of the right of way and within his enclosure.

It is conceded, and if not the fact clealry appears from the record, that this right of way was condemned and the damages awarded paid by the appellant, or those from whom it derived title, to the appellee.

The jury was told that if the borrow pit was outside of the right of way, and on appellee's land, he was entitled to recover. This was the only issue involved, and the jury, finding for the plaintiff, returned a verdict of $100.

The railroad company at the point designated, and for some distance west of it, had condemned and was entitled to 200 feet of appellee's land. This is not controverted, and the contention is as to the real boundary of this right of way. The railroad company insists that its roadbed is located in the center of the right of way, which, if true, would entitle the company to 100 feet on each side from the center of the railway track, and if this is so the appellant (the company) is not guilty of the trespass.

It is argued, and such would be the logical result in the absence of any contrary testimony, that the railway track is in the center of the right of way. Masterson and O'Neal, both of whom were present when the land was condemned, one a commissioner and the other a surveyor, state that there was but one line of stakes set when the commissioner condemned the land; and that the condemnation was 100 feet on each side of the stakes, and they were in the center of the roadway. Judge Major, who was counsel for Bates on his appeal to the circuit court, states that the claim for damages, as he recollects, was for 100 feet of land on each side of the roadway, and Masterson and O'Neal make a like statement, and they both were examined as witnesses. This is in substance the testimony for the defense.

The appellee, Bates, swears that there were three rows of stakes, and the fill or bed of the road was located on the northern side of the center row of stakes, and the dirt to make the roadbed taken from the southern side of the fill, and that he built his fence

on the northern line of the right of way, where it has been for twenty years, or since the land was condemned.

Gullion says he saw a row of stakes about 200 feet south of where Bates built his fence, and there is evidence conducing to show that in the original construction of the road the company took dirt on the south side for a greater distance than 100 feet from the center of the track.

The testimony is, therefore, conflicting, and the fact of Bates' fence being built and allowed to stand for so many years, with the borrow pit in the original construction extending south further than the distance of 100 feet from the center of the track, strengthens the testimony of Bates as to the true location of this boundary. While the act of building the fence would have been regarded as merely permissive, and the statute of limitation would constitute no defense if within the right of way, still that fact is persuasive that the fill is not in the center of the way, and while the preponderance of the evidence may be with the defendant, the verdict is not so flagrantly against the eivdence as to authorize this court to interfere. The record evidence as to the survey and location of these lines, if any ever existed, is not before us, and their location depends upon the recollection of what transpired more than twenty years before this trial was had.

The old fence of Bates, which is 38 feet from the center of the track, must be regarded as the northern boundary of the right of way, and from that line a distance of 200 feet south must be held to constitute the right of way for the distance of 2,100 feet on plaintiff's land. Other parts of the land was condemned for a longer distance on plaintiff's land, but for a less distance on each side of the roadbed, but this is not involved in the present controversy.

The judgment below is affirmed.

BIGGERSTAFF'S EX'ORS, &c. v. BIGGERSTAFF'S ADM'R.

(Filed November 28, 1893.)

1. Antenuptial contract construed—A wife by marriage acquires no marital rights whatever in the property of her husband where the parties have made an antenuptial contract which provided that each party was to hold and enjoy his or her own property free from claims of the other, and that "each party is to have, enjoy and use their own property * * * free from the interference of the other, and to have the perfect right to sell, convey or otherwise dispose of the same as though no marriage had taken place."

2. Same—Will revoked by marriage—Appeal from order of probate—A widow, who by antenuptial contract deprived herself of all marital rights in her husband's estate has no right to appeal from an order of the county court probating a will made by her husband prior to his marriage to her. Although the will was revoked by the marriage, the wife has no interest in the estate of her husband, and, therefore, no right of appeal from such order, even though it is erroneous.

Porter & McQuown and A. W. Scott for appellants.

Sandidge & Sandidge and John G. Craddock for appellee.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Lewis.

April 14, 1860, Hiram Biggerstaff made a will devising to his wife, Susanah, for life, all his property, and to be equally divided at her death between his children, except $500 in money given to each of two grandchildren, America and Martha T. McComas.

In 1867, being then a widower, he married Melinda McComas, with whom he lived until his death in 1889. March 4, 1889, the paper dated April 14, 1860, was by order of the county court admitted to record as his last will; but upon appeal by Melinda Biggerstaff, widow, and America McComas and Martha Cloyd, formerly Martha McComas, his two grandchildren, judgment of the circuit court was rendered, reversing that order and directing the county court to reject the paper as a will.

However, before the case was submitted for final judgment of the circuit court, America McComas and Martha Cloyd caused an order made dismissing, as to each of them, the appeal from the county court order, thus leaving as only appellant David McComas, administrator of Melinda Biggerstaff, who had in the meantime died.

According to a statutory provision the marriage of Hiram Biggerstaff in 1867 operated as a revocation of his will made in 1860; and America McComas and Martha Cloyd, being his heirs at law, had a right to reversal of the erroneous order of the county court admitting the paper to record as his true last will; but if Melinda Biggerstaff had no interest in the estate of her deceased husband, she was not at all affected by the county court order, nor could she while living, nor her administrator after her death, prosecute an appeal therefrom; and such being the case, the motion to dismiss the appeal, made after America McComas and Martha Cloyd ceased to be parties, ought to have been sustained.

Whether she acquired or had, in virtue of her marriage to Hiram Biggerstaff, any interest in the estate at his death depends upon proper construction and meaning of the following contract, which appears to have been duly executed and recorded; "Whereas, Hiram Biggerstaff and Melinda McComas contemplate entering into the holy bonds of matrimony, and for the purpose of living forever in harmony, we do hereby make the following marriage contract, to wit: It is expressly understood and agreed that each party, that is to say, Hiram Biggerstaff is to hold what property he now has free from the claims of his contemplated wife, now Melinda McComas, and the said Melinda McComas is to have entire and complete control of all property that she now holds in her own right free from the claims of said Hiram, and is allowed the privilege of using her separate property in any way she may see fit and proper. It is expressly understood that each party to this contract is to have, enjoy and use their own property, which they now own, free from the interference of the other, and to have the perfect right to sell, convey or otherwise dispose of the same as though no marriage had taken place.

"HIRAM BIGGERSTAFF,
"MELINDA McCOMAS.

"November 27, 1867."

According to the language of that contract it is plain the parties intended the property of each should be free of any marital right or claim of the other while they lived together as husband and wife; and also that neither should, at death of the other, be entitled to allotment or distribution of his or her estate as either curtesy or dower, for exclusion of claim or right on account of the marriage is not, in terms or meaning of the contract, limited to their lives, but was manifestly intended to continue and apply

after death. Indeed the wife's claim to her husband's property is generally contingent upon his first dying.

Though the relative value of their property at time of the marriage does not appear, it is reasonable to assume, in absence of evidence to contrary, she entered into the contract freely and intelligently, and that complete control of her own property, free of his claims, retained by her under the contract was a fair consideration for her agreeing he should hold his property free from her claims, and "as though no marriage had taken place."

As we construe the contract, Melinda Biggerstaff had no interest whatever in the estate of her deceased husband, and it was, consequently, error to overrule the motion to dismiss the appeal from the county court order.

Wherefore, the judgment of the circuit court is reversed and cause remanded, with directions to sustain that motion.

VOLZ v. C. & O. RY. CO.

(Filed December 9, 1893.)

A master is not liable to a servant for injuries sustained by him through the gross neglect of a fellow servant where both servants are of the same rank and engaged in the same field of labor.

L. J. Crawford for appellant.

J. C. Wright and Geo. Washington for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was a member of a crew of workmen engaged in driving piles on the road of the appellee. Through the gross negligence of a fellow workman his arm was crushed and cut off while "ringing" a split pile by the premature fall of a hammer under the control of the fellow workman.

The foreman in charge of the crew was in nowise at fault or negligent upon the occasion of the accident.

Upon the conclusion of the testimony offered by the appellant, showing the state of case indicated, the court peremtorily instructed the jury to find for the appellee, and the question involved on this appeal is the correctness of that ruling. In other words, the question is whether the employer is to be held liable to his employe for an injury caused by the gross negligence of a fellow workman of the same grade or rank and engaged in the same field of labor with the injured employe.

The appellant cites a number of cases of this and the Superior Court in support of his contention, and while we think the rule is clearly settled against him, we will review some of the authorities on the subject.

In all cases the principle upon which the employer is held liable is said to be that of agency. What he does through another he does himself. As to strangers, therefore, railroad companies are held liable for the negligence of their employes, whatever may be the grade of the negligence. When, however, a workman enters upon this admittedly dangerous service he must be held to assume the ordinary risk incident to the service. This is true of

him whether he be pile driver, brakeman or conductor. He is presumed to know the perils of the service, and he knows that there will be a want of ordinary care at times, by reason of which he may be injured. In other words, that there will occur, in the nature of things, "common blunders and ordinary negligence" on the part of those among whom he is associated. These contingencies he risks. But recurring directly to the question at issue, what risks do fellow servants, working as co-equals in the same grade of service, take with respect to their negligent acts affecting each other?

Amidst all the confusion and diversity of opinion prevailing in the different courts of the States on the general subject of fellow servants, we believe there is but one answer given to this question. The differences obtaining are with respect to the rules determining who are "fellow servants." On all hands it is said that such servants, when of the same grade and engaged in a common field of labor, are not the agents of the company with respect to each other.

Beginning with the first Kentucky case, Louisville & Nashville R. R. Co. v. Collins, 2 Duvall, 114, it is said: "Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental but independent service, no one of them, as between themselves and his co-equals, is the corporation's agent, and, therefore, it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employes would be its agent as to entire strangers to it."

That case seems directly in point and apparently precludes the right of appellant to recover in this case.

In the case of the Louisville & Nashville R. R Co. v. Robinson, 4 Bush, 508, and which is relied on by the appellant, the question was whether the company was liable to its brakeman for damages resulting to him by reason of the gross negligence of its engineer, and it was held that although the engineer and the brakeman were in the same line of service, and for that reason must be presumed to have mutually undertaken to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert, yet "this implied understanding between the company and its employes in the same class of service does not, as adjudged in the case of Collins (2 Duvall, 114), exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another of them."

This was upon the principle decided in the Collins case that it was the duty of the corporation to provide, among other things, a competent and faithful engineer, and those who were subordinate to him could not reasonably be presumed to expect or to hazard his gross negligence.

The rule in nearly all the States for determining who are fellow servants is based on the character of the act being performed by the neglectful employe, and is not determined from his grade or rank or that of the injured servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employe, whatever may be his grade or rank, or by whatever name he may be designated, is not a servant but an agent, but as to all other acts they are fellow servants. These contract duties are said to be to furnish such machinery and appliances and keep them in repair; to select and retain sufficient and competent servants, and to establish proper rules and regu-

lations for the safety of employes, such as keeping its roadbed clear of obstructions as far as practicable, etc.

This rule was never adopted in Kentucky, or rather this limitation on the responsibility of the principal was never admitted here, but from the start was extended so as to apply the rules of law applicable to principal and agent to a system based on the relation of the offending employe to the injured one—that is, his grade of service in point of being superior in power or authority to the other. And, still further extending the old rule, our courts said that employes working in a distinct and independent department, although in the same line of service as engineers operating different trains, were co-agents and not fellow servants.

So, in Louisville & Nashville R. R. Co. v. Filburn's Adm'r, 6 Bush, 574, a case relied on by the appellant, the employer was held liable for the death of the engineer, caused by the gross negligence of a "section boss," whose duty it was to keep the road free from obstructions.

While this case was put within the rule annouced in the Collins case of liability for the gross negligence of co-agents in a distinct line of service, it may be observed that it easily falls within even the conceded rule by which it is made the "contract duty" of the company to furnish and keep its appliances, its road and bridges, etc., in repair, and enforce such regulations as will afford reasonable protection to its employes.

In the case of the Louisville, Cincinnati & Lexington R. R. Co. v. Caven's Adm'r, 9 Bush, 559, the question was as to the liability of the company for damages resulting in the death of an engineer on one of its trains by reason of the gross and willful neglect of a conductor on another of its trains, and it was held that the company was liable, even upon the assumption, though such an assumpion was not held tenable, that there was no distinction between the offices of conductor and engineer, and that they were in the same line of service. They were working in distinct and separate departments and were co-agents. But it was there said that "where a number of persons contract to perform service for another, the employes not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. * * * Public policy requires that when the laborers are co-equals and engaged in laboring in the same field, or on the same railroad train, or in any other employment, that each should exercise proper care in the conduct of the business and look to it that his co-laborer does the same thing, and when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution."

The case of the Louisville & Nashville R. R. Co. v. Brooks' Adm'x, 83 Ky., 129, relied on by the appellant, was where a brakeman lost his life by reason of the gross negligence a conductor on the same train. It was held that the engineer and brakeman were not co-equals, and the employer was held liable on that principle.

In the case of the same company against Moore, 83 Ky., 675, the question was as to the liability of the road for the gross negligence of a fireman, acting temporarily as an engineer, causing the death of a brakeman on the same train. It was held that the rule of principal and agent applied and the company was held liable. In the course of the argument the court said: "Where a number

of persons enter a common employment for another, all being upon a common footing, and none superior or subordinate to the other, and one receives an injury by the neglect of another in the discharge of the undertaken duty, they are regarded as agents of each other, and no recovery can be had against the employer."

In Casey's Adm'r v. Louisville & Nashville R. R. Co., 84 Ky., 79, the injured employe was a common laborer as well as the servant injuring him, and the court refused to apply the principle of agency, saying that "the risk is taken by these parties in the same field of labor and in the same grade of employment as to all injuries that may happen by the neglect of their co-laborers."

In the case of Fort Hill Stone Co. v. Orm's Adm'r, 86 Ky., 183, the deceased, Orm, and the person or persons to whom his death was contributable were co-equals and engaged in a common employment, it was held that they must "be regarded as the agents of each other, and no recovery can be had against the employer."

In the last two cases cited the liability of the companies was sought to be fixed on the ground of the gross and willful negligence of the servants, and the relief was denied not because the acts of the offending servants did not constitute gross and willful negligence, but because, as co-equals in this common employment, they are regarded as the agents of each other and not of their employers.

The abstracts of the cases of Wagner v. Wetmore, 12 Ky. Law Rep., 638, and of Greenwood v. McHenry Coal Co., 14 Ky. Law Rep., 336, decided by the Superior Court, and cited with confidence by the appellant, seem to support his contention; but without the opinions before us we can not undertake to review them, and it is more than probable that they conform to the principles of the numerous cases herein cited.

The judgment is affirmed.

McKEE, &c. v. HILPP.

(Filed December 14, 1893—Not to be reported.)

Judicial sales—Liens—Priorities—The debtor's property was sold to satisfy debts due P. and S., P.'s debt having priority over S.'s. The debtor became the purchaser at the sale and executed three bonds for the purchase price, the first two of which were about sufficient to satisfy P.'s debt. After the sale B., by assignment, became the owner of P.'s claim. Upon some assumption that B. held in trust for the debtor, the chancellor, in disregard of B.'s rights, ordered the whole property sold to pay the last of the three bonds and for the benefit of S. alone, and directed that a deed for the property be made to the purchaser at such sale "free of lien." Held—This was erroneous as to B., who had not of record relinquished his rights under the first two bonds. The property should have been sold to satisfy all the bonds.

Stone & Sudduth and W. H. Holt for appellants.

H. S. Barker for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

During the course of the litigation to sell the property of the appellant, Samuel McKee, for debts owing by him to Stein's

guardian and to one Parr, J. H. Brainerd, of whose estate the appellant, Gideon R. Brainerd, is the administrator, became the owner of the Parr debt by assignment and transfer from him. At that time the property had been sold under a decretal sale to the appellant, McKee, who had executed, with appellee Kohn as his surety, three purchase money bonds in payment therefor, each for $1,910.16⅔. Parr's debt had preference over that of Stein, and the first two bonds would about satisfy his debt, leaving the last bond with which to satisfy the Stein debt.

Brainerd was the brother-in-law of McKee, and it seems to have been assumed that he simply furnished the money to McKee with which to pay off the first bonds, as they were subsequently treated as paid by the court, and, notwithstanding the fact that Brainerd's ownership of the Parr debt and his equity in the proceeds of the first two bonds were shown by the record, the chancellor, in disregard of his rights under Parr, in whose shoes he stood, rendered a judgment for the sale of the whole property to satisfy only the last bond, and that for the benefit alone of the Stein debt. At this sale Hilpp became the purchaser of the property, worth from $8,000 to $10,000, at the price of the debt, interest and costs coming to Stein, to-wit, $1,995, and the purchase was thus made, it is claimed, in pursuance of an arrangement that the purchaser was to hold in trust for McKee. The circumstances very strongly support this contention, but we deem it unnecessary to determine that question attempted to be raised by the appellant, Samuel McKee, or the issues sought to be raised by his wife.

In a contest between McKee alone and Hilpp this sale was confirmed, it being held by the chancellor, and by this court on McKee's appeal from the judgment below that no appraisement of the property was required to be made prior to the sale. This was the principal, if not the only, question determined. (McKee v. Stein's Gd'n, &c., 91 Ky., 240.

It is not shown that Brainerd, in any of these proceedings, did anything to preclude the assertion of his rights. He stood in the record as one entitled to the proceeds of the first two sale bonds, which were wholly uncollected and which were valid liens on the property. He has now only these liens to look to, and we think the judgment of the chancellor directing the commissioners of his court to convey the property in contest to Hilpp "free of lien" is erroneous and prejudicial to the appellant, Brainerd. Prior to such a conveyance, the chancellor having all the parties before him, should hear and determine the equities of all, and not leave them to the institution of dependent suits. (Stemmons v. Duncan, 9 B. M., 351.

Hilpp, as well as all the parties to the action, had notice of Brainerd's equities, and it was the duty of the chancellor to have sold the property to pay not the last bond alone, but all of them. Upon the face of the record Hilpp could acquire only a lien on the property for the money he paid—he must be made whole, but Brainerd's equities must also be protected.

Judgment reversed, with directions to let the petition, etc., of Brainerd be filed, to the end that the equities of the parties may be determined.

McCLURE, &c. v. ALEXANDER.

(Filed January 4, 1894—Not to be reported.)

Right of action for death resulting from careless use of fire arms—Constitutional law—Section 6 of chapter 1 of the General Statutes, giving a right of action to the widow or minor child of a person killed by the careless, wanton or malicious use of fire-arms, etc., was not repealed by section 241 of the Constitution, which provides in substance that whenever the death of a person shall result from an injury inflicted by negligence or wrongful act of another, then damages may be recovered, until otherwise provided by law, by an action prosecuted by the personal representative. This section 241 was intended to harmonize the statute concerning the right of action for death from negligence, and the words "wrongful act" therein used denote acts from which negligence arises.

S. D. Rouse, J. O'Hara, J. W. Bryan and H. C. White for appellants.

W. W. Dickerson and James T. Willis for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, James B. Alexander, in December, 1891, shot and killed W. H. McClure.

The deceased left surviving him a widow and an infant daughter, and the two instituted the present action against Alexander to recover damages for the wanton and malicious taking of the life of the husband and father.

The action is based on the provisions of section 6 of chapter 1 of the General Statutes, as follows: "The widow and minor child or children (or either or any of them) of a person killed by the careless, wanton or malicious use of firearms, or by any weapon, etc., not in self-defense, may have an action against the person or persons who committed the killing and all others aiding or promoting the killing," etc.

On the trial the action was dismissed on the ground that the cause of action was alone in the personal representative of the decedent by reason of section 241 of the State Constitution. That section provides: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same. Until otherwise provided by the law, the action to recover such damages shall in all cases be presented by the personal representative of the deceased person. The general assembly may provide by law how the recovery shall go, and to whom belong, and until such provision is made shall form part of the personal estate of the deceased."

It is contended by counsel for the appellants (the widow and children) that this provision of the Constitution does not refer to or affect section 6 of chapter 1 of the General Statutes, but was intended to apply only to sections 1 and 3 of chapter 57. Section 1 of that chapter authorizes an action to be brought by the personal representative for the loss of life of one not in the employ of a railroad company, caused by the negligence of its employes, etc., and the third section authorizes an action by the widow, heir or personal representative where the life of one was lost by the willful neglect of any person or corporation

It is manifest the framers of this section of the Constitution, when adopting it, were considering alone the right of recovery where death was the result of negligence, and to harmonize the statute on this subject, as well as to change the construction this court had placed upon the sections in chapter 57 relating to negligence, section 241 was inserted.

The difficulty in construing this section of the Constitution and in ascertaining the meaning of its framers arises from the use of the words wrongful act. Whenever death results from an injury "inflicted by negligence or wrongful act" a recovery may be had. It is argued that the intentional killing by shooting one with a pistol is a wrongful act, and, therefore, by this constitutional provision the personal representative can alone recover, and it must be conceded, if such is the meaning the framers of the Constitution attached to those words, the widow and child had no cause of action, the killing occurring after the adoption of the Constitution and before any subsequent legislation was had by which the right of the widow and child to sue had been restored.

There is no special reference to this enactment or to any other in this section of the Constitution, but when considering the object the convention had in view, as already suggested, viz., to simplify the statute on the subject of negligence and to harmonize the decisions under it, we have but little difficulty in arriving at the conclusion that the framers of that section never contemplated the repeal of section 6 of chapter 1, by which the widow and infant might sue where death resulted from the malicious or careless use of deadly weapons. The words wrongful act were intended to denote any and all kinds of acts from which negligence could arise, and, while the word negligence would embrace all degrees of neglect, the framers of the Constitution could have had no such object in view as the repeal of the act being considered.

This construction of the section is also sustained by subsequent legislation on the same subject in a legislature composed of many members, who were also members of the convention that framed the Constitution.

The personal representative could not have maintained the action because the statute gave to the widow and infant children the right to reparation for the injury committed where death was the result of the use of deadly weapons, and in no other instance could she maintain an action, except for death caused by willful neglect, and in this latter class of cases the right to bring the action was taken from her by section 241 of the Constitution.

The action now, by legislation subsequent to the adoption of the Constitution, can be maintained by the personal representative, where the death is the result of an injury inflicted by negligence or wrongful act; and where the act is willful or the negligence is gross, punitive damages may be awarded, the amount of recovery to pass to the parents and children in the manner provided by the act. The exact language of the Constitution is used in this legislature, by which it is provided the action shall be prosecuted by the personal representative. This legislation is found in chapter 252, section 6 of the laws enacted in the year 1891.

In section 4 of the same chapter the provision of the General Statutes authorizing the widow and infant to sue where the intestate loses his life by the malicious or careless use of a deadly weapon is inserted, showing clearly that the words wrongful act were not intended to give the right of action to the personal rep-

resentative for such a wrong as mentioned in section 6 of chapter 1, General Statutes.

It may be argued that this subsequent legislation, although giving to the widow and child the right to sue as formerly, where life has been taken in a particular mode, indicates that the legislature, in construing this provision of the Constitution, regarded the right of action in the wife or widow as gone, and, therefore, re-enacted it. We can not so adjudge, because the legislature, in the section of the act authorizing the personal representative alone to sue, uses the exact language of the Constitution, and in the same chapter gives to the widow the right of action as found in the General Statutes. They intended, no doubt, to embrace the entire law in reference to such subjects in the one chapter, and, therefore, re-enacted the act as found in section 6 of chapter 1. If not, you have the legislature attaching to the same language one meaning when used in the Constitution, and another and different meaning when used in the statute. It may be said that, under this construction, if one is killed by the wrongful use of a deadly weapon, the party inflicting the injury is not liable to a civil action by the administrator, and this necessarily follows, for, if the language of the section in the Constitution and in the statute authorizes the administrator or personal representative to sue, then you produce the same confusion that existed prior to the adoption of the Constitution as to whom the right of action belonged and the mode of distributing the recovery. If the personal representative can sue for the death caused by a pistol or slung-shot, or where the intestate is killed in a duel, why single out these particular wrongs and give to the widow and children the right to bring the action? Such legislation excludes the personal representative from bringing either action, as there is no provision authorizing him to sue if there is no widow or children, and to say that either can sue for this particular wrong, because of the words "or wrongful act" used in the Constitution and statute, is but a re-enactment of that which produced the meaning the framers of the Constitution attempted to remedy. The court below erred in dismissing the action.

The judgment is, therefore, reversed and remanded for proceedings consistent with this opinion.

L. & N. R. R. CO. v. WHITLEY COUNTY COURT.

(Filed January 4, 1894.)

1. A county may maintain an action to recover damages for the injury or destruction of one of its highways.

2 Same—Verdict not excessive—Where a railroad is so constructed as to injure and destroy a part of a county road, and to cut off a large section of the county from traveling over it to the county seat, and it would cost the county more than $10,000 to repair the damage and restore the road, a verdict for $10,000 damages is not excessive.

3. Railroads—Eminent domain—Highways—An intent on the part of the legislature to authorize a railroad to take land for its right of way which has already been dedicated to public use as a highway will not be presumed unless there is a clear expression of such intent.

Authority to construct a railroad between certain termini and to build branch roads does not authorize the railroad to use or destroy, in constructing its road, an existing county highway; and the railroad is liable in damages for an injury done such highway.

Hill & Denham, J. W. Alcorn and Wm. Lindsay for appellant.

J. H. Tinsley and K. D. Perkins for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

In building its road through Whitley county the appellant cut through the outer base of a mountain, and thus destroyed the county road running along the mountain side, above and parallel to the railroad. The support below the county road being thus removed, landslides occurred, and the road was rendered impassable and useless.

The county recovered damages to the extent of $10,000, and from that judgment this appeal is prosecuted. It is contended by the appellant that by virtue of its charter it was authorized to construct a branch of its road to the Mississippi river, or any other branch it might desire, and having so acquired this right of eminent domain, it did not "devolve upon the company to construct a wall or erect any defense for the protection of the adjoining property from the consequences resulting from a proper and reasonable use of the way for the railroad, although such consequences would be injurious, and inevitably so to the grantor;" that the county court is but the Commonwealth, and by reason of the grant to construct the road they (the county and the Commonwealth) must be held to have consented to the consequences resulting from the proper use of the right of way; and further, that the authority to seize and occupy the county road longitudinally was intended to be given by the charter providing that other branches might be built, and, therefore, as the right to do this embraces the right to destroy, no damages are recoverable for such destruction.

We can not concur in these views. Upon the maxim invoked by the appellant (salus reipublicæ lex suprema est) we might concede the power of the legislature to have granted to the appellant right to take land already appropriated to another public use, and say, as contended, that "the grant of land for one public use must yield to that of another more urgent;" but, as said in the case relied on by appellants, Inhabitants of Springfield v. Connecticut River Railroad Co., 4 Cushing, 72, "when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words or by necessary implication," and the court further said: "As no company or persons have authority to lay out a railroad, except so far as such power is conferred by the legislature, the court are of opinion that by a grant of power by a legislative act to lay out a railroad between certain termini, where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, no authority is given prima facie to lay such railroad on and long an existing public highway longitudinally, or, in other words, to take the roadbed of such highways the track of their railroad."

The broad terms of the appellant's charter in authorizing the construction of "other branch roads," instead of enlarging the power to appropriate public lands or easements, as contended by counsel, are restrictions on the power of the company, or at least are so general as not to indicate the right of such special appropriation.

The damages complained of are such as could have been provided against by the erection of stay walls on the right of way

of the appellant at the beginning of the work, the cost of which would then have been inconsiderable.

The proof shows that a large section of the county is cut off from the county seat by reason of the destruction of this road, and that whatever remedy may be found with which to relieve the people of that section, the cost will be largely more than the amount of the verdict. It is not, therefore, excessive when considered as the total damages recoverable for the construction complained of.

The county could have done nothing to prevent the injury, and its right is undoubted to maintain an action for injury to its public roads. (Lawrence County v. Chattaroi R. R. Co., 81 Ky., 225.)

Judgment affirmed.

HANDLY v. COMMONWEALTH.

(Filed January 18, 1894—Not to be reported.)

1. Homicide—Instruction as to involuntary manslaughter—The instrument that appellant used to commit the homicide, for which he was indicted, was a deadly weapon, and its use indicated a purpose on his part to kill; and the instruction concerning involuntary manslaughter was more favorable than he was entitled to.

2. Same—The fact that appellant seized such weapon in a transport of passion does not excuse the homicide, although it may reduce the offense from murder to manslaughter.

3. Improper argument by Commonwealth's attorney—Prejudicial error—While certain statements made by the attorney for the Commonwealth, in his argument to the jury, were improper because not warranted by the evidence, the appellant was not prejudiced thereby, the court having admonished the jury that such statements could not be considered as evidence in the case.

Gore & Friend and I. W. Twyman for appellant.

W. J. Hendrick for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was convicted of manslaughter under an indictment charging him with the murder of Thomas Patton. There is much testimony in the case sustaining his plea of self-defense, and at the same time testimony for the State the jury seemed to have adopted as the correct reason of the altercation between the parties, making a clear case of manslaughter.

There is a question raised in regard to the manner of selecting the jury that if available here was not made one of the grounds for a new trial in the court below. The instruction in regard to involuntary manslaughter was as favorable for the defense as he was entitled, and in fact if it had been refused this court would not have reversed on that ground, as the weapon used indicated a purpose to kill, and was as deadly as a ball fired from a gun or pistol.

Any reasonable man should have known that a blow on the head with this heavy piece of iron would fracture the skull and produce death, and the fact that he seized the weapon in the transport of passion is no excuse except to reduce the offense from murder to manslaughter.

While the attorney for the State in the course of his argument made statements not warranted by the testimony, the jury was

told that such statements should not be regarded by them when considering the case. and we are satisfied the jury trying this man had too much intelligence to base a conviction upon statements made by the attorney and not supported by the evidence, and particularly when the court had said to them that these statements were not evidence.

Judgment affirmed.

HOPPER v. HARROD.

(Filed January 20, 1894—Not to be reported.)

1. Construction of will—Life estate—Right of possession—A testator devised 100 acres of land to his widow for life and directed his son B. to take possession of such land and take care of his mother or cause it to be done, and at her death the land to be his. Held—The son, B., had no interest in the land during the life of the widow, and even if he had a right of possession as trustee for the widow the right was terminated by his death and did not continue in his widow or child.

2. Same—After the death of the son, B., a parol gift or division of the land between testator's widow and the widow of B. was void and not binding on the parties.

Geo. C. Drane for appellant.

Ira Julian for appellee.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Pryor.

John H. Harrod, of Franklin county, died, leaving the following devise relating to his realty:

"It is my will at my death for Enoch, my son, to have fifty acres of land, where he now lives on, run to the best advantage, if not run off before; and William, my son, to have fifty acres on the other side, run to the best advantage, if not run off before my death; and Sarah, my wife, to have the other 100 acres, including the horses, stables, homestead, etc., so long as she remains my widow; Barnet, my son, to take possession of the 100 acres of land, and to take care of his mother, or cause it to be done, and at her death the 100 acres to be his."

He also directs a sale of forty acres of other lands by his son Barnet and his mother for the needs of his wife, with the right to use the principal or interest for that purpose.

The testator had three sons, Enoch, William and Barnet. By the will Enoch and William got fifty acres of land each, and Barnet the 100 acres after the death of his mother. These sons were all grown and with families, and the devise to Barnet of the remainder interest (his mother being advanced in years) was equivalent to the devise made to the other sons.

Barnet continued to live with his mother after his father's death with his wife and one son until his (Barnets') death, that took place some time prior to this litigation.

When Barnet died his widow left the home and went to live with her own relations. After living with them a year or two she returned to the home of Mrs. Harrod, her husband's mother, but again left, and after this manner: She left because she said she had received a kuklux notice to leave. It is not pretended

the old lady, her mother-in-law, caused this notice to be given, but, on the contrary, she seems to have been desirous of having her son's widow remain with her.

It seems that while the son's widow and her son were living with the aged widow of the testator there was a survey being made to establish certain boundary lines between lands other than the land devised, and while the surveyor was present he was directed to divide the 100 acres devised to the widow so as to leave fifty acres to the widow of the testator and fifty acres to the widow and son of Barnet. Who directed this to be done does not distinctly appear, but that it was done, and that the widow of Barnet and her son took possession of their fifty acres is evident, and we are inclined to think it was by the appellee's consent, although the testimony conflicts on the subject. The widow of the testator brought this action to recover the fifty acres, and the chancellor below gave it to her.

There was no writing between the parties, if the appellee even consented to the division, and the parol gift was void unless the will of the testator gave to Barnet and his children some other than a remainder interest. By the will Barnet was to take possession and have the old lady cared for, and while he assumed this trust we concur with the court below that he obtained no interest in the land during the life of his mother; but if he is to be regarded as a trustee to hold for his mother, when he died the trust terminated in so far as he was concerned, and his widow and her son, or her second husband, had no right to the possession, use or profits of any part of this land until the death of the testator's widow.

It is plain, we think, the chancellor decided properly when giving to the widow the possession of the entire devise made to her by the will of her husband.

Judgment affirmed.

BUCHANNON, &c. v. COMMONWEALTH.

(Filed February 24, 1894.)

1. Criminal law—Statutes—The act of April 10, 1893, entitled "An act relating to crimes and punishments," was intended to be a complete system of statutory law relating to crimes and punishments and to supersede or repeal all statutes then existing on that subject.

2. Same—If two or more persons unlawfully confederate or band themselves together and go forth armed or disguised for the purpose of intimidating or alarming any persons, or to do any felonious act, the only penalty that can be inflicted is imprisonment for not less than six nor more than twelve months, even though pursuant to such conspiracy they actually do alarm, assault and beat a citizen and injure his property. Subsection 12 of section 6, chapter 182 of the statutes, approved April 10, 1893, applies to the offense.

Hurst & Byrd for appellants.

W. J. Hendrick for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Lewis.

The indictment in this case charged appellants with the offense denounced in section 96, subdivision 12, chapter 182, entitled "An act relating to crimes and punishments," approved April 10, 1893, as follows: "If two or more persons shall unlawfully con-

federate or band themselves together and go forth armed or disguised for the purpose of intimidating or alarming any person, or to do any felonious act, they shall each, on conviction, be imprisoned in the penitentiary not less than six nor more than twelve months."

But it is stated in the indictment not only they were guilty of the particular offense described in that section, but that in pursuance of the confederating and banding together they did alarm, disturb and beat one Stephen Combs and injure his property, and the lower court instructed the jury they might, upon the latter hypothesis, fix the punishment at confinement in the penitentiary not less than twelve nor more than eighteen months.

The indictment seems to have been drawn and the jury instructed upon the theory that the section quoted was intended to be simply an amendment to, and not a substitute for, the entire act, approved April 11, 1873, known as the "kuklux law." Section 2 of that act makes it a distinct offense for two or more persons to confederate or band themselves together for the purpose of intimidating, alarming or disturbing any person or persons, or to do any felonious act, and fixes the punishment at confinement in the penitentiary not less than six nor more than twelve months, or, in discretion of the jury, a fine of not less than $100 nor more than $500 and imprisonment in the county jail not less than three nor more than six months, while section 3 makes it an offense for two or more persons to unlawfully confederate or band together and go forth armed or disguised, though punishment is the same as prescribed in section 2. But section 4 provides that if any injury results to any person or property by reason of the unlawful acts denounced in the preceding sections, those engaged shall, on conviction, be confined in the penitentiary not less than twelve nor more than eighteen months.

As will be observed, in order to make a complete offense under section 96 of the act of April 10, 1893, it is essential not only that two or more persons unlawfully confederate or band themselves together, as provided in section 2 of the act of April 11, 1873, but that they go forth armed or disguised for the purpose of intimidating or alarming persons, or to do a felonious act, as denounced by section 3 of that act. But it is manifest both sections were intended to be superseded or repealed by section 96 of the act of 1893. The main question, however, is whether that section has operated or was intended to repeal section 4 of the act of 1873. For, if so, then it was an error of court affecting substantial rights of appellants to instruct the jury that twelve months was the minimum and eighteen as maximum punishment in case injury had resulted to the person and property of Combs.

The act of April 10, 1893, was, it seems to us, intended to be a complete sytem of statutory law relating to crimes and punishments, and, as a consequence, to supersede or repeal all existing statutes on that subject; for under the comprehensive title of crimes and punishments every offense mentioned in chapter 29, General Statutes, having the same title, as well as all others provided against by special acts, are considered and treated of in that act, which is formally divided into articles relating to different classes of crimes and subdivisions of each class.

And as section 96, embracing only provisions of sections 2 and 3 of the act of 1873, is all on the subject the legislature deemed necessary to engraft in the act of 1893, the conclusion is entirely reasonable that it was not intended that section 4, or any other part of the act of 1873, should be longer in force. This interpreta-

tion does not at all leave a person injured by reason of such unlawful acts without redress, or the person or persons who do the injury from punishment.

As, therefore, section 4 of the act of 1873 was not in force when the alleged offense was committed, it was error to instruct the jury to fix any other kind or degree of punishment than that prescribed in section 96, act of April 10, 1893, and the judgment is reversed for a new trial consistent with this opinion.

NORTHUP, &c. v. STANDIFER.

(Filed September 26, 1893—Not to be reported.)

Wallace & Lackey for appellants.

Stewart & Stewart for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Chief Justice Bennett.

The contract sued on in this case is a fac simile with that reported in Northup v. Ward, 12 Ky. Law Rep., 735. It was decided in that case that there was no consideration for the appellee's promise to convey one-half interest in his mineral lands. The fact that the appellants did aid in constructing a railroad from a point to a point mentioned in the contract does not make a legal consideration, for the construction of said road was not the one mentioned in the contract.

The judgment is affirmed.

COV. & CIN. ELEVATED R. R. BRIDGE CO. v. COMMONWEALTH.

(Filed October 3, 1893—Not to be reported.)

W. H. Jackson for appellant.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The opinion delivered in this case at a former hearing determined the constitutionality of the act of the legislature reducing the tolls on appellee's bridge. This is the only question involved in the present appeal and having heretofore adjudged the act constitutional, we perceive no reason for disturbing the judgment below, and the same is now affirmed. (Covington & Cincinnati Bridge Co. v. Commonwealth, 14 Ky. Law Rep., 836.)

McELROY, &c. v. RUSSELL & AVRITT.

(Filed November 25, 1893—Not to be reported.)

W. C. McChord and J. W. S. Clements for appellants.

W. E. Russell and Samuel Avritt for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor.

This appeal brings up the identical question that was passed on by both the Superior Court and this court (11 Ky. Law Rep., 888). While the services of distinguished counsel deserve full compensation, the contract in this case, made with their clients, speaks for itself.

Such of the clients as see proper not to enforce this demand have the right to do so, but the rule should have gone for those asking it. The mandate must be enforced.

Reversed and remanded that this may be done.

TAYLOR v. TAYLOR.

(Filed February 1, 1894—Not to be reported.)

The guardian's accounts herein should be settled as directed in a former opinion in this case (12 Ky. Law Rep., 879), and the court below erred in charging the guardian with one year's rent of the land more than was proper.

J. Q. Ward and J. R. Minor for appellant.

Wm. H. Holt and Geo. Doniphan for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Pryor.

The original action was to surcharge the county court settlements made by the appellant. There was no complaint made that he had not been charged rent for the number of years he had cultivated the land of his ward, but it was insisted the rent per year was inadequate.

This court nearly doubled the amount of rent that had been charged, and intimated plainly it was for eleven years. The guardian had, in fact, been in the possession eleven years and six months, and from his testimony had cultivated the land for eleven years. Besides, as said in the former opinion (14 Ky. Law Rep., 379) the land was left in as good or better condition after the expiration of the eleven years than when the guardian took possession of it. His charges against his wards, for which he was entitled to credit, were less in value than he was entitled to, and he made no charge for his services as guardian in his county court settlements. Looking to this condition of the accounts between the guardian and his wards, and the manner in which he had cared for the property, the chancellor, as well as this court, would not be so exact as to time in charging for the use of these premises belonging to the appellees, and, as clearly indicating the purpose of this court, the petition for a modification of the opinion so as to enable the appellee to recover for a longer time, or to make the opinion more explicit, was overruled.

The judgment is, therefore, reversed to the extent only that one year's rent was improperly charged. With this error corrected the chancellor will render judgment for the balance.

KENTUCKY SUPERIOR COURT.

MEMPHIS & CINCINNATI PACKET CO. v. NAGEL.

(Filed February 28, 1894.)

1. Punitive damages—A corporation as well as a natural person may be held liable in punitive damages for injuries inflicted by the tortious acts of their employes committed within the scope of their authority.
2. A passenger has the right to recover of a common carrier punitive damages for injuries resulting from the willful or reckless misconduct or neglect of the employes of the carrier in carrying the passenger beyond his destination.
In this action against a common carrier to recover damages on account of the failure of defendant's employes to put the plaintiff off at the place for which she had purchased and presented a ticket, the evidence as to the conduct of defendant's employes being such as to authorize an instruction as to punitive damages, the court, after giving an instruction as to compensatory damages, properly instructed the jury that if they believed from the evidence that the failure of defendant's employes to put plaintiff off at her destination "was willful or the result of gross or wanton and intentional neglect on the part of any of defendant's employes in the discharge of their duty, or that the conduct of defendant's employes was insulting towards plaintiff, either in manner, words or tone, they may assess damages in any sum which they may believe from the evidence, in the exercise of a sound discretion, the plaintiff ought to recover," not exceeding the amount claimed in the petition.
3. Compensatory damages—Both mental suffering and bodily pain are elements of compensatory damages.
4. Order of argument—Waiver of objection—The defendant can not complain of the ruling of the lower court in requiring the plaintiff to open the argument, as no exception was taken to the ruling until after the argument had been begun, and it was then too late to change the order of argument.

Campbell & Campbell for appellant.

Chas. K. Wheeler and W. D. Greer for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Barbour.

That a corporation as well as a natural person may be held liable in punitive damages for injuries inflicted by the tortious acts of their employes, committed within the scope of their authority, is the settled law of this State.

While the basis of the action in this case is a contract—and necesarily so, for without it defendant owed no duty to the plaintiff—still the action sounds in tort. The right of a passenger to recover of a common carrier punitive damages for injuries resulting from the willful or reckless misconduct or neglect of the employes of the carrier in carrying the passenger beyond his destination has been repeatedly declared by both this court and the Court of Appeals.

The plaintiff contracted with the defendant's agent to be carried from Paducah, Ky., to New Albany, Ind., upon one of its steamers. She boarded the steamer, and her ticket, which named the point of her destination, was presented to the chief clerk, and she was assigned a stateroom. She was not permitted to land at

the point of her destination, and for the damages growing out of the acts of defendant's employes in this particular she instituted this suit.

The sole excuse for this misconduct seems to be that the plaintiff did not inform the captain until the boat reached a point about opposite the New Albany wharf that she wanted to get off at that place. This is no defense.

It was not incumbent upon the plaintiff to inform the captain or any other officer as to her destination. They knew, or ought to have known, it from her ticket, and it was their duty, without any further notice, to stop the boat when it reached New Albany and afford her an opportunity to get off; but, even if the plaintiff should have gone to the captain and told him to put her off at New Albany, the whole evidence, except that of a witness who has held so many high offices and positions of trust and honor that he may be excused from remembering accurately this little incident, shows that as the boat was passing the wharf she asked the captain why he did not put her off, and in tears implored him to do so. It was certainly then the duty of the captain to turn his boat about, even if it did occasion delay and incur some additional trouble and expense, and allow her to get off at the place to which his company had agreed to carry her; but the chief question is whether the facts were such as entitled the plaintiff to exemplary damages, and this will necessitate a more extended statement.

The plaintiff, Miss Nagel, a young lady, desiring to attend her cousin's wedding at New Albany, having been selected by her cousin as one of her bridesmaids, purchased a ticket from the defendant's agent, which authorized her to travel on defendant's steamer from Paducah to New Albany. The agent, with the plaintiff and another lady, who was going to Louisville, went upon the boat at Paducah, and the agent, presenting the tickets and telling the clerk that Miss Nagel was going to New Albany and the other lady to Louisville, had them assigned to the same stateroom.

On her way up plaintiff talked to the officers of the boat, the clerks and pilot, and told them she was on her way to New Albany to attend the cousin's wedding. When the boat approached New Albany the porter came to her and asked her for her check, and told her to get her trunk ready to get off. She went to her stateroom, got her trunk ready, put on her hat and wraps and waited, expecting the boat to land; but on looking out and discovering that the boat was making no effort to land and had not blown its whistle, she went out in front of the boat about the time it was opposite the New Albany landing—there she could see her friends on the shore waiting for her arrival—and told the captain she wanted to land there. His answer was: "I thought you were registered for Louisville." She said no, "my ticket was for New Albany." The captain then said to the clerk: "I thought you told me this young lady was registered for Louisville." The clerk responded "she is." Miss Nagel then said to the clerk: "You know I wanted to get off at New Albany," and he said: "I never dispute a lady's word."

Miss Nagel, with tears in her eyes, implored the captain to land. This he declined to do, and spoke roughly to her, but very generously presented to her the alternative of two propositions, of being put off at Portland or of being carried to Louisville, saying that she and her trunk should be carried to New Albany without additional expense to her.

She, a girl, alone, with no power to prevent this grossly insulting treatment, with no way to enforce her rights, left the boat at Portland, and, humiliated, walked up the hill to the railway

station, got aboard the train, and after several hours, excited, nervous and in tears, reached her cousin's home. In a short time her trunk was brought to the house. It was covered with mud, and had to be cleaned before it could be brought into the house. The trunk was filled with fine clothing, several silk dresses and other articles of female apparel suitable for the occasion at which she had so anxiously expected to appear. When it was opened the contents were found to be saturated with muddy water, and the greater part ruined. She and her friends attempted to clean and dry them. As the result of all this mortfication and trouble she was taken sick, was not able to take her part as bridesmaid, and, the night of the wedding, was suffering intensely with nervousness and severe pain in the head. A physician was called and attended her for some time. She was confined to the house two or three weeks, and a good part of the time to her bed.

This additional fact is proven and is not controverted, although the chief clerk testified for the defendant: As the boat was nearing New Albany the captain asked if there was any one to get off at New Albany, and the second clerk answered "yes; Miss Nagel wants to get off there." The captain did not reply to the second clerk, but, directing himself to the chief clerk, asked: "Where is the young lady registered for?" The chief clerk answered "Louisville," and the captain then said: "If Miss Nagel does not say anything more before we get there, do no tell the pilot."

That the plaintiff was, under this evidence, entitled to punitive damages we think can not be seriously questioned; but counsel insists that the instructions were misleading. In the first instruction the court told the jury that they must find for the plaintiff such actual damages as they may believe from the evidence she sustained, etc.; "and if they believe from the evidence that the failure of defendant's employes to put her off at New Albany was willful, or the result of gross or wanton and intentional neglect on the part of any of defendant's employes in the discharge of their duty, or that the conduct of defendant's employes was insulting towards plaintiff, either in manner, words or tone, they may assess damages at any sum which they may believe from the evidence, in the exercise of a sound discretion, the plaintiff ought to recover, not exceeding $1,995."

The instruction, on account of its verbiage, may be subject to criticism, but it can not be misunderstood, and, in our judgment, fully presents the law as applicable to the facts of the case.

That the defendant had violated its contract with the plaintiff is conceded, but the jury were not authorized to find punitive damages for the plaintiff for the defendant's failure to put her off at New Albany, unless they believe, first, that the failure was willful; or, second, that it was the result of gross or wanton and intentional neglect, i. e., gross and intentional neglect or wanton and intentional neglect; or, third, that the conduct of defendant's employes towards the plaintiff was insulting. In either state of case the plaintiff was clearly entitled to punitive damages.

The second instruction, defining compensatory damages, included within its meaning the plaintiff's mental suffering and bodily pain. We have in several cases held that mental suffering as well as bodily pain were elements of compensatory damages.

The remaining question is, was the court's ruling in regard to the order of argument prejudicial to the defendant? After instructing the jury the court informed the attorneys that he would limit the arugment to one hour on each side. The plaintiff's at-

torneys said they desired three speeches on their side, and the defendant's attorneys said they woud have only two speeches.

The plaintiff was entitled to the conclusion, and the court announced that if the plaintiff had three speeches, one of her attorneys would have to go first. Thereupon one of the plaintiff's attorneys announced that he would occupy only ten minutes. After arguing the case for ten minutes, defendant's counsel stated that he desired to except to the plaintiff's attorney opening the argument, when the court said that one of the plaintiff's three attorneys was required to speak first for the defendant's benefit, and that it was then too late to change the order of argument. The defendant excepted, and the plaintiff's attorney continued his argument and consumed twenty minutes, when one of the attorneys for the plaintiff declined to speak, and the case was argued for the defendant by its two attorneys, and the argument was concluded by one of the plaintiff's attorneys.

The Code, section 317, provides that in the argument the party having the burden of proof shall have the conclusion and the adverse party the opening. If there be more than one speech on either side * * * the court shall arrange the relative order of argument."

Under the facts as stated in the bill we can not say that the court abused its discretion.

No exception was taken to the ruling of the court requiring the plaintiff to open the argument until after it had been begun, and, as said by the court, it was then too late to change the order of argument. How the fact that one of the three attorneys failed to make an argument could have prejudiced the defendant we are unable to see. Possibly the attorney who failed to speak might have made mistakes which could have been taken advantage of by the defendant's attorney who followed in the argument, but this is not to be presumed. At any rate we are satisfied that the defendant was not prejudiced by the order of the argument, for under instructions which authorized a recovery for the plaintiff for punitive damages the jury rendered a verdict for only $900, when the evidence was sufficient to have authorized a verdict for a large sum as simply compensatory damages.

We think that the defendant has no cause to complain of the result of the trial, and the judgment is affirmed with damages.

CITY OF HENDERSON v. PARGNY.

(Filed March 7, 1894.)

1. Right of action against city for injury to property by "tumultuous assemblage"—To authorize a recovery under section 1 of chapter 5 of the General Statutes, which gives a right of action against a city for injury to property "by any riotous or tumultuous assemblage of people," it must appear from the petition that the notice to the city authorities, which is made by the statute a condition precedent to the right of action, was given in such manner, to such person, and in such time as to require the corporation through its proper organs to act for the prevention, or at last the mitigation, of the injury. It is not sufficient to allege merely "that the authorities of said city—its marshal and policemen—had notice of such riotous and tumultuous assemblage and of their unlawful acts, and were able and could have prevented same, but made no effort whatever to do so." And the plaintiff must also allege that the plaintiff had not failed to do what he reasonably could toward preventing, allaying or suppressing the alleged tumult, as the

proviso that he shall not recover unless he had done so is contained in the very section which gives him a cause of action.

2. Same—Even if a jolly crowd engaged in "ratifying" the result of an election is to be regarded as a "riotous or tumultuous assemblage" of people within the meaning of the statute, a merchant who sold to the crowd the fireworks, the reckless use of which resulted in the injury to his goods of which he now complains, must be regarded as contributing to the tumult, as he continued to sell the fireworks up to the moment of the injury, with a knowledge of the reckless manner in which they were being used, and, therefore, can not recover.

Clay & Clay and J. L. Dorsey for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by presiding Judge Brent.

By section 5, chapter 1, General Statutes, it is provided: "If within any city of this Commonwealth any house used or designed for the transaction of lawful business, or * * * any article of personal property shall be * * * injured by any riotous or tumultuous assembly of people, the full amount of the damage so done shall be recovered by the sufferer or sufferers by action against the city: Provided, The authorities thereof have abilty of themselves, or by the aid of their own citizens, to prevent such damage: Provided, also, That no person shall maintain such action who shall have unlawfully contributed toward exciting or inflaming such tumult, or who shall have failed to do what he reasonably could towards preventing, allaying, or suppressing it: And provided further, No such liability shall be incurred by such city unless the authorities thereof shall have had notice, or good reason to believe, that such riot or tumultuous assembly was about to take place, or, having taken place, had notice of the same in time to prevent said injury or destruction by their own force or the aid of the citizens of said city."

Relying upon this statute, the appellee, Pargny, brought suit against the city of Henderson, alleging that he was a merchant, doing business in that city; that in November, 1892, during the Cleveland and Stevenson ratification in said city, a riotous and tumultuous assemblage of people took possession of the sidewalk on Main street, between First and Second, in front of his place of business, and commenced a wild and unlawful shooting of Roman candles and other fireworks against and into his and other houses on said street, and set fire to his store, stock of merchandise and fixtures, and damaged them to the extent of $350 in excess of the insurance thereon. He also alleged that the authorities of said city, its marshal and policemen, had notice of such riotous and tumultuous assemblage and of their unlawful acts aforesaid, and were able and could have prevented same, but made no effort whatever to do so; and that the plaintiff did not, by word or deed, contribute to said act.

To this petition the defendant demurred generally. The demurrer being overruled, it answered, and issue was joined on the facts of the case. The verdict was for plaintiff for $150, and from the judgment on that verdict this appeal was taken. The demurrer should have been sustained. In the first place the allegation of notice is insufficient.

In the case of Ward v. City of Louisville, 16 B. M., 191-2, the court, in discussing a hypothesis upon which the city might have

been supposed to be liable for the destruction of property by a mob, says, speaking of the allegation of notice: "What object could there be in making this requisition (i. e., of notice to the authorities) except that it should be made to appear that the notice was given in such manner, to such person and in such time as to require the corporation, through its proper organs, to act for the prevention, or at least the mitigation, of the injury, and to give an opportunity of doing so by the proper use of the means within their power, and which it was their duty to use for the purpose, and, although the petition is somewhat more specific in this case than the declaration was in the other, it omits to state the manner of the notice, nor does it state the time of the notice so as to show it was such as would have enabled the officers notified to use with effect the means of defense or protection within their power or that they could, by those means, have prevented the injury. The petition is, therefore, defective even when subjected to this test."

The reasoning of the court in that case appears unanswerable, and it is evident that the same fatal objection applies to the petition here. In the next place the petition should have stated that the plaintiff had not failed to do what he reasonably could towards preventing, allaying or suppressing the alleged tumult.

The proviso that he should not recover unless he had done so is contained in the very section which gives him a cause of action, and must be noticed in his pleading (Newman, Pleading and Practice, 398). Until he so pleads the petition shows no right of action in him. Besides this the verdict in the case is plainly contrary to the evidence.

The city alleged that the defendant had contributed towards exciting and inflaming the alleged tumult, and the evidence, particularly his own and his personal testimony, put it beyond a doubt that to whatever tumult or disorder there was he certainly did contribute, for he continued to furnish the crowd with the elements of disturbance by selling them fireworks up to the very moment when his stock of goods, consisting partly of fireworks, was set fire to. If the reckless use of fireworks made this jolly crowd an unlawful, tumultuous assemblage, who more contributed to that end than the plaintiff, who, seeing the use made of what he sold under his very eyes, continues the supply as long as he can sell? It is too plain, from the evidence, to bear argument that if there was such a tumult as the statute contemplates the defendant unlawfully contributed to exciting and inflaming it, and can not, therefore, recover.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

PEOPLES' &c. v. FIRST NATIONAL BANK OF STANFORD.

Filed February 14, 1894. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. The State courts have jurisdiction to enforce the forfeiture of interest provided for by section 5198 of the Revised Statutes of the United States where a national bank charges or reserves a rate of interest greater than that allowed by law.

2. When a national bank lends money at a usurious rate of interest and the note therefor is renewed from time to time, usury being embraced in each renewal, the entire interest may be eliminated from the last note so that nothing can be recovered thereon except the original principal.

W. H. Miller for appellants; W. G. Welch for appellee.

PADUCAH STREET RAILWAY CO. v. GRAHAM, &c.

Filed February 14, 1894. Appeal from McCracken Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Expert testimony—In this action against a street railway company to recover damages for personal injuries which the plaintiff alleged that she sustained by the sudden starting of one of defendant's cars as she was attempting to step from the car, the defense being that the plaintiff attempted to step from the car while it was in motion and was thus thrown to the ground, the court properly refused to allow a witness to testify as an expert on behalf of the defendant as to the difference between the manner or direction in which a person will fall in attempting to step from a car in motion, and the manner or direction in which one will fall where the fall is caused by the sudden starting of a car while one is in the act of stepping off. The laws of force and motion have no application where the bodies are capable of self-control and voluntary action.

2. Same—Even if such testimony would otherwise have been competent the court properly rejected it because the witness offered as an expert did not qualify himself. It can not be presumed that because a person has gone through a curriculum where physics are taught he is expert in every branch of physical science, or, because he is engaged in a business where such knowledge would be eminently useful, that he, therefore, has it.

Burnett & Dallam for appellant; Campbell & Campbell for appellees.

PAINTSVILLE, &c., PASSENGER LINE CO. v. GILMAN, &c.

Filed February 14, 1894. Appeal from Johnson Circuit Court. Opinion of the court by Judge Barbour, reversing.

Corporations—Rights of stockholders—The fact that a corporation has not kept its records as the law directs, and has failed to show by record what has been done with the money paid in by stockholders, and refuses to give stockholders any information as to its business, does not, even though the officers have acted fraudulently, render the corporation liable to a personal judgment at the suit of a stockholder for the amount of stock subscribed by him, though the stockholder may, upon a proper showing, be entitled to a settlement of the corporate affairs.

Wm H. Holt and John P. Wells for appellant; James Goble for appellees.

GARRISON v. DANIEL.

Filed February 14, 1894. Appeal from Leslie Circuit Court. Opinion of the court by Judge Barbour, affirming.

Master and servant—A master is liable civilly for wrongs committed by his servant about his business, if the servant's act is within the scope of his employment.

In this action, in which the plaintiff sought to recover damages for the loss of a raft of logs caused, as he claims, by the negligence of defendant's employes while engaged in defendant's business, the court, under the evidence, properly instructed the jury that if defendant's employes tied to and broke plaintiff's raft loose without plaintiff's consent, and by reason thereof the raft was lost, they should find for plaintiff; but that if plaintiff consented that defendant's employes should tie to his raft, they should find for defendant, unless they should further believe that the breaking loose of the raft was caused by the careless and negligent manner of tieing to it. And a verdict for plaintiff, under this instruction, was sustained by the evidence.

D. B. Logan for appellant.

RIDER v. SULLIVAN.

Filed February 14, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Newly-discovered evidence which is merely cumulative, or which only tends to discredit or impeach an opposing witness, will not authorize a new trial.

2. A new trial should not be granted upon the ground that the successful party after the trial made a foolish remark which could be construed as inconsistent with the claim upon which he obtained his judgment.

W. P. Haynes for appellant; Sprigg & Chelf for appellee.

CAMERON, &c. v. BRANDON.

Filed February 14, 1894. Appeal from Trigg Circuit Court. Opinion of the court by Judge Yost, reversing.

Settlements of fiduciaries—Failure to appeal—Where a guardian has made a settlement of his accounts with the county court, and that court has, upon full hearing of exceptions filed by the ward to the settlement, fixed the amount due by the guardian, the remedy of the guardian, if he is dissatisfied, is by appeal, and, failing to appeal, he can not surcharge the settlement in the circuit court.

Robert Crenshaw and W. G. Bullitt for appellants; R. A. Burnett and J. E. Kelly for appellee.

TOMPKINS, &c. v. CARTER, &c.

Filed February 14, 1894. Appeal from Clinton Circuit Court. Opinion of the court by Judge Yost, affirming.

Advancements—When a mother gave to each of her three daughters $500, and gave nothing to the children of a deceased son, in the distribution and division of her estate after her death the sums given to the daughters were properly charged to them as advancements, it appearing that the mother said "she had given her daughters $800 each because she thought they needed help first, but that she thought she would have enough to make the grandchildren equal with them," and that she was about to make a will to equalize the grandchildren, but upon being told that the law would make them equal, said that she did not care to make a will if that was so. These facts show that the money was given to the daughters "with a view to a portion or settlement in life."

Sam C. Hardin for appellants; J. A. Brents for appellees.

McALLISTER v. McALLISTER.

Filed February 14, 1894. Appeal from Fayette Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Divorce—Evidence of adultery—In this action by the wife against the husband for a divorce from bed and board, in which the husband by his answer charged the wife with adultery and lewdness and asked for an absolute divorce, the evidence was not sufficient to establish the charges made by the husband, as the credibility and good character of the witnesses offered to prove these charges were neither certified by the examiner nor proved, and the judge states in his opinion that they are not personally known to him to be persons of credibility and good character.

2. Alimony—As the estate of the husband amounts to between $5,000 and $6,000, an allowance of $300 per annum as alimony was not an abuse of discretion.

Breckinridge & Shelby and Watts Parker for appellant; George Denny, Jr., for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. CURRY.

Filed February 21, 1894. Appeal from Lyon Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Killing of stock on track—In this action against a railroad company to recover damages for the killing of stock by a train of cars on defendant's road, as the evidence shows that the engineer and fireman did all that could be done to save the stock as soon as they saw, or by ordinary vigilance could have seen, them, the verdict should have been for defendant.

2. Same—The killing having occurred near a crossing, evidence as to the failure to sound the whistle for the crossing was competent solely for the purpose of showing that the engineer was not keeping the proper lookout; but this evidence was not sufficient to overcome the positive evidence showing that all was done that could be done to save the stock.

3. Clerical misprision—The plaintiff was entitled to recover only the value of the stock as laid in his petition; and while he prayed for $500 damages, yet as the value of the animals was fixed in the petiiton at $265, it was error to render judgment for $275, and this was not a mere clerical misprision, the judgment being rendered pursuant to a verdict of the jury which was based upon evidence fixing that amount as the value.

J. G. Miller and P. H. Darby for appellant; T. J. Watkins for appellee.

KNIGHT v. BROWN.

Filed February 21, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Construction of devise—A testator devised land to trustees in trust for the use and benefit of L. and her infant son J. The land was never to be divided, but to descend to any children J. might have. L. and her then husband were to have the privilege of a home on the land for themselves and any children they then had, or she might have, during minority, but one fourth of the proceeds to be appropriated by the trustees to the education of J. The land and proceeds were to be controlled by the trustees, and all raised on th farm, except the fourth appropriated as before mentioned, to be used by L. for the benefit of herself and family. The trustees have ceased to act, and L. having removed from the land, the guardian of J. has rented it out and collected the rents. In this action by L. to recover of the guardian three-fourths of the rents, Held—That she has the right to maintain the action, and that she is entitled to recover, as she did not, by removing from the land, forfeit all right to the proceeds. As J. has voluntarily left his mother's home, he has no right to share any of the three-fourths of the proceeds set apart by the will for the support of her and her family.

Montgomery Merritt for appellant; Yeaman & Lockett for appellee.

KELLY v. GRAHAM.

Filed February 21, 1894. Appeal from McCracken Circuit Court. Opinion of the court by Judge Barbour, affirming.

Evidence—In this action upon an acceptance an unconditional promise to pay, the only defense being a plea of non est factum, the court properly excluded evidence showing a contemporaneous written agreement making the payment of the bill conditional.

E. W. Bagby and Rhey Boyd for appellant; J. W. Bloomfield for appellee.

KOHN BROS. v. STEINAU, &c.

Filed February 21, 1894. Appeal from Jefferson Circuit Court, Chancery division. Opinion of the court by Judge Yost, reversing, Judge Barbour dissenting.

Husband and wife—Right of wife to decree empowering her to trade—In this action by husband and wife, seeking to have the wife empowered to act as a feme sole under the statute, appellants, creditors of the husband, having entered their appearance to the action and opposed the granting of the relief sought, on the ground that it was sought for the purpose of hindering and delaying the husband's creditors, the court erred in granting the relief in the absence of evidence to show that the wife had any property whatever or any trade, calling or business in which she might engage. The mere fact that she is a hard-working, industrious woman, who would be able to carry on business and could get assistance from her relatives to enable her to start in business, and that the husband is insolvent, is not sufficient to entitle her to the decree.

Barnett, Miller & Barnet for appellants; O'Neal, Phelps & Pryor for appellees.

HARRIS v. HILL, &c.

Filed February 21, 1894. Appeal from Nicholas Chancery Court. Opinion of the court by Judge Yost, reversing.

Pleading—An answer by a personal representative, alleging a want of information or knowledge as to whether goods had been sold to his decedent, is equivalent to a plea by the decedent, if living, denying that the goods had been sold and delivered.

Ross & Owens for appellant; Kennedy & Son for appellees.

CRIGLER & CRIGLER v. CONNOR.

Filed February 21, 1894. Appeal from Kenton Chancery Court. Opinion of the court by Judge Yost, affirming.

Exemptions—Where the defendant in an attachment did not have on hand the provisions which are exempted by the statute from execution or attachment, he was entitled to have set apart to him out of the proceeds of the attached property $40 for each member of his family; and his right to the exemption is not affected by the fact that his children have other property, as the exemption is to the father as head of the family, and not to the children.

Collins & Fenley for appellants; Menzies & Mitchell for appellee.

SMITH v. ALLEN.

Filed February 21, 1894. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Mortgage—Agency—Ratification—Estoppel—In this action to enforce a mortgage lien on personal property in which appellee claimed the property under a purchase from one who had purchased from the mortgagor, alleging that the sale was authorized by plaintiff, and if not that he had ratified it

the evidence fails to establish the alleged authority from plaintiff to make the sale, and as the person from whom the appellee purchased did not profess to act for plaintiff, there could be no ratification by plaintiff of his acts. Whether the plaintiff, by receiving, if he did in fact receive, a part of the property for which the mortgaged property was bartered, might possibly have estopped himself to assert his lien is a question not presented, no estoppel being pleaded.

J. J. Cornelison for appellant; Thomas Turner and C. C. Turner for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. BULLINS.

Filed February 21, 1894. Appeal from Laurel Court of Common Pleas.

Opinion of the court by Presiding Judge Brent, affirming.

Instruction to jury—Contributory negligence—The defendant can not complain of the failure of the court to give an instruction as to contributory negligence unless he has drawn a proper instruction on the point and asked the court to give it, as the court is not required in civil cases to give all the law applicable to the case; and this is true, although the instructions given were given by the court on its own motion, and may have been intended to embrace the whole law.

Alcorn & Craft for appellant; H. C. Eversole for appellee.

The Kentucky Law Reporter

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

VOL. 15. MAY 1, 1894. No. 21

KENTUCKY COURT OF APPEALS.

WILLIS, &c. v. TERRY.

(Filed January 11, 1894—Not to be reported.)

Execution sale—Mortgages—The plaintiff in an execution purchased for $90.87 the land of the execution defendant, subject to the lien created by a mortgage to defendant's wife This mortgage was recognized as valid at the time of the sale by the officer making the sale and by the purchaser. The land, free from the mortgage lien, is worth $700. The purchaser now contends that the mortgage was void because the description of the land was indefinite, etc., and claims the land, free of the incumbrance, by reason of his purchase. Held—The purchaser having recognized the mortgage as valid at the time of his purchase, can not now claim the land clear of the lien. It would be unconscionable to allow such a claim. He should be allowed a lien on the land for the purchase money paid by him.

Geo. T. Duff for appellants.

W. L. Porter for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Pryor.

Geo. B. Willis died the owner of 300 acres of land, leaving a widow and fifteen children surviving him. He devised his estate, real and personal, to his wife for life, and at her death directed the land sold and the proceeds divided equally between his children.

The widow died in the year 1889, and an action was instituted in the court below for a sale of the land and a distribution of the proceeds between the children.

In November, 1883, one of the children, Frank Willis, being indebted to his (Frank's) wife, evidenced by note, executed to her a mortgage to secure the payment. The land is described in the mortgage as the "one-fifteenth part of my interest in the real and personal estate of my mother, Elizabeth Willis."

The purpose of the instrument, as is maintained in argument, was to mortgage to the wife the interest of Frank (her husband) in the realty left by his father; that the widow had only a life estate that ended its duration when she died, and the language used in the deed was merely descriptive of the land mortgaged.

In the year 1886, nearly three years after the mortgage had been given by Frank Willis to secure this debt to his wife, the appellee, C. W. Terry, had an execution placed in the hands of the sheriff that was levied on this interest of Frank Willis in the land of his father, subject to the mortgage executed to the wife, and when sold was purchased by Terry, and a deed made to him by the sheriff, subject to this mortgage.

The creditor, Terry, came into this court in this action for distribution and asserted his right to the entire proceeds of sale, on the ground that the mortgage passed nothing to the wife of Frank Willis, as it embraced the estate of the mother of Frank and not that of his father, and also claimed the mortgage void for insufficiency in description of the land conveyed. The court below gave the entire proceeds of sale to Terry and excluded the wife, who is now appealing.

If this interest had been sold regardless of the mortgage, we would have some difficulty in holding that it created a lien upon the remainder interest of Frank Willis in the land of his father.

We are satisfied the purpose was to mortgage that interest, as there was nothing to mortgage as being derived from the mother. There is no averment, however, of mistake, and the entire question turns upon the meaning and construction given this writing by the appellee himself.

We are not favored with a copy of the execution levied on this land or the return upon it, nor does it appear even to have been filed in this case; but the deed under which the appellee claims conveys to him the land, "less the one-fifteenth part of said individual interest on which Laura Willis has a mortgage, executed to her by Frank Willis, on November 19, 1883, and of record in Barren county clerk's office, Book No. 12, page 314, showing clearly the sheriff and appellee recognized this as a mortgage on the remainder interest and purchased it as such. Terry purchased this land at $90.87 in the year 1886 and subject to this mortgage, that was recognized by both himself and sheriff as being a lien superior in date to that of the levy.

It is unconscionable under such circumstances to exclude the wife and give the whole of the proceeds to the creditor (which is near $700), when he knew or must have known, as well as the sheriff who made the levy, the purpose of the mortgage to the wife, and in making the purchase, subject to this mortgage, was aiding the parties to fully execute their intention of creating a lien by their mortgage of 1883.

The appellee recognized it as existing and was entitled to no more than he purchased, and when distributing the proceeds, even if no lien existed by the mortgage, it appearing that the appellee purchased subject to its provisions, regarding it as a lien, he should be bound by it and allowed his debt, interest and costs, and the balance paid to the wife. He acquired a lien under the statute, and nothing more.

Judgment reversed and remanded, with directions to pay the debt, interest and costs of the appellee out of the proceeds, as there is enough to satisfy both demands.

PATTERSON v. PATTERSON, EX'OR, &c.

(Filed January 20, 1894—Not to be reported.)

Advancement by father to son not fraudulent as to wife's marital rights—A father who has advanced $20,000 to one of his sons, and who is worth $100,000, has a right to advance as much as $20,000, or to pay that sum for a conveyance of land to his other son; and such advancement is not fraudulent as to his wife in the absence of proof of a purpose on the part of the husband to defeat the wife's marital rights by such advancement. Proof of mere hatred and ill will on the part of the husband for the wife is not sufficient to establish an intent to defeat the wife's marital rights by such advancement.

W. B. Fleming for appellant.

James E. Cantrill for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Pryor.

Joseph Patterson, the husband of the appellant, was a man of wealth, and died during the pendency of an action brought by him against her for a divorce.

He seems to have had no affection for the appellant, and no doubt made her married life miserable. Nothing was done by him to contribute to her happiness, but his entire conduct indicated an aversion to her that amounted to hatred on his part.

He finally left his home in Scott and removed to Lexington, leaving his wife on the farm he at the time occupied, and was evidently endeavoring to bring about their final separation. It is needless, however, to go further into the history of their married life, except in so far as it constituted a motive, as is contended by the appellant, for the husband to convey or to have conveyed certain real estate to one of his sons by a former marriage so as to deprive the wife of distribution or dower.

After he left his wife and removed to Lexington he purchased property (realty) in Lexington, Louisville and elsewhere, and had the title made to the appellee, and the wife (the appellant) insists that this was done from a fraudulent purpose on his part to deprive her of her marital rights, and this action is now brought to recover dower in the lands conveyed to the son that the appellant insists was held by him in trust from his father.

The estate of the husband at his death, or at least when these conveyances were made to the appellee, was worth as much and perhaps more than $100,000.

One of the sons lived in St. Louis (he had two), to whom he had given about $20,000, and what he gave the appellee would not amount to that much.

The realty that was purchased was conveyed directly to the son by the vendor under deeds that were absolute and irrevocable except at the son's instance, and, besides, it is shown by the testimony that the appellee was a farmer of industrious habits; had the use of a part of his father's land and rented for several years his large plantation, from which he must have derived an income that placed means in his own pocket that were his and not the means of his father. The appellee says he paid a part of the money for this land, although the payment was actually made by the father, and doubtless this was the case, as the proof indicates that the miserly disposition of the father would induce

him to take charge of his son's earnings, as well as handle his own money. He was overbearing, tyranical and miserly.

It seems to us, however, that the character of the father and husband has but little to do with the issue in this case.

Here was a father with two sons, and possessed of an estate of $100,000, having already given one of his sons $20,000, that proposes to give and does give to the other son as much by investing the same amount in land for him. Is this unreasonable and a fraud on the marital rights of the wife? Reverse the picture of their married life and make all sunshine and happiness in their country home, and see the father give to the son this money, retaining in his possession a large landed estate without encumbrance, worth at least $80,000, with stock on his place sufficient to make the farm profitable, or, if not, with money ample to purchase it, and would it be said that this was an unreasonable allowance or gift and in fraud of the rights of the appellee?

We have no evidence of any wrongful purpose on the part of the husband in giving to the son except such as may be implied from his intense hatred of his wife, and this will not authorize the chancellor to take from his son what was a reasonable, just and proper gift. The consideration of love and affection upholds the transaction, and, while the legal duty of the father to provide for the son may not exist, the gift was in discharge of a natural and parental obligation that no chancellor would disturb. If his father held the writing of the appellee to reconvey this property, there might and would be something in appellant's claim, but here the deeds are absolute and constitute a reasonable settlement. The wife is left with over 300 acres of land, allotted to her as dower, and one-third of the personalty, although it has originated from rents, her third being $5,000 or $6,000, and while she may have the right to preserve the property of the husband to indemnify her for a life of bondage, oppression and cruelty that she submitted to for years, a court of equity will not sever the ties that bound the father and son in adjudging that he had no right to make such gifts, by reason of the misery and ruin he brought to the domestic circle.

In the case of Radfield v. Radfield, 78 Ill., 16, relied on by counsel, the husband retained the right to control the property, and could rescind the will at his pleasure; the title, in fact, was in him. Not so here. While the father collected the rents, the title was absolute in his son, and if the deeds had passed the title to a remainder interest, the father holding for life, they could have been upheld.

In Mannikee's Adm'x v. Beard, 8 Ky. Law Rep., 736, the husband gave to his children the whole of his estate, including money, choses in action, etc., and it was held to be a fraud on the wife.

In this case an ample estate is left the wife, and the gift to the son must be sustained.

Judgment affirmed.

BEARD, &c. v. CITY OF HOPKINSVILLE, &c.

(Filed January 23, 1894.)

1. Section 158 of the Constitution, limiting the amount of indebtedness municipal corporations are authorized or permitted to incur, became operative immediately upon the adoption of the Constitution, and before the cities were actually classified by an act of the legislature.

After the adoption of the Constitution, and before it was by act of the legislature assigned to cities of the fourth class, the city of Hopkinsville,

which had more than 3,000 and less than 8,000 inhabitants, could not increase its indebtedness beyond 5 per centum of the value of the taxable property therein.

2. Same—A contract by the city to pay annually for a number of years a certain sum for water works, where the aggregate sum to be so paid exceeds the maximum sum for which the city is authorized by section 158 of the Constitution to "incur indebtedness," is unconstitutional and void, although the certain sum that becomes due each year can be paid by the city by a tax levy not exceeding 75 cents on the $100, which tax rate the city is authorized to impose.

J. I. Landes, Petree & Downer, C. H. Bush, Joe McCarroll, E. P. Campbell and J. T. Hanbery for appellants.

Wood & Bell and James Breathitt for appellees.

Appeal from Christan Circuit Court.

Opinion of the court by Judge Hazelrigg.

On June 13, 1892, the appellee, through its board of councilmen, entered into a contract with its co-appellee, John P. Martin, by the terms of which the latter agreed to construct and maintain in and near the city a system of waterworks and sewerage, and also an electric light plant.

For the use of seventy hydrants for five years and of thirty-five arc lights for the same period, the city agreed to pay Martin as rents the sum of $5,500 per year. At the expiration of the five years the contract for water rental was to continue fifteen years longer at $4,500 per year, the city having an option to renew the contract for lights at $1,000 per annum.

The city contained a population of more than 3,000 and less than 8,000, and, therefore, would be a city of the fourth class whenever the assignment and classification should be made of the cities and towns of the State as required by the Constitution. This assignment or classification had not been made at the date of the contract or institution of this action.

The indebtedness of the city was something like $125,000, due mainly in five-thirty bonds to the Ohio Valley Railway Company. The value of the taxable property for 1891 was $1,546,380. It is shown that with a tax rate of 75 cents on the $100, together with the usual collections from other fixed sources, the city could pay its annual current expenses of all kinds and also the additional water and light rental proposed in the contract and still have an annual surplus of several thousand dollars.

Immediately after this contract was made the appellants, who are citizens and taxpayers of the city, instituted this action to have the contract declared void, contending that the city of Hopkinsville, or its board of councilmen, had no constitutional power to make the contract, because it bound the city to pay an indebtedness shown to be in excess of the limitations imposed on the city and its authorities by the Constitution. There were other contentions which are not necessary to notice.

The chancellor determined all the points made against the plaintiffs below, upheld the contract and dismissed the petition. This appeal involves the correctness of that judgment.

The constitutional provision supposed to affect the question involved is as follows:

Section 158. The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to

incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz, * * cities and towns of the fourth class, 5 per centum, * * * provided any city, town, etc., may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution. * * *

"Section 166. All acts of incorporation of cities and towns heretofore granted, and all amendments thereto except as provided in section 167, shall continue in force under this Constitution, and all city and police courts established in any city or town shall remain, with their present powers and jurisdictions, until such time as the general assembly shall provide, by general laws, for the government of towns and cities and the officers and courts thereof, but not longer than four years from and after the first day of January, 1891, within which time the General Assembly shall provide, by general laws, for the government of towns and cities and the officers and courts thereof as provided in this Constitution."

By their contention the appellants mean that the indebtedness of the city at the time of the contract was in excess of 5 per centum on its taxable property, which is the limit prescribed by the 158th section of the Constitution for cities of the fourth class, and Hopkinsville is alleged to be a city of the fourth class by reason of its population being 3,000 or more, and less than 8,000. In order to apply the limit of 5 per centum, counsel for the appellants plead as a fact that the population of the city was such as required its assignment and classification among cities of the fourth class. It is not contended, as we understand the argument, that the actual assignment—the new form of classification—directed by the Constitution to be made by the general assembly, can be made by the courts, but that it was the evident intention of the framers of the Constitution to have the wholesome limitations provided for in the section to apply instantly upon its adoption; that the assignment or classification was a mere form and its delay should not entitle the cities desiring to do so to overreach the plain provisions of the Constitution and deliberately incur an unauthorized indebtedness. Notwithstanding the fact that some difficulty may seemingly arise in ascertaining what maximum percentage on the value of the taxable property in a given city is to be applied in determining what limitation on its indebtedness shall control in the absence of the classification, yet we are constrained to the conclusion that not to apply the section as one affecting and controlling the cities of the Commonwealth, immediately upon the adoption of the Constitution, would be in clear defiance of the determined will of the body framing the instrument.

No one idea stands out more clearly than that barriers should be erected against the creation of municipal indebtedness. In times of popular excitement the internal improvement craze had wellnigh wrecked many of the most flourishing counties and towns of the hitherto staid and conservative Commonwealth. To seek excuses for withholding the application of these conservative restraints thus wisely devised by this body of enlightened men, and delay the beneficient results intended, merely because a formal assignment of a given city had not been made to its appropriate class, would be giving prominence to the shadow and

losing sight of the substance. Moreover, it will be observed that the percentages are not fixed wholly with reference to the classes to which the cities may belong, but the per centum fixed for some of the cities is made to depend on their population, and recourse must, therefore, be had in such case to the ordinary methods of proof to ascertain the percentum applicable.

In discussing a similar question it was said, in Law v. The People, 87 Ill..385, "it has been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitive clauses of this character found in a constitution execute themselves as legislative provisions in the same or other language, prohibiting the incurring of such indebtedness, could be no more binding or forcible than the Constitution itself."

In the case of Holtzhauer v. City of Newport, 15 Ky. Law Rep., 188, it was contended that because the indebtedness of the city at the time of the adoption of the present Constitution, and at the time the contracts in question were entered into, was in excess of 10 per centum on the valuation of her taxable property during that time; therefore, the prohibitory provisions of section 158 were applicable, and we said of this contention: "It may be admitted that, to the extent that this section provides for a state of case in existence at the time of the adoption of the Constitution, it is applicable to all towns and cities resting under the conditions named. But in express terms the limitation of 10 per centum may be exceeded when the porposed indebtedness 'has been authorized under laws in force prior to the adoption of this Constitution.'"

This section was, therefore, treated as in full force upon the adoption of the Constitution, and as applicable to the cities and towns resting under the conditions named. The contract for the increased indebtedness of the city (Newport) was upheld upon the ground that it was contracted "under laws in force prior to the adoption of the Constitution," those laws being in the form of amendments to the charter of the city, approved in 1890, authorizing the issual of bonds for specific purposes, to be paid by taxes levied within certain specified tax districts, created by the acts in question. These amendments to the organic law of the city were held to be continued in force in express terms under the provisions of section 166 of the Constitution.

Construing the section (158) as operative immediately upon the adoption of the Constitution, the question is, does the contract under consideration "authorize an indebtedness" on the part of the city of Hopkinsville "to an amount, including existing indebtedness, in the aggregate exceeding" 5 per centum on the taxable property of the city? The question is wholly new to the law of our State, but the Constitutions of a number of the other States contain provisions similar to the one under consideration, and the answers given by the various courts to the question indicated are by no means harmonious. It is to be remembered that the annual rentals are to be met out of the annual revenues without any increase of the tax rate of 75 cents on the $100 of taxable property, and that, as the contractor, Martin, furnishes the water and light and thus earns the money, he is paid therefor. The appellees, therefore, contend that the liability is thus extinguished as soon as it comes into existence. They contend that "when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of the prohibition of the Constitution." The cases relied on by them sustain their contention that revenues may be disposed of in advance of

their receipt, hypothecated, as it were, as if already in the treasury, and when such an appropriation will meet and discharge the obligation, which is but a contingent one, no indebtedness is created in the meaning of the Constitution. We suppose, however, that if the words used in the Constitution are to be given their usual and commonly accepted meaning by the contract in question, the city does "incur an indebtedness" in the sense these terms are used in the Constitution, and that this indebtedness is in excess of the limitation imposed is apparent.

Turning to some of the decisions in States with Constitutional provisions similar to ours, we find the Illinois Supreme Court, in City of Springfield v. Edwards, 84 Ill., 626, thus discussing the question: "It is provided by section 12, article 9, of the present Constitution, that 'no county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggreagte exceeding 5 per centum on the value of the taxable property therein, to be ascertained by the last assessment,' etc. * * * The prohibition is against becoming indebtedness—that is, voluntarily incurring a legal liability to pay in any manner or for any purpose when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently, and a debt payable upon a contingency as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and, therefore, within the prohibition. If a contract or undertaking contemplates in any contingency a liability to pay when the contingency occurs, the liability is absolute—the debt exists—and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred; and since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else."

In Culberston v. City of Fulton, &c., 127 Ill., 30, in discussing a contract for constructing a system of waterworks, to be paid for in the future, the court said: "By entering into the contract of August 15, 1887, the city 'became indebted.' The obligation entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the Constitution. It can not be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed, and could be compelled to do so if the work should be done according to contract;" and the case of the City of Springfield v. Edwards, supra, is referred to and approved. To the same effect are the cases in the same suit of Law v. People, 87 Ill., 385; Prince v. City of Quincy, 105, Ill., 138.

In the case of Sackett v. City of New Albany, 88 Ind., 473, it was held that where the Constitution forbids a municipal corporation ever to become indebted beyond a certain amount, that sum may not be exceeded even for necessary expenses.

The contract was for the erection of fire alarm strikers and signal boxes, at the price of $3,325, when the limit imposed by the Constitution had already been exceeded. The language of the Constitution was similar to ours, and the court, by Chief Justice Niblack, after reviewing the decisions of the courts of Illinois and Iowa, said: "By 'indebtedness,' in this connection,

we mean an agreement of some kind by the city to pay money when no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the legislature in submitting, and of the people in adopting, the thirteenth article of the Constitution, to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of the taxable property, and to require, when that limit of indebtedness has been reached, that such corporation shall be prepared to pay whatever of value they may obtain without the incurrence of any further indebtedness for any purpose whatever."

That there are cases in all these States upholding contracts similar to the one now under consideration, must be admitted, and that the two classes of cases are not easily, if at all, reconcilable is evident.

We have adopted the view in accord with the spirit of our Constitution, as we understand it, and as we think also in accord with better reason. Any other doctrine opens the door to all the mischiefs intended to be inhibited by the Constitution.

A fair illustration of the doctrine contended for by the appellees is given in the case of Dively v. City of Cedar Falls, 28 Iowa, 232, relied on by them, where it is held that "if A should undertake to build a courthouse within three years, doing so much and to be paid accordingly each year, the obligation of the contract would arise when executed, but the indebtedness under the Constitution (if there were none other) would be measured by that to be paid each year."

It seems to us that such a construction of the Constitution would render the limitations in question wholly nugatory.

It is needless to notice any other of the alleged reasons urged against upholding the contract, as the views here announced are fatal to its validity.

The judgment is reversed, with instructions to proceed according to the principles announced in this opinion.

SLONE v. GRIDER, &c.

(Filed February 6, 1894—Not to be reported.)

1. Devise—Joint tenants—Partition—A father devised three tracts of land jointly to his children, C. and M. C. mortgaged a tract containing 125 acres as "being fully described in the will of" his father. The mortgage was foreclosed, and the land purchased at the judicial sale by appellee. Subsequently C. acquired by devise from M. 50 acres, which he sold to appellant. In this action by appellee against appellant to recover eight or ten acres embraced by the conveyance of C. to appellant. Held—Since there was never a partition between C. and M., the parties to this suit, who claim under them, have no right of action, the one against the other, to recover any specific part of the land before such partition or division by order of court.

2. A verbal partition between the two joint owners of the land did not pass title from the one to the other because it was within the statute of frauds.

J. E. Hays for appellant.

N. H. W. Aaron and J. B. Stone for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Lewis.

By will dated 1866 Charles Back devised to two of his children, Chalres M. and Martha, his "homestead of land, supposed to be 100 acres, 50 acres up the branch called Crocus Fork, also 100 acres above the last-named land, being balance of the 150-acre survey."

In 1872 Charles M. Back executed a mortgage to G. W. Hunter upon what is therein described as "a tract or parcel of land lying in Cumberland county, on waters of Lesters Creek, containing 125 acres and fully described in a deed from Martin Grider to Charles Back, and in the will of Charles Back, it being the same land that I now live upon."

In 1879 H. A. Staten, to whom the debt had been assigned by Hunter, brought an action for judgment therefor and enforcement of the mortgage lien to satisfy it, and having become purchaser at the judicial sale and received a deed from the master commissioner, in 1883 conveyed to appellees, Griders, the land being referred to as lying "on waters of Lesters Creek, containing about 225 acres, more or less, and which is fully described in two deeds made by the commissioner of court and recorded in deed books" named. It is proper to explain in this connection that Thomas Back, a brother of Charles M., executed to Staten, after the debt was assigned to him, a mortgage on his land, which was likewise sold and purchased by the plaintiff in that action, and thus was acquired and conveyed to appellees 225 instead of 125 acres, the supposed quantity devised to Charles M. by his father.

It appears from the testimony of Charles M. that subsequent to date of the mortgage his sister, Martha Back, died, leaving, by will, to him and another brother her land, of which he, Charles M., in 1882, conveyed 50 acres described in the deed by metes and bounds to appellant, Stone.

Appellees, Griders, brought this action ordinary in 1892 to recover of appellant, Stone, 8 or 10 acres embraced by the deed from Charles M. Back to the latter, but alleged in the petition to be within boundary of land purchased at judicial sale by Staten, and by him conveyed to appellees, and, therefore, they were entitled to the property.

Upon trial the lower court gave, at instance of plaintiffs, the following instructions: "If the jury believe from the evidence that the 50-acre Martin Grider tract of land, in evidence before them, was embraced in the mortgage to Hunter and in the commissioner's deed to H. A. Staten, and in the deed from said Staten to the plaintiff, they will find for the plaintiff the land in controversy, * * * unless they should believe from the evidence that at the time plaintiffs received said deed from H. A. Staten defendant was in the actual adverse possession of said land that is, the land in controversy—in which event they will find for the defendant;" but, refused this, asked for defendant: "If the jury believe from the evidence that H. A. Staten, vendor of plaintiff and C. M. Back, while they were the owners of adjoining land, a portion of which is now in dispute in this suit, met and agreed on a division line between them and had the same run off or fenced, that they are both bound by said line, and those claiming under them are also bound by the division line, and they should find for defendant."

It seems to us the instruction given in this case is erroneous. By the will of Charles Back, from whom both plaintiff and defendant derive title, these tracts of land were devised jointly to Charles M. (his son) and Martha Back (daughter), and it does not appear from the record a partition had been made at date of the mortgage from Charles M. Back to Hunter, or even when

Staten received the commissioner's deed, in virtue of which he acquired whatever title he possessed or could convey to his vendees. It is true the interest mortgaged is described as 125 acres, which is, in fact, one-half supposed quantity of the three tracts devised to Charles M. and Martha Back; but there is no further or more definite description given in the mortgage than was done in the will. So that Staten had, as did Charles M. Back before him, simply an undivided moiety in the three tracts devised by Charles Back, the 50-acre Martin Grider tract referred to in the instruction being one of them. It does not, therefore, follow, as assumed in the instructon, that because that particular tract was embraced in the mortgage to Hunter and in the commissioner's deed to Staten and in his deed to plaintiffs, the latter had the right to maintain an action ordinary for recovery of a specific quantity of the 50-acre tract or of either the other two tracts devised against defendant claiming under Martha Back, who held a joint and undivided moiety of the three tracts; for, according to the testimony of Charles M. Back, not excepted to, the 50 acres he conveyed to defendants was acquired by him after date of the mortgage under will of his sister, Martha. Thus the attitude of plaintiffs and defendant is that of vendees claiming respectively under two joint tenants, between whom a partition does not appear to have ever been made; and before either can recover a disputed parcel within boundary thus held there must be a division made and evidenced by partition deeds, or else by one made in pursuance of a judgment upon equitable principles.

There is evidence that a division line was made and agreed upon between Staten and Charles M. Back before either plaintiffs or defendant acquired title to the land respectively claimed by them. And pursuant to that evidence the refused instruction was asked in behalf of defendants. But it does not sufficiently appear that agreement was reduced to a writing by which title could be passed from one to the other joint owner. That instruction was, therefore, properly refused. But, if no partition was ever actually made that is now enforcible, it follows that plaintiffs are without right to recover by ordinary action the particular parcel sued for, that defendants are now in possession of, claiming under a title fully as valid and effectual as the title of the plaintiffs.

Wherefore, the judgment is reversed for a new trial consistent with this opinion.

NATIONAL EXCHANGE BANK OF LEXINGTON, KY., v. WILGUS' EX'ORS, &c.

(Filed February 13, 1894.)

1. Partnership—Notes executed in name of members of firm—Where two members of a firm executed a note to a bank, for money borrowed for the use of the firm, in their individual names, which was not the firm name, the third member of the firm is bound thereby, although he did not sign the note, when it appears he requested the officers of the bank to loan the money to the firm, recognized the liability subsequently as that of the firm and stated that he did not wish to sign such note because he was a director in the bank and did not wish his name to appear on its paper. The member not signing the note is considered as having authorized the use of the names of the other individual members of the firm as equivalent to the firm name.

2. Same—Renewals—After the death of the partner who did not sign the note no one had authority to execute renewals of the note so as to bind him.

but his estate is not released by the acceptance of such renewal notes by the bank unless it thereby intended to release such estate; and, if the release was not intended, the debt evidenced by the original notes may be enforced.

Wm. Lindsay and J. H. Beauchamp for appellant.

R. A. Thornton and L. W. Robertson for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Bennett.

J. B. Wilgus and W. E. and E. K. Cropper composed a firm of partners engaged in the tobacco business in the city of Lexington, Ky., under the firm name of Cropper & Co. During the existence of the firm W. E. and E. K. Cropper signed their names to six promissory notes to the appellant for money loaned for the use of the firm, and which was used by the firm in its business. J. B. Wilgus having died and the firm having become insolvent and the notes not having been paid, the appellant presented the notes to the estate of J. B. Wilgus for payment. The representatives of said estate refused payment of the notes upon the ground that as they were signed by W. E. and E. K. Cropper in their individual names, and not in the firm name of Cropper & Co., J. B. Wilgus, a member of the firm, was not bound for the payment of the notes, nor upon an implied assumpsit for the money so loaned.

It appears, without contradiction, that J. B. Wilgus, at the time of the loans, was a director in the appellant; that he told the appellant that his firm needed the loan of some money, and requested the appellant to let the firm have it. But, inasmuch as he was one of the directors of the appellant, he did not wish his name to appear on the paper, and for that reason to let the paper appear in the name of W. E. and E. K. Cropper; that the money was loaned to the firm for its use and the notes taken under said arrangement; also that the money was used by the firm with the knowledge and consent of Wilgus, and that he afterwards recognized the firm's liability for the payment of the notes.

The question is, when a note is signed by one partner in his individual name, which is not the firm's usual name, for borrowed money to be used for the benefit of the firm and at the request and consent of the other partner, is the partnership bound on the note for its payment?

As this court has settled that question to its own satisfaction, it is needless to go outside to look for precedent.

In the case of Carter v. Mitchell (ante, 53), the cases by this court upon the question at issue are reviewed and a rule established which governs this case.

It is held in that case that the doctrine announced in the case of Hicks v. Crawford, 4 Bush, 19, to the effect that when a note had been executed for borrowed money by one member of the firm in his own name, and which was not the firm's name, and the money was used for the benefit of the firm, the firm was liable on the note for its payment, was no longer the law in this State. It was also held in that case that when a note was executed by one member of a firm in his individual name, which was not the firm's name, for the benefit of the firm, by the consent of the other member, such consent made the note the firm's note and it was bound for its payment. It seems in such case

that the consent of the member not signing that the other member may sign the note for the benefit of the firm, is equivalent to making that member's name the firm's name for that particular transaction, and the case of Macklin v. Ferguson, 6 Bush, 401, is construed to be in harmony with this view. It is clear that the money was loaned by the appellant to W. E. and E. K. Cropper in their individual names and not in the firm's name, but for its benefit at the request of J. B. Wilgus, and the firm did get the benefit of it.

These facts certainly made the notes firm notes and bound Wilgus for their payment. But it is said that Wilgus refused to sign the notes, which shows that he did not intend to be bound thereon, and that the bank so understood it; but we think the facts relative to that matter are in favor of his liability on the notes, because he asked the bank to loan the money to W. E. and E. K. Cropper for the benefit of the firm, and gave as his reason for not getting the money in the name of Cropper & Co. that, being a director in the bank, he did not wish to appear as obligor on the notes.

This fact we think emphasizes the conclusion reached that Wilgus authorized the use of the names W. E. and E. K. Cropper as representing the firm's name; also the fact that the firm's tobacco was pledged as to secure the payment of the notes with the knowledge and consent of Wilgus, is another fact showing that he intended said names to represent that of the firm. Some of said notes were renewed in the lifetime of Wilgus in the name of the same payors. This fact does not militate in favor of Wilgus, because, as the names of the Croppers were intended to represent the name of the firm in the matter of borrowing money from the bank, the renewals of the notes were only evidences of the same transaction and bound Wilgus for their payment. Conceding that the Croppers had no right to renew one of the notes after the death of Wilgus, the bank did not release Wilgus from the payment of the original note which he was bound on, unless the bank had intended to release him. But the bank says and proves it that it never intended to release Wilgus from the payment of the original note, and that the cancellation of the same was an inadvertance. According to this he remained bound on the same until the renewal was paid or satisfied.

The judgment is reversed and the case is remanded, with directions to give appellant judgment on the notes sued on, except the one executed after the death of Wilgus, and to render judgment in that case on the original note against Wilgus' representatives.

HOWE v. SADDLER, &c.

(Filed February 13, 1894—Not to be reported.)

1. A conveyance in fee of a certain boundary of land, excluding therefrom "the C. mineral lease, lying," etc., means that the boundary of such lease is excluded from the land conveyed, and not that the fee of such leased lands is conveyed subject to the lessee's rights under his lease.

In this case the fact that the grantor, after the conveyance, retained possession of such leased premises and cut trees thereon, etc., shows that the fee to such land did not pass to the grantee.

2. Same—Ejectment—Judgment—Where the answer in an action of ejectment denies that plaintiff is entitled to any part of the boundary sued for, and the evidence clearly shows that he is entitled to fifty-nine acres of the land sued for, a judgment for the defendant is erroneous and prejudicial.

although on appeal the defendant in brief of counsel insists that he has never asserted any claim to such fifty-nine acres.

3. Pleadings—The plaintiff in ejectment was not prejudiced by the rejection of an amended petition which merely set out the evidence or origin of the title under which he claimed.

Wm. H. Holt and Thos. T. Cape for appellant.

Wood & Day for appellees.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant brought this action for the recovery of 880 acres of land situated on the Leatherwood fork of Indian creek, in Menifee county, alleged to be in the wrongful possession of the appellees. He claims title through one Morrison, by deed from him of July 3, 1877, and seeks to show title in Morrison by deed from one James Ballard, of March 16, 1874, for 500 acres of the land, and for title to the balance relies also on Morrison, whom he seeks to show held under Ballard by parol purchase after the deed of March, 1874.

The appellees are the widow and heirs of James Ballard, who died, they allege, in 1886 or 1887, without having sold or disposed of the lands in dispute to Morrison or any one else.

It may be observed at the outstart that very strong evidence against the claim of the appellees is found in the circumstance that when Ballard came to make his will, just prior to his death, he apparently undertook to dispose of his entire estate, and yet makes no disposition of or reference to the large boundary of land in contest, thus seemingly precluding the probability of his then claiming or owning it; but the appellees were not the plaintiffs in the action, and, therefore, not under the necessity of making out title in themselves.

However this will may be regarded as affecting the establishment of the title of the appellees, the fact remains that the appellant must show title in himself to the lands sued for by him. The omission of the testator to dispose of them is undoubtedly corroborative of the apellant's contention, but it is by no means conclusive of the questions in dispute.

The appellees are admitted by the petition to have been in possession of the whole boundary sued for, and the proof for the appellees shows that for years before his death James Ballard, through whom they claim, was in possession of a large boundary on the Leatherwood fork, and after 1874 claimed the lands below the Daniel line to the mouth of the creek.

If there is any one thing established beyond doubt in this record of conflicting claims and contradicting proof, it is the location of the Daniel line. That this line forms the lower line of the Morrison 500-acre tract is clearly shown by the survey in the case and the map on file. Above that line, extending towards the head of Leatherwood to the Hatcher cave cliff, is situated the Morrison claim under the deed of March 16, 1874, to the lands embraced in which the appellant is entitled, and this deed contains only 83 acres of the land sued for, and from this boundary must be excluded, as we shall see, 24 acres found within the Cox & Nash lease. The survey, therefore, shows the appellant to be entitled to recover 59 acres lying immediately above the Daniel line and adjoining the Cox and Nash lease.

It is said in the brief of counsel for the appellees that they do not claim this tract of 59 acres, and never have; but by their answer they deny that the appellant is entitled to the boundary sued for "or any part of it," and put Howe to the proof of his title.

Manifestly, therefore, the judgment, to the extent that it denies to the appellant any relief, is erroneous. He is clearly entitled to the 59 acres, the location of which is designated by the capital letter "C" on the map. Whether he is entitled to the 24 acres, which are also within the boundary of Morrison's deed of 1874, is a question depending on the construction of that deed.

In consideration of $4,000, paid and to be paid, Ballard conveyed to Morrison a tract of 500 acres, more or less, beginning at the point of the Hatcher cave cliffs on the Leatherwood fork of Indian creek and running by natural objects and other known lines to the old Daniel line, and thence back to the beginning point, "excluding from the above-named boundary the Nash & Cox mineral lease, lying on the south side of Leatherwood, beginning at the road leading from Conway's to the forks of the branch; thence with the south fork of said branch to Cassidy's line, to the sandstone cliff; thence with said cliff to the Wash Pitts path; thence to the beginning."

It seems to us that if it had been intended to convey this 500 acres, "subject merely to the Cox & Nash lease," the deed would have used this simple form of expressing that idea. The fee to the whole tract would have passed by simply adding the words, "subject only to the lease of Nash & Cox;" but from the "boundary" of the 500 acres is "excluded" the Nash & Cox mineral lease, as specifically bounded in the deed. It must mean that the boundary of the lease or the lands embraced in the lease are excluded.

Turning to this lease, as it is called in this deed, we find this recitation: "The said Ballard has this day sold and leased for coal, minerals and mining purposes to said Cox & Nash a tract of land lying in Menifee county, on the head of the Leatherwood fork," etc.

Cox proves that from the time he and Nash bought this mineral right in 1869 he thinks, or so far as he knew, Ballard had possession of the soil of the tract up to his death, and this occurred in 1886 or 1887, more than ten years after the Morrison deed.

This proof is unsatisfactory, but by others it is shown clearly that Ballard retained possession of the leased lands and exercised the right to cut timber from them and control them long after the Morrison deed in 1874, a right clearly inconsistent with the claim of the appellant that Morrison got the fee in the deed mentioned. We think, therefore, that the 24 acres did not pass under this deed.

We do not think that the rejection of the appellant's amended petition affected his rights. It was merely an effort to plead the evidence or origin of his title through Morrison, and this he did in his proof and was entitled to do so without the pleading.

It appears that prior to April, 1877, the Roberts heirs had sued for the recovery of these Leatherwood lands, and both Ballard and Morrison had defended their respective possessions. The Roberts people succeeded and at the date last named they made a deed to Ballard for the lands now in dispute in consideration of the payment of $800, and a release of further claim by Ballard of the residue of the Roberts boundary on Leatherwood as surveyed by one Robb. This conveyance was made with the full knowledge of Morrison, and without objection or contention that it should be made to him or to his vendee.

It is now contended by the counsel for appellant that "this deed was evidently made to Ballard through a mistaken belief

that it should be done because he claimed the land when this suit"—meaning, we presume, the Roberts suit—"was brought, or an errnoneous supposition that he has then conveyed it all by deed to Morrison."

This seems hardly credible to us, and there is no evidence to support the contention. Both Ballard and Morrison, as well as Helm, the representative of the Roberts heirs, knew that Ballard had made no such conveyance to Morrison. It is urged, too, that there must have been a mistake, or it must have been conveyed to Ballard merely to be reconveyed to Morrison, because a part of the land embraced by it was already covered by the general warranty deed of Ballard to Morrison, and this would not be without force if the deed of 1874 embraced any material part of the lands conveyed by the Roberts heirs in April, 1877. As seen, however, only 59 acres was so embraced. This is not important, as the parties probably knew little of the exact location of the lines, the boundaries being given in all the deeds in general terms.

The $800 seems to have been paid thus: Ballard owed the Roberts heirs this $800 on the compromise. Morrison owed Ballard $800, balance due on the purchase of the 500-acre tract, and the appellant, Howe, owed Morrison a balance on lands sold Collins and himself. So the appellant paid the $800 to the attorneys of the Roberts heirs, and it effected a discharge of indebtedness all around, but coming at last out of Ballard.

We conclude, therefore, that the appellant fails to show himself entitled to any part of the tract of land sued for, save the 59 acres; that Morrison had no title to the lands below the old Daniel line, and his attempted conveyance to the appellant, of July 3, 1877, does not affect the title and possession of the appellees; that the proof shows Ballard to have been the owner of the lands in dispute, save to the extent indicated, at the time of his death, and the circumstances of his failing to dispose of them in his will is not sufficient to outweigh the proof that he was such owner.

We perceive no error other than the one indicated, and the judgment is reversed, with directions to adjudge the 59 acres to the appellant.

SCHMIDT v. MITCHELL, &c.

(Filed February 24, 1894.)

1. Upon refusal of an inferior court to grant an appeal to a party entitled to it, this court will compel the granting of such appeal by mandamus.
2. The clerk of the Court of Appeals has no authority to grant an appeal until after the expiration of the term of court at which the judgment complained of was rendered.
3. An appeal and order of supersedeas granted before the expiration of such term by the clerk of the Court of Appeals is void, and may be disregarded by the inferior court and the parties to the action.

B. F. Buckner, C. B. Seymour, Byron Bacon and Ernest Macpherson for appellant.

Humphrey & Davie for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

On January 31, 1894, the appellant, Schmidt, filed in the office of the clerk of this court a copy of the judgment against him in the Jefferson Circuit Court, Law and Equity division, in the case of John Mitchell, &c. v. The Oregon Gold Mining Company, &c., and was granted an appeal therefrom by the clerk, who also issued a supersedeas upon the execution by the appellant of the bond required by law.

The inferior court, declining to stay proceedings upon the judgment appealed from, the appellant seeks a rule against the judge of that court and certain of the appellees to show cause why they have disobeyed the order of supersedeas.

It is evident that unless the order was absolutely void it was the duty of the court below and all others to obey it, and if they wished to avoid it by reason of any irregularity in the manner of its issual, a motion to quash would have been the proper remedy. The inquiry, therefore, is as to the validity of the order of supersedeas.

The judgment sought to be appealed from was rendered on January 30, 1894, the day before the appeal was granted and the supersedeas was issued. This, therefore, was during the term of the inferior court at which the judgment was rendered. Section 734 of the Civil Code provides that an appeal shall be granted as a matter of right "by the court rendering the judgment, on motion made during the term at which it is rendered, or thereafter, by the clerk of the Court of Appeals, on application of either party or his privy, upon filing in the office of said clerk a copy of the judgment from which he apppeals."

Therefore, the granting of the appeal and the issual of the supersedeas were unauthorized, and these acts were not mere irregularities to be taken advantage of by motions to dismiss the appeal or to discharge the supersedeas. They are void, and, therefore, may be disregarded. If the bond were insufficient as to the surety offered, or defective in securing the rights of the appellee, a motion to discharge would have been the proper remedy. Or, if the appeal were improperly granted, or the appellant's right to prosecute it further had ceased, then a motion to dismiss would be proper. (Sections 750 and 757, Civil Code.)

In American Accident Company v. Reigart, 92 Ky., 142, it was held that the lower court could only grant the appeal during the term at which the judgment or order was rendered. An appeal thereafter granted was void. The principle of that case is that the lower court has the exclusive right to grant an appeal within the term, and after that the clerk of the Court of Appeals has the exclusive right to grant it.

To the same effect is the case of City of Newport v. Newport Gas Light Company, 92 Ky., 445, where it is said: "Four days after this judgment was rendered the appellants sued out an appeal from this court and superseded the judgment.

"Thereafter, and for the reason, doubtless, that under our Code an appeal can only be granted during the term at which it is rendered by the court rendering it, and which term of the Louisville Law and Equity Court expires sixty days from the judgment, the appellants asked that court to grant them an appeal. It was refused, and after the expiration of the term they sued out another appeal from this court and again superseded the judgment."

The valid supersedeas was the second one sued out after the expiration of the term of sixty days. So, also, in the case of the Louisville Industrial School of Reform v. City of Louisville, 88 Ky., 584, it is said that "there is no way for a party to bring a judgment of an inferior court to this court for reversal or modi-

fication until after the term at which it was rendered has expired, unless the appeal be granted by such inferior court."

Upon the refusal of the inferior court to grant the appeal the appellant, if he be otherwise entitled to such appeal, may obtain one from the lower court during the term by motion in this court for a mandamus.

In this case he is clearly entitled to the appeal as a matter of right, and upon an application therefor the lower court will grant it. That it affects the substantial rights of the appellant and is final in its effect is fully shown in the Kelley motion, this day determined. (Kelley v. Toney, &c., ante, 718.)

The motion is overruled.

LOUISVILLE GAS CO. v. CLAY.

(Filed March 8, 1894.)

Husband's right in stock in corporation held by wife—Where a wife dies the owner of certificates of stock in an incorporated company, the stock passes to the husband unless it is expressed on the face of the certificate or transfer book of the company that such sock is for the use of the wife. The mere issual of the certificate in the name of the wife does not indicate that it is for the "use" of the wife, so as to deprive the husband of his marital rights under the same.

Humphrey & Davie for appellant.

Barnett, Miller & Barnett for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

Mrs. Pattie A. Clay died in December, 1891, leaving a husband, the appellee, and five children surviving her.

The husband qualified as the administrator of his wife and as guardian for his children.

When she died Mrs. Clay was the owner of 100 shares of the capital stock of the appellant, which had been issued to her in the usual form, the certificates reading that "Pattie A. Clay is entitled to * * * shares of the capital stock in the Louisville Gas Company, transferable in person or by attorney on the books of the company at their office in Louisville."

Neither upon the face of the certificates nor on the stock book of the company was there expressed any "use" to the holder, separate or otherwise.

The question on this appeal is, does the stock in question descend to the children of Mrs. Clay or does it pass to her husband? The statute supposed to control the subject (General Statutes, chapter 52, article 4), is as follows:

"Section 15. If any stock in any of the banks or other corporations of this State is taken for or transferred to any female, and it is expressed on the face of the certificate or transfer book of such stock that it is for the use of such female, no husband of hers shall take any interest in such stock or the dividends thereon, and at her death it shall pass to her heirs; but if unmarried she may dispose of it by will; or, if married, so dispose of it with the consent of her husband, or without such consent

if so provided in the deed or will creating the trust. She may receive the dividends and give acquittances therefor, though married, but she shall not, in any way, anticipate the same, nor shall any dividend be paid upon an order or power given by her before the same is declared."

It seems to us that in order to impress on the stock the quality which extinguishes the husband's marital rights two things are necessary: First, the stock must be taken for her or transferred to her; second, there must be some expression or indication on the face of the certificate or transfer book of the stock to the effect that the stock is "for the use of the female."

It may be argued that if the stock stands in her name she necessarily has the use of it, as it would be absurd to say that she has not the use of that which she owns. But the use she has as such owner is not the use created by the terms of the statute. The provision that the stock "is for the use of such female," when expressed on the certificates or stock book, raises or creates a trust, and the statute in question operates to exclude the husband from taking any interest therein, although it may not be disposed of by will, save with his consent. Unless these words, or words of similar import, are so expressed, we think the statute has no application in controlling the disposition or destination of the stock. It goes as any other unfettered personalty of the wife. That which was to be expressed on the certificates under the old statute on this subject was that such stock was "for the exclusive use of such female," and it is argued that by the omission of the word "exclusive" the present statute creates the trust, even if it be not expressed on the certifiates of stock that it is for the use of the female.

This is but a repetition of the argument before alluded to that the use of the property must follow its ownership, and that by simply putting it in the name of the female the use of it is implied. This construction renders nugatory the important requirement that upon the face of certificates or on the stock book there must be expressed "that it is for the use of the female."

If such had been the intention the statute would have read "that when stock in any of the banks or other corporations of this State is taken for or transferred to any female no husband of hers shall take any interest," etc.

We think the words of the present statute "for the use of such female" mean the same thing as the words of the old statute "for the exclusive use of such female," and that unless the certificate or transfer book of the stock contain some such words indicative of the creation of such "use" in the female, the statute in question extinguishing the marital rights of the husband do not apply.

The judgment of the chancellor giving the stock to the husband is affirmed.

RAWLINGS, &c. v. McROBERTS, &c.

(Filed March 8, 1894.)

Certain instrument a deed of conveyance and not a will—A writing in the form of a deed of conveyance, duly executed, acknowledged and recorded, wherein the grantor, in consideration of love and affection and to provide for his kindred, sells, aliens and conveys to certain kinspeople all his real estate, with the condition annexed that the deed was to be put to record, "but not to take effect, so as to give possession to the grantees until after the grantor's death, at which time they are to divide the land," is in intent

and effect a deed of conveyance and not a will. It was an irrevocable conveyance of the land, although the right to the possession did not pass to the grantees until the death of the grantor.

W. G. Dearing, John P. McCartney, J. H. Power, Wm. H. Holt and Edward W. Hines for appellants.

W. J. Hendrick and W. G. Bullitt for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Hazelrigg.

The sole question to be determined on this appeal is whether the following instrument is a deed or a will: "This deed of conveyance, made and entered into this 6th day of April, 1891, by and between Austin Rawlings, of Fleming county, Ky., of the first part, and Thomas R. McRoberts, Wm. McRoberts, John McRoberts, Jamse McRoberts and George McRoberts, of Fleming county, Ky., of the second part, witnesseth: That, whereas, Austin Rawlings, a bachelor, now advanced in years, has numerous kinspeople, and, whereas, in view of the uncertainty of life, said Rawlings desires to make a distribution of his estate, to take effect, however, and to go into effect on and after death. Now, in consideration of $1 cash in hand paid, the receipt whereof is hereby acknowledged, the said Austin Rawlings has this day aliened, sold and conveyed unto the said George McRoberts, a great nephew, all my right, title and interest in and to all that tract or parcel of land bought by said Rawlings of James Rice, and which land is situated in Fleming county, Ky., on the waters of Locust Creek, and the same is bounded, * * * supposed to contain about 150 acres, to him, his heirs and assigns, forever, with covenants of general warranty, to have possession at my death. This is understood to pay George McRoberts for the kindness, care and nursing rendered me, and which may be necessary hereafter while I may live. The said Austin Rawlings has also this day aliened, sold and conveyed jointly to Thomas McRoberts, James McRoberts, Wm. McRoberts and John McRoberts all his right, title and interest in and to all the residue of his said land of which he is now seized, consisting of about ——— acres, the same being situated in Fleming county, Ky., and is described as follows, to wit (giving metes and bounds of several tracts): All of the foregoing tracts and parcels of land the said Austin Rawlings, for and in consideration of love and affection, and as recited heretofore, hereby aliens, sells and conveys unto the said parties of the first part, namely, Thomas McRoberts, John McRoberts, James McRoberts and Wm. McRoberts, their heirs and assigns forever, with covenants of general warranty. This conveyance to put to record but not to take effect so as to give possession unitl after my death, at which time they are to divide the same as they see fit and proper. It being the intention of said party of the first part to make each and all of the parties of the second part equal as near as possible, who are my nephews (sons of my deceased sister, whom I have raised), said party of the first part further conveys and stipulates that at his death whatever money, notes or personal property remains is to be divided equally between said last-named four nephews, each accounting for sums advanced, not taking into consideration rents, which are not to be taken against them after paying at my death $50 to Elizabeth McRoberts, wife of George McRoberts, for kindness and attention to me while living, to have and to hold unto the said George

McRoberts, Thoams R. McRoberts James McRoberts, John McRoberts, their heirs and assigns forever. In testimony whereof, the party of the first part has hereunto subscribed his name, day and year first above written.

"Signed: A. RAWLINGS.

"Attest JAMES McCREARY."

This instrument was signed and acknowledged by the grantor before James McCreary, the clerk of the Fleming County Court, who had also witnessed the signature of the grantor, and it was thereupon recorded in that office.

The contention of the appellants, who were the plaintiffs below, is that, although the document is couched in the form of a deed and has the usual words of conveyance, yet it is in fact a testamentary disposition of the property described, and hence a will. They sue for the land sought to be conveyed to the appellees because the writing as a will is not effective through lack of proper attestation under the statute. It is, of course, true that the form of the instrument is not conclusive of the intention of the maker of it; nevertheless if the writing has all the requisites of a deed it is a fact throwing strong light on the intention.

Here we have grantor and grantee, and the ordinary words operative of conveyance; we have the thing granted, the consideration expressed, the execution, including signing, attestation and acknowledgment, delivery, acceptance and registration.

As Lord Cook would put it, we have the premises, habendum, tenendum, reddendum, condition, warranty and covenants. But with all this, if the instrument has no present operation, if intended to vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It seems to us, however, that besides the fact that the form of the writing shows the intention of the grantor to make an ordinary deed, with possession postponed until after his death, the significant fact that the instrument was to be put to record is substantially conclusive of the point involved. This shows its irrevocable nature.

"This conveyance to be put to record but not to take effect so as to give possession until after my death" is the language. And then what? Not that the grantees are then to own the lands or take the lands. They are made the owners by the instrument, but they are to divide what is already theirs. It seems to us that if the express words of the grant are to control, the instrument must be construed to be a conveyance, with possession of the land conveyed postponed until after the death of the grantor.

If a will, then it was revocable, and the provision that it was to go to record is wholly inconsistent with the thought of revocation. The intention was to put the instrument with the thought of revocation. The intention was to put the instrument, solemnly aknowledged as it was in due form of law, forever beyond the control of the maker, but in providing for thus putting it on the record, as indeed was its ordinary course, as the grantor knew he was careful to have this expected registration so operative as not to give instant possession as it ordinarily would do. It may be true, as contended, that the reasons given for making the instrument are those often given by testators when about to make their last wills and testaments, but the fact that the grantor was a bachelor, advanced in years, had numerous kinspeople, and desired to make a distribution of his estate because of the uncertainty of life, are all facts fully consistent with the intention of making a disposition or distribution of his property by a deed, and while it is provided that the "distribution" was

to take "effect only on and after death," and thus the characteristics of a will are suggested, yet, looking at the express effect to be given the recording of the instrument—that is, to delay merely the possession—we are constrained to the conclusion that the intent was to make an irrevocable conveyance of the fee, the enjoyment of which only was to be deferred until after the death of the grantor. The language "to take effect, however, and to go into effect on and after death" is supposed by counsel for the appellants to be conclusive of the question. But it will be observed that it is not said that the writing is to take effect or go into effect on and after death. The words of the grant are those which are operative of conveyance—are effective immediately. They are in the present tense. The grantor "hereby aliens, sells and conveys," etc., but the distribution—that is, the division provided for, not the grant—is postponed until after the death of the grantor.

It is not true, as so earnestly argued by counsel, that in positive and unequivocal terms, the deed was not to take effect or go into effect until on and after death. It was the possession merely, the actual division and distribution that was thus postponed. No inferences arising out of the gifts of the personalty, as made in the deed, can be allowed to overreach the clear terms of the grant of the real estate, no questions respecting the personal property being before us.

Numerous cases are referred to, in which certain writings are held to be wills rather than deeds, the underlying principles being the same in all of them. By like energy, no doubt, as many instances might be found where the instrument has been held to be a deed rather than a will. Cases are useful in determining questions like the one before us, only as they illustrate the principles involved. It would be unprofitable to discuss them or distinguish them from the case under consideration. We have examined them and find them merely declaratory of the well-known distinction between wills and deeds. They throw no light on the intention of Austin Rawlings in making the deed of April, 1891.

The judgment dismissing the petition and upholding the writing in contest as a deed is affirmed.

MENNE'S HEIRS v. MENNE.

(Filed March 8, 1894—Not to be reported.)

Conveyance by wife to husband—Fraud—A conveyance by a wife of land, acquired by her by devise, to her husband without consideration may in some cases be upheld, but only where she executed it intelligently and without coercion or fraud.

A wife conveyed land devised to her by her first husband to a stranger without consideration, who immediately, without consideration, conveyed it to the wife's second husband. The wife was ignorant of her rights in the property, and was induced to make the conveyance upon the husband's representations that unless she did so her son by her first husband could take the property from her, and also upon the husband's promise to devise the land in the same way it would go if held by her. This the husband attempted to do, but the will was void because imperfectly executed. Held—The conveyance by the wife should be set aside because she did not execute it intelligently and freely, but was induced to do so by the fraudulent representations of her husband.

Root & Root and A. T. Root for appellants.

M. J. Brown for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, to whom was devised by her first husband, John Varhagan, the real property in controversy, brought this action to set aside a deed therefor made by herself and second husband, J. F. Menne, to one Michael Costigan, without consideration, and by him immediatley conveyed back to J. F. Menne, likewise without consideration.

Although such a scheme to divest the wife of her title to real property and pass it to her husband has been in some cases upheld by this court, still it should not be permitted to stand in any case where she has not intelligently and without coercion or fraud entered into it.

Appellee had two children by her first husband, and the effect of the deeds was to entirely deprive them of the estate their father had acquired and trustingly devised to their mother, and give it to the children by her second husband.

The two grounds upon which she seeks to set aside the deeds are, first, want of consideration, which we need not now consider, but the second ground is that her husband, ultimate beneficiary of the transaction, represented to her that unless she made the conveyance one of her sons by the first husband, who seems to have been on bad terms and frequently quarrelled with his stepfather, would sue and deprive her of the land.

The evidence satisfactorily shows she was ignorant of her actual legal rights under the will, and believing such representation to be truthful, and upon faith of her husband's promise to devise the land by his will in the same way it would go if held by her, she united in the deed to Costigan.

It appears J. F. Menne did attempt by will to devise the land to his wife, appellee, but the instrument being defectively executed, was not admitted to record.

In our opinion appellee did not join in the deed to Costigan freely and intelligently, but was induced to do so by fraudulent representations of her husband; consequently, the lower court properly set aside that deed as well as one from Costigan to J. F. Menne, whereby appellee is reinvested with title to the estate devised by her first husband.

Judgment affirmed.

COMMONWEALTH v. MAGOFFIN, &c.

(Filed March 8, 1894—Not to be reported.)

1. Official bonds—Authority to sign name of surety—One can not become bound as surety on an official bond unless he signs his name in person or by an agent duly authorized by written power to do so for him. Mere verbal authority in the agent to sign the surety's name will not bind the surety.

2. Same—Where an official bond is so executed as to be not binding on one of the sureties named in the body of it, it is not binding on any of the other sureties.

3. A county court has authority to accept the revenue bond of a sheriff only within the period fixed by the statute, and a bond executed or accepted after that time is void.

A revenue bond which was signed by only a part of the sureties within the period fixed by statute, and by the others subsequently, and which was never acted on by the county court, is void.

W. J. Hendrick for appellant.

Bell & Bell and P. B. Thompson for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

This action was brought to recover on a revenue bond purporting to have been duly executed on first Monday of January, 1887, by J. M. Board, sheriff of Mercer county, and appellees, his sureties.

Failure of Board to fully collect and pay over State Revenue for that year as he had covenanted to do, and his consequent liability for alleged deficiency, is not controverted; but upon various grounds, all of which need not be considered, appellees resist recovery of them for any part thereof.

1st. They allege that at least two of those whose names are stated in body of the bond as sureties and subscribed thereto, were not in fact signed until the day after first Monday of January, 1887.

2d. That the name of one of them was not signed by himself nor by a person having written authority to do so, but by another one of the sureties without any authority whatever.

Appellant, plaintiff below, does not in its reply make an issue of fact in respect to either statement of the answer mentioned; so far from it the petition does not contain a statement that the county court did at any time approve and accept the bond in question.

In Commonwealth v. Yarbrough, 84 Ky., 496, the rule in such case as this is, upon authority of several cases cited, stated and illustrated as follows: "As the power of the county court to take the revenue bond of sheriffs exists alone by statutory authority, and as the statute prescribes the time in which such bond shall be taken, and as such bond, although tendered and partially signed within the time fixed by the statute, has no binding force until adjudged sufficient and accepted by the county court in taking the bond in controversy not within the time fixed by the statute, was without authority and the bond is void."

In this case it not only appears the bond was only partially signed on the day prescribed by statute, but there seems to have been no action taken by the county court in respect to either them or those who signed it the following day.

It has been repeatedly decided by this court that a surety is not bound to answer for default of his principal in such bond as the one in question unless he either signs his name in person, or in writing empowers another to do so for him.

Adhering to the rule mentioned, we must, therefore, hold that upon the first ground the bond is ineffectual and void as to all the sureties. And being not binding upon that one of them whose name was signed without authority, according to another well-settled rule, it is not binding on the other; for, as said, where the principal has proposed certain persons as his sureties, all of whose names are set out in the bond, each one, as he signs, has the legal and moral right to expect and rely upon the proper officer causing it to be fully and properly signed; and thus each officer is expected and required not only to cause all to sign, but to have each to do so in such manner and time as will bind him jointly with the others.

In our opinion the bond, for reasons stated, sued on is not effectual and binding on the sureties for any purpose, either as a statutory or common law bond.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

CAMERON, &c. v. BRANDEN.

(Filed February 14, 1894.)

Settlements of fiduciaries—Failure to appeal—Where a guardian has made a settlement of his accounts with the county court, and that court has, upon full hearing of exceptions filed by the ward to the settlement, fixed the amount due by the guardian, the remedy of the guardian, if he is dissatisfied, is by appeal, and, failing to appeal, he can not surcharge the settlement in the circuit court.

Robert Crenshaw and W. G. Bullitt for appellants.

R. A. Burnett and J. E. Kelly for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Yost.

Prior to May 5, 1886, appeals from judgments of county courts admitting an administrator's or guardian's settlement to record were not authorized or provided for by statute.

On that day it was provided by an act of the general assembly, Carroll's Code, section 379, that appeals should lie to the circuit court from all orders or judgments of the county court in settlements of the accounts of personal representatives or guardians.

J. H. Branden qualified as the guardian of Julia A. Branden. In April, 1892, his ward having previously married Lee Cameron, Branden made a settlement of his accounts with the county court. At the May term following, Cameron and wife appeared and filed exceptions to this settlement, and on a final hearing in this tribunal, all parties being present, the exceptions were sustained, and it was found and so adjudged that Barnden owed his ward $287.60, and this settlement was admitted to record.

More than sixty days after this suit, no appeal having been taken to the circuit court from this judgment by Branden, Cameron and wife brought this suit to recover the amount found due them by the judgment above referred to.

In this petition the full facts concerning this settlement were set out, and copies of the orders of the county court showing its admission to record were filed as exhibits.

In his answer Branden admitted the allegations touching the judgment of the county court, but sought to surcharge the settlement thus made, alleging that the court had improperly charged him with certain collections and had failed to credit him with several amounts paid out by him for his ward.

The court overruled a demurrer to this answer, heard the causes on the issues there presented, and corrected the settlement in several particulars.

From that judgment this appeal is prosecuted, and the question is, did the answer present a good defense to the action? We think not. These questions had been fully heard and determined by the county court, a tribunal which had jurisdiction both of the subject-matter and the parties litigant. Its judgment was,

therefore, conclusive upon all of the parties and privies thereto so long as it remained unreversed.

It has been held by the Court of Appeals (Bell, &c. v. Henshaw's Ex'rs, 91 Ky., 430), that a devisee could not, under the provisions of the act cited, supra, contest a settlement by the fiduciary in both the county and circuit courts, and that when he contested its validity in the county court his remedy was by an appeal. It is, of course, equally clear that a fiduciary can not contest his settlement with a devisee or ward in the county court, and then seek to surcharge that settlement in an action brought to recover of him the amount found due upon his settlement. His only remedy, if dissatisfied, is by an appeal.

Branden appeared in the county court and made his settlement therein in the presence of his ward. He failed to appeal and is now without remedy. The demurrer to the answer ought to have been sustained.

The judgment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

HARTWELL, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 7, 1894.)

1. Carriers—Rights of consignor and consignee—The consignee named in a bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the absolute owner until the carrier has had notice to the contrary, and a delivery to him without such notice will discharge the carrier.

2. Same—Where there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered, or after the goods have passed from the possession of the initial carrier into that of a succeeding one, alter their destination and direct their delivery to another consignee unless the bill of lading has been forwarded to the consignee first named or to some one for his use.

Where a consignor of goods, to whom the bill of lading was delivered, afterward notified the carrier not to deliver the goods to the consignees until they produced the bill of lading and paid a draft which the consignor had drawn on them, and the carrier, in violation of that direction, delivered the goods to the consignees without the production of the bill of lading and before the draft was paid, the consignor has a cause of action against the carrier; and the consignor and a bank to which he assigned the bill of lading, and in whose favor the draft was drawn, were properly joined as plaintiffs, there being no written transfer of the bill. But even if the joinder was improper the defendant could not be prejudiced; and it is immaterial to the defendant whether there was any consideration for the assignment of the bill to the bank.

S. H. Bush for appellants.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barbour.

Mr. Hutchison, in his work on Carriers, says: "The consignee named in the bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the absolute owner until he has had notice to the contrary, and a delivery to him without such notice will discharge the carrier."

And again: "Where there has been no agreement to ship the goods, which will make the delivery of them to the carrier a delivery to the consignee and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered, or after the goods have passed from the possession of the initial carrier into that of a succeeding one, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named or to some one for his use."

We believe the above is a correct statement of the law. The petition in this case, to which a demurrer was sustained, shows that the plaintiff, Hartwell, was, on the 9th of September, 1892, the owner of 170 barrels of apples, and made a contract with defendant, whereby it agreed and contracted with him to carry said apples from Elizabethtown, Ky., to St. Louis, Mo.; that the apples were consigned to Pennington & Co.; that defendant gave him a bill of lading for the apples, which bill plaintiff files with his petition; that said bill of lading was endorsed by plaintiff, Hartwell, to his co-plaintiff, the bank, and plaintiff drew a draft on Pennington & Co. in favor of the bank for $300, the value of the apples, and the bill, together with the draft, were forwarded to St. Louis; and the defendant was notified on September 10th, and prior to the delivery of the apples to Pennington & Co., and prior to their arrival in St. Louis, not to deliver them to Pennington & Co. until they produced the bill of lading and paid the draft; that Pennington & Co. had advanced no money on the apples, and had no interest therein, but the defendant, in violation of the instructions, wrongfully delivered the apples to Pennington & Co. without their having paid the draft or having produced the original bill of lading.

The petition sets up a good cause of action. It is argued that there was a misjoinder of parties; that either the bank or Hartwell should have sued; that they could not prosecute a joint action. How the joinder could prejudice the defendant we are at a loss to see.

Though the petition alleges that Hartwell assigned and endorsed the bill of lading to the bank, no written assignment or transfer is alleged, and there is none on the bill filed with the petition. It should, therefore, be treated as a verbal assignment, and while such an assignment vests the bank with an equitable interest and makes it necessary that it should be a plaintiff, Hartwell is also a necesary party.

What the bank paid Hartwell for the transfer of the bill of lading is of no concern to the defendant. If Hartwell chose to give it to the bank he could do so.

The judgment is reversed and the cause is remanded, with directions to overrule both the special and general demurrer to the petition, and for further proceedings.

SUPERIOR COURT ABSTRACTS.

SHARPE v. COMMONWEALTH.

BOLLINGER v. COMMONWEALTH.

Filed February 28, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, overruling motion to affirm as delay case.

Affirmance as delay case—A judgment in favor of the Commonwealth in a misdemeanor case can not be affirmed as a delay case, there being no statute authorizing such an affirmance.

O'Neal, Phelps & Pryor and Hallam & Myers for appellants; W. W. Cleary for appellee.

THE KANAWHA DISPATCH v. RANKIN'S ADM'R.

Filed February 28, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Findings of fact—In this common law action, in which the law and facts were submitted to the court, the evidence was sufficient to authorize the court's findings of fact. And while they were not as full as they might have been, yet if either party was dissatisfied in this respect the court should have been requested to make them more specific.

W. H. Jackson and J. F. Clay for appellant; S. B. & R. D. Vance for appellee.

EASTIN, COMMISSIONER v. HATCHITT.

Filed February 28, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Rents accruing after the landlord's death belong to the heir and not to the personal representative, and, therefore, if collected by the personal representative, his sureties are not liable therefor.

M. Merritt for appellant; Yeaman & Lockett for appellee.

McNEIL, &c. v. WATKINS' ADM'R.

Filed February 28, 1894. Appeal from Laurel Circuit Court. Opinion of the court by Judge Yost, reversing.

Interest—In this action upon a promissory note, which by its terms, bore 10 per cent. interest "from date," as the plaintiff alleged in her petition that the agreement was that the note should bear this rate of interest until the debt should be paid, and that the words "until paid" were omitted by mistake of the draftsman, and there was evidence of such an agreement by one of the obligors, a judgment against him for 10 per cent. interest until the debt should be paid was proper; but as there was no evidence to connect the other obligors with this agreement, and nothing to show any mistake in the note so far as they were concerned, it was error to render judgment against them for any greater rate of interest than 6 per cent. after the maturity of the note.

Byron & Eversole for appellants; Ewell & Smith for appellee.

HUGHES v. WAGGONER'S EX'OR.

Filed February 28, 1894. Appeal from Cumberland Circuit Court. Opinion of the court by Judge Yost, reversing.

A judgment may be revived against the personal representative of a de-

fendant after ten days' notice has been given him of the motion to be made, which motion shall be docketed and tried as other motions.

No defense being made to the motion for revivor of judgment in this case, the court erred in overruling the motion, the notice being sufficient. The fact that the motion was pending from December, 1887, until May, 1890, does not show that it had been abandoned by the plaintiff, as it was submitted in December, 1887, and the delay of the court can not prejudice the plaintiff.

Scott Walker for appellant; J. H. C. Sandidge for appellee.

MORGAN v. COMMONWEALTH.

Filed February 28, 1894. Appeal from Leslie Circuit Court. Opinion of the court by Judge Yost, affirming.

Appeals—Upon this appeal from a judgment convicting appellant of the offense of selling liquor in Leslie county in violation of a prohibition law then and there in force, as there was no demurrer to the indictment and the grounds for a new trial are not in the record, the court has no means of ascertaining what the appellant complains of.

W. J. Hendrick for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. HARVEY.

Filed February 28, 1894. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Master and servant—Discharge—One who was employed by a railroad company as brakeman for an indefinite time, having reported for duty and held himself in readiness to perform it, is entitled to recover of the company the agreed wages up to the time he was discharged, although he did no actual work. And the fact that the company failed to pay him his wages and ignored his letters demanding payment did not amount to a discharge or notice of a discharge. A discharge must be in unambiguous words or by actions clearly indicating the party's intent.

2. Evidence—As this was an action to recover agreed wages and not to recover damages for a wrongful discharge, the court properly refused to allow defendant to allege and prove the plaintiff's habits as to liquor.

3. Instructions to jury—Prejudicial error—As the evidence all tended to show the value of a brakeman's services was what the contract in this case by fair implication called for, the defendant was not prejudiced by an instruction authorizing the jury to find for plaintiff the value of a brakeman's services, as appeared from the evidence, although as matter of law the criterion of recovery was the contract price.

J. A. Mitchell for appellant; Sims & Covington, W. T. Cox, H. B. Hines and Edward W. Hines for appellee.

MELTON v. NEWPORT NEWS & MISSISSIPPI VALLEY CO.

Filed February 28, 1894. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Brent, affirming.

1. New trial—Surprise—The fact that the plaintiff was taken by surprise by the testimony of defendant's witnesses does not entitle the plaintiff to a new trial unless witnesses had, by some fraud or deceit, led him to rely upon them to testify differently.

2. Same—Newly-discovered evidence—A new trial will not be granted upon the ground of newly-discovered evidence in the absence of anything to show that the evidence could not have been had at the trial by ordinary diligence.

3. Railroads—Presumption of negligence overcome—In this action against a railroad company to recover damages for the killing of plaintiff's stock by one of defendant's trains, as the unimpeached testimony of defendant's em-

ployes in charge of the train showed that there was no negligence, the statutory presumption of negligence was overcome, and as the plaintiff introduced no other evidence he failed to make out his case, and a peremptory instruction to find for defendant was proper.

D. M. Rodman for appellant; P. H. Darby for appellee.

GALLIHER v. HARTFIELD, MOSS, &c.

Filed February 28, 1894. Appeal from Adair Circuit Court. Opinion of the court by Presiding Judge Brent, dismissing.

Final order—An order overruling a demurrer to an answer, unless followed by the entry of a judgment disposing of the action, is not a final order from which an appeal lies.

Rollin Hurt for appellant; J. R. Hindman and Garnett & Garnett for appellees.

BREYFOGLE v. WOOD'S ADM'R.

Filed March 7, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Lease of mineral lands—Notice of prior lease—A lessee of mineral lands having taken his lease and worked the property with knowledge of a prior lease, he is liable to the prior lessee for the damages resulting to him from the working of the property and the removal of minerals.

2. Same—The defendant having actual notice, through his agent, of the prior lease, it is immaterial that the lease was not properly recorded.

3. Same—Abandonment of lease—As the prior lessees paid a cash consideration for the lease and by its terms had thirty years in which to work it, the evidence of nonuser for fifteen or eighteen years was not conclusive evidence of an abandonment of the lease; and as there was evidence that the lessees intended, when they became able to do so, to develop the property, the jury were authorized to find that there had been no abandonment.

4. Withdrawal of incompetent evidence from jury—This court must assume that the jury did not consider evidence which the court, after it was admitted, ruled to be incompetent, and, therefore, the defendant was not prejudiced by the admission of the evidence.

James Montgomery for appellant; Poston & Marriott and J. B. Hobson for appellee.

HART v. SCHEIBLE.

Filed March 7, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Arbitration and award—When by an award acts are to be performed by both parties, and those acts are distinct and independent, the one not a condition precedent to the other, either party is guilty of a breach of the award who does not perform all he is ordered to do, although the other party may have entirely neglected to obey the award on his side. But if the acts ordered to be done by one party are dependent on acts ordered to be done by the other, the former can not sue until he has shown performance on his part.

Sprigg & Chelf for appellant; Hobson & O'Meara for appellee.

HALL v. OWENSBORO WAGON CO.

Filed March 7, 1894. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Subscription to corporation—Where the original writing containing the terms of subscription to the capital stock of a corporation stated that another company would contribute its stock or plant, and the subscribers afterward met and rejected the offer of the company referred to to contribute its plant. one of the subscribers who was present at that meeting and after the waiver of that condition agreed to take the number of shares originally subscribed

by him, and then signed and acknowledged the articles of incorporation, can not resist the payment of his subscription upon the ground that the condition referred to was not performed. The parties to the original writing had the right to modify it or waive any of the terms therein prescribed.

Wilfred Carrico for appellant; Owen & Ellis and J. B. Karn for appellee.

THOMPSON, &c. v. GRAY.

Filed March 14, 1894. Appeal from Bourbon Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Landlord and tenant—Assignment of terms—Where a tenant having a term of one year assigned to another for the same term a portion of the rented premises, the assignee has a right of action against the assignor for failing to put him in possession; and the fact that the landlord refused to consent to the transfer constitutes no defense, for, although such a transfer, without the wirtten consent of the landlord, operates under the statute as a forfeiture to him, that fact does not render the transfer void as between the parties.

2. Same—Estoppel—The assignment of the term being in writing, the assignor can not plead as an estoppel a parol agreement by the assignee at the time of the contract to get the landlord's consent. Neither can such an agreement be pleaded as a condition precedent without an allegation that it was omitted from the contract by fraud or mistake.

3. Reversible errors—There can be no reversal on account of error in an instruction, the giving of which was not made a ground for new trial.

Ward & Dickson for appellants; J. W. Lucas for appellee.

NORTON v. LAUGHLIN.

Filed March 21, 1894. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Brent, affirming.

1. In sales of land by auctioneers the auctioneer is the agent of the vendor until the accepted bid is made and the property struck off. He then becomes the agent of both vendor and vendee for the purpose of making and authenticating the written memorandum of the contract of sale.

2. In this action by vendor to enforce specific execution of a contract for the sale of a city lot made by an auctioneer as plaintiff's agent, the fact that the lot is not on the east side of the street as was represented constitutes no defense, as the defendant shows no damage to him from this fact and could not have been misled as to it, being present at the sale on the premises and acquainted with the neighborhood.

3. The word "alley" does not imply necessarily a way open to the public; and when a lot is described as running back to a ten-foot alley it is not necessary that it should. In order to answer that description, run back to a public alley such as the city owns, controls and improves. It is sufficient that the way is open and used by the owners of abutting lots.

John Barret and John Roberts for appellant; Dodd & Dodd for appellee.

DAVIS, &c. v. WHITE.

Filed March 21, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Evidence as to transaction with decedent—In this action upon a promissory note in which the representatives of a deceased obligor pleaded the limitation applicable to sureties, the only issue being whether the decedent was a surety or a principal, the payee of the note who had assigned it to his coplaintiff to be held as collateral was not a competent witness to prove that the decedent was a principal, there being nothing to show that the payee was no longer beneficially interested in the collection of the note, the lapse of time alone being sufficient for that purpose. If the payee had assigned

the legal title and ownership of the note to his coplaintiff for value, the failure of the assignee to sue at the next term to which he could have brought suit after maturity of the note would prima facie have released him and he would have been a competent witness, but the note having been assigned as collateral only the rule is different.

S. B. & R. D. Vance for appellants; Montgomery Merritt for appellee.

CARLISLE v. DODDS.

Filed March 21, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

Assignment for creditors—Right of assignor to sue in his own name—A trust created from necessity or for a special purpose will cease with the necessity which gave rise to it, or upon the accomplishment of the special purpose. And after the purposes of a trust have ceased the legal title vests in the beneficiary without a conveyance from the trustee.

An assignee for the benefit of creditors having settled with all the assignor's creditors at 25 cents on the $1, and obtained from them a complete discharge of his assignor from any further liability on account of said indebtedness, the assignor had the right to maintain this action in his own name upon a judgment in his favor which was not taken into consideration in the settlement because it was then regarded as hopelessly worthless.

H. W. Rives and H. P. Cooper for appellant; S. A. Russell for appellee.

NEALE v. HAYS.

Filed March 21, 1894. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Under the plea of non est factum the defendant can introduce no testimony which does not tend to prove that he never signed or delivered the writing sued on. If he intends to rely upon the fact that the writing was obtained by duress or fraud, or that it has been altered or any other fact which admits the execution and delivery of it, he must, under the Code, state in his answer the facts upon which he intends to rely.

2. Alteration of note—The addition to the note sued on of the words "with interest from date" is a material alteration, but as the defendant does not aver in his answer that the alteration was made either after the delivery of the note or without his consent, the answer does not as to that matter allege facts sufficient to constitute a defense.

W. C. McChord, J. W. S. Clements and I. H. Thurman for appellant; John W. Lewis for appellee.

The Kentucky Law Reporter

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

VOL. 15. MAY 15, 1894. No. 22

KENTUCKY COURT OF APPEALS.

SCHMIDT, &c. v. LOUISVILLE, CINCINNATI & LEXINGTON RY. CO.

(Filed February 8, 1894.)

1. Railroads—Mortgage by trunk line of net earnings accruing to it by reason of business coming to it from leased branch road—A mortgage by a trunk railway of all net earnings which may accrue to it by reason of business coming to it from or over the line of a branch road, which it has leased, created a lien upon the net earnings accruing to it in carrying business over its own lines in both directions, to and from the leased line. The lien covers net earnings from business originating on the trunk line and carried to and over the branch road as well as earnings on business received by the main line from the branch road.

2. Same—Such net earnings are to be determined by first ascertaining the gross earnings from such business and deducting from this the gross expense of handling such freight by the main line; and this gross expense is to be ascertained by regarding the business of the line as a unit and charging the business to and from the branch line with its proportional part of such unit.

3. Same—Interest—Although the amount of such earnings was in dispute and the contract under which it accrued ambiguous, the railroad must pay interest on the several amounts found to be due from the date they ought to have been paid by it, the sums due and the time of payment being fixed by a written contract.

4. Same—The trunk line can not, under its mortgage, apply the net earnings above mentioned to the payment of the loss accruing to it from operating the leased branch road before paying it over to the mortgagees. The mortgage expressly requires such net earnings to be paid to the mortgagees.

Simrall & Bodley for appellants.

Helm & Bruce for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

In 1879, the Northern Division of the Cumberland & Ohio Railroad Company leased to the appellee, the Louisville, Cincinnati & Lexington Railway Company, for the term of thirty years, its unfinished roadbed, rights of way, with the improvements and appurtenances, depots and depot grounds, machinery, tools and implements, together with all its property rights and franchises, belonging to or in any way appertaining to its line of railway at the town of Eminence, Kentucky; thence running southwardly through the counties of Henry, Shelby and Spencer, and terminating at Bloomfield, in the county of Nelson.

In this lease the first-named company agreed to mortgage to the appellee all its property, rights and franchises belonging to or in anywise appertaining to its line of railway, as described above, to secure the payment of 350 bonds, of $1,000 each, with coupons attached, to run fo a term of years. The number of these bonds was subsequently reduced to 250.

These bonds were to be put in the hands of the appellee to be sold and the proceeds applied to the construction of the Cumberland & Ohio railroad, and if there were any deficiency to complete the road from Shelbyville to Bloomfield, the appellee was to supply it and have a second lien therefor on the road. After such construction the appellee was to operate the road under the lease for thirty years and apply the net earnings derived therefrom to the payment of interest on the bonds indicated, and to the creation of a sinking fund for their retirement. To this end the lessee was to make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the roadbed in order. Out of the gross earnings was first to be deducted annually the sum of $1,000, to be paid the lessor, with which to keep up its organization; and, if the net earnings did not prove sufficient to pay the interest and provide for the sinking fund on the mortgage bonds, then the lessee (appellee), if all other sources of raising money failed, the lessor was to supply the deficiency as far as might be done by appropriating the net earnings, or so much as might be needed on its own lines, which might accrue by reason of business coming to it from or over the lessor's lines. The construction of the road from Shelbyville to Eminence was abandoned because the appellee had obtained a long lease of the Shelby branch road, which connected with its own lines at Anchorage, thus connecting the contemplated road of the lessor with its own road and making it a "feeder" therefor. The sale of these bonds depended on the plan adopted for the prompt payment of the interest, and in order that this might be met properly the appellee agreed to pay it during the construction of the road, and then, as we have seen, see to its payment out of the earnings indicated. The appellee at the start contemplated giving an absolute guaranty of the payment of this interest, but upon the advice of its attorney that it had no power to do so, it executed the following mortgage on the earnings pledged in the lease heretofore described: "That, whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky, approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction and operation of the latter company's line of road from Eminence, in Henry county, Kentucky, through a part of said county and the counties of Shelby and Spencer, and into Nelson county so far as Bloomfield, all in the State of Kentucky; said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein, that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide

for the sinking fund of 850 bonds of $1,000 each, bearing interest at the rate of 7 per cent. per annum, payable half yearly on the first days of June and December, and having twenty years to run from the 2d day of July, 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company; and if all the sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed on its own lines, which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company; and, whereas, said contract of lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulations as to said net earnings.

"Now, in consideration of a dollar cash in hand paid by said second party to said first party and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio Railroad Company to the said Joshua F. Speed, as trustee aforesaid (who is the trustee for the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company to secure said 50 bonds, of $1,000 each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northren Division of the Cumberland & Ohio Railroad Company's lines, for the purpose of discharging said interest and sinkng fund as they severally fall due."

In pursuance of the contract of lease and mortgages, these bonds were placed on the market by the appellee and sold at about their face value. No interest having been paid on them since 1883, the appellant, Schmidt, as successor to the trustee named in the mortgage, and the other appellants who were the purchasers of the bonds, instituted this action to compel the appellee to account for the net earnings alleged to have accrued to it by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of paying the defaulted interest and establishing the promised sinking fund with which to retire the principal at maturity.

The appellee denied that it had made any profit from the business coming to it from or over the line of the leased road. The case was elaborately prepared, and after a number of references to and reports from special commissioners—expertsi n the tabulation of figures—and the accumulation of several thousand pages of record, the chancellor finally dismissed the petition.

The appellants contend that the net earnings made on the lines of the appellee and put in pledge under the lease and mortgage, were the net earnings on business coming to the appellee from both directions—that is to say, earnings accruing by reason of business on its own lines brought to it on account of the building of

the new road. The appellee says that it was the intention to put in pledge only the profits of business coming literally from off the new road on to the main line, and this is the first question to be decided.

In his first opinion the learned chancellor held that the plaintiffs and other holders of the bonds were entitled to the net earnings of the appellee "on business coming to it from or over the lines of the Northern Division of the Cumberland & Ohio Railroad Company in both directions," and the commissioner was directed to ascertain and report the net earnings accordingly. Again, considering the question carefully, the chancellor more than a year after his first opinion "reached the conclusion that the net earnings pledged embrace such as arise from business carried on over said road both ways, going and coming," but in the opinion and judgment appealed from, he comes to a different conclusion. We are of opinion that his first impressions were correct.

Business coming to it "from" the Northern Division of the Cumberland & Ohio, means business coming to it by reason of, out of or by aid of, the Northern Division of the Cumberland & Ohio. The new road is the source of the business or the cause of the business. The fact that it has been built brings business from Louisville, Cincinnati and Lexington on to the lines of the appellee, and over its own line to Bloomfield and other points on the way. It also brings businesso on its own line to the main line, and it is by reason of the new road, and, therefore, "from" the new road that the business originates.

This construction is in accord with the spirit of the argeement and the purpose in view. The trunk line wanted a feeder. It was willing to give up temporarily all it might earn by reason of the business—all the business—brought to it by the new road for the sake of having a permanent feeder in the future. It might not pledge its own resources, though willing to do so, to the payment of this interest, but it could give up all it made for the time being out of the business created by the new road.

The second question is, how are we to ascertain the net earnings in lien under the mortgage?

The gross earnings are given, but from them what shall be deducted in order to show the net earnings?

The appellants say that the appellee, being fully equipped with officers, rolling stock and other appliances for operating its roads, should account for the gross earnings received for doing the business brought to it from the Cumberland & Ohio, less the cost and expense of handling this particular business; that their contract is not that they should have the net earnings of the Louisville, Cincinnati & Lexington Railway Company on business coming to it from or over the Cumberland & Ohio road after it has been thrown into the hoth-potch with the other business of the appellee, and borne a proportion of the general expenses of the entire system; nor is it that they should have what is left of the net earnings after there has been deducted therefrom a certain proportion of all the expenses and all the losses which the appellee has incurred on all its business. But that their contract is for all the net earnings which the Louisville, Cincinnati & Lexington Railway Company may make out of this particular business, which, of necessity, is the difference between its gross earnings from that particular business, and the additional cost or expense of handling this particular business.

Now, granting full effect to all counsel say as to limiting or restricting the deduction to be made from the gross earnings in the

way of cost for handling this particular business, we fail to understand how we are to arrive at the cost of handling this business. It can not be meant that each shipment of freight, to the profit of shipping which the appellants are entitled, is to be traced over the lines of the appellee to its destination, and the cost thereof sought to be ascertained by some special rule not applicable to shipments of other freight. Manifestly the particular shipments in which the appellants are interested enjoy no special place or retain no privileged classification when they come to be mixed with the other shipments of the main lines. Notwithstanding that the contract controls the final destination of the net earnings of this freight and gives it to certain designated persons, nevertheless in what respect, may we ask, does it cost less to ship a pound of this freight than to ship a pound of any other freight carried over the appellee's lines?

It is said that the appellee would have carried this general freight anyway, and been to the cost of doing so whether it carried this particular freight or not; but this can be said of every pound carried on the train, and, besides, it is not true that the appellee could have done the business thus coming to it from the Cumberland & Ohio without additional cost; and to find this additional cost we are called on to adopt some just rule.

There is nothing in the mortgage which prescribes the method of ascertaining the net earnings. They are, therefore, to be arrived at in the usual way. The shipments in question must be subjected to a like cost of transportation as falls on other business. From the gross receipts must be deducted the cost of producing them.

The traffic from the Cumberland & Ohio is solicited by the usual methods of advertising, received at the various depots of the main line, sorted, loaded, transported, unloaded and delivered. Counsel admit the existence of some proper charges against this business, otherwise the appellee would be held for the gross earnings; but how shall we stop short of letting it bear the same proportion of cost as falls on other business? Why, for example, should a proportion of the cost of additional water supply or fuel be charged against the business, and not a proportion of the amount paid for labor on the road? Certainly the more business done, the greater tonnage hauled, the more water, fuel, labor, etc., required, and greater the wear and tear of the road and rolling stock; and we know of no way to arrive at all this save approximately by a proportion distributing the total operating expense over the whole business.

This process has been approved in many cases (St. John v. Erie R. R. Co., 22 Wall., 136; Pullam v. C. & O. R. R. Co., 5 Bissell U. S. C. C., 237; United States v. Kansas Pacifi R. R. Co., 99 U. S., 455).

In the first named case it is said: "The business of the road is a unit. If it had been disintegrated, as proposed by the complainant, we apprehend it would have been found that the corelations of the main stem and the branches were such that the expenses and charges incident to the entire business and those of its several parts were so interwoven and blended that an accurate ascertainment of the net profit of the main line and any of the auxiliaries, taken separately from the rest, would have been impracticable."

It appears from the record that some eight or ten commissioners' reports have been elaborately prepared and filed, seeking to ascertain the net earnings in dispute. The first one (R. E. S., No. 1) ignores the equitable method of distributing the cost of the business in question by proportion, as indicated above, and others reach results by using what is called "arbitraries." Of

them we may say they have no place in this case by reason of the absence of any agreement to the effect that they may be used.

Upon an examination of all the reports and the principles underlying them, we are of opinion that the report of Mr. Sewell (R. E. S., No. 2) is a nearer approximation to correct results than any of the others. It estimates the earnings on the appellee's lines in both directions, and finds the net earnings by deducting from the gross receipts the expenses of operating the road by which the receipts are earned. The cost of transportation is ascertained by proportion, and the proper percentage is charged to the business in dispute; all, of course, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. This gives to the appellants the sum of $60,192.27 of net earnings up to the date of the report named. Other reports reduce this sum, although purporting to be based on the same principles, and it may be admitted that by the exercise of sufficient ingenuity in multiplying the items of expense attending such a business as that of railroading, the actual earnings of a road may be made to vanish in a maze of mathematical calculations.

In addition to the fact that this expert (R. E. S., No. 2) shows itself to be the nearest approach to absolutely correct results, its conclusions are approved by the judgment of Baird, Sewell and others who have devoted years of study to the question at hand.

The chancellor finally reached the conclusion that, under the contracts in question, the net profits which the appellee made on its own lines from the business coming to it from the Cumberland & Ohio road should be applied not in payment of the interest on the bonds, but in paying the losses incurred by the lessee and appellee in operating the leased road; holding, in other words, that there were no net earnings as long as there was a loss in running the leased road.

We think this is manifest error. It was to meet this contemplated loss or deficiency that the contract was made, and in express terms directed the net earnings to be applied to the payment of this interest.

The loss accruing to the appellee in this case, if any, arises not out of the pledge of what it makes on its own lines from the business brought to it from the new road, but out of an unprofitable lease of the new road. The appellee had the power to make this unlucky contract of lease, though it might not agree to pay this interest.

The results arrived at by the commissioner in the report R. E. S., No. 2, as the net earnings up to the date fixed in the report, are evidently fair and just to all the parties concerned, and this report is approved.

The judgment is reversed, with directions to take the report indicated herein as the basis for further proceedings consistent with this opinion.

Judge Hazelrigg delivered the following response to petition for rehearing and extending opinion:

In response to the inquiry as to whether or not the sums to which the bondholders are entitled under the opinion herein should bear interest, and, if so, from what time, we are of opinion that although the amount of the earnings was in dispute and the terms of the contract not altogether free from ambiguity, nevertheless the sums due were fixed by a written contract and the time of payment also fixed, and we perceive no reason why the earnings, as they are ascertained in the approved report of the

comimssioner, should not bear interest from the time they should have been applied under the contract in payment of the interest on the bonds.

If the comimssioner has computed the earnings from too early a date, it is because the coupons on the bonds for such time had already been paid; and, if so, such coupons were taken in by the railroad company, and will be admitted as credits on final hearing, which meets the suggestion of error in that particular made by counsel for the appellees.

The petition for rehearing is overruled.

SALES v. COSGROVE, &c.

(Filed March 8, 1894—Not to be reported.)

Judicial sale of land to pay taxes—The purchaser of lands old by order of court to pay amount of taxes a daughter had advanced and paid upon the property which had belonged to her mother, who was dead, acquires a good title under the decree; and it is immaterial to him whether the mother was a married woman when the taxes were assessed or payment thereof made by the daughter.

L. N. Dembitz for appellant.

O'Neal, Phelps & Pryor, A. L. Dembitz and Samuel S. Blitz for appellees.

Appeal from Jefferson Circuir Court, chancery division.

Opinion of the court by Judge Lewis.

Peter Cosgrove, administrator, brought this action for settlement of the estate of Mary Ford, deceased, alleging and showing the only property left by her, real or personal, was a lot of land not susceptible of division But the only demand adjudged valid and subsisting was $78.66, amount of taxes assessed against the lot and advanced and paid by appellee, Kate Ford. And to satisfy that demand and pay costs of the action the lot was, under judgment of the court, sold, appellant, Mark Sales, becoming purchaser.

The only ground suggested on this appeal for disputing validity of the sale is that Mary Ford was a married woman as well when the taxes were paid as when she died. But we do not think that under the circumstances of this case that fact renders the judgment under which the sale was made to appellant either void or erroneous. The lot would have been inevitably subjected and sold to pay the taxes if Kate Ford, a daughter and heir of deceased, had not advanced and paid the amounts assessed; for it appears that neither her father or mother had ability or means to do so, having to depend upon her even for necessaries of life. Certainly other heirs of decedent would not be heard in a court of equity objecting to applying a part of proceeds of the lot to reimburse her, when, but for the payment she made, the whole would have been sacrificed and lost to them; and if they could not reasonably complain of the sale no person could.

Judgment affirmed.

THOMAS v. HUGHES, &c.

(Filed March 8, 1894—Not to be reported.)

Courtesy—Evidence—The evidence as to whether issue was born alive during the marriage of appellant and his deceased wife is conflicting, and the action of appellant in abandoning all claim to courtesy for fourteen years is inconsistent with his claim; therefore, the judgment below refusing to allow him courtesy must be affirmed.

J. E. Hays for appellant.

R. C. Warren and Stone & Stone for appellees.

Appeal from Casey Circuit Court.

Opinion of the court by Judge Lewis.

The only question in this case is whether there was issue of the marriage of appellant and Nancy Jane Thomas born alive. If there was, he became entitled at her death in 1869 to estate for his own life in the land then owned and possessed by her; otherwise not.

There was born January 2, 1868, a male child, but the evidence does not, in our opinion, satisfactorily show it was born alive The attending physician, whose deposition was taken in 1892, twenty-four years after the event, does not undertake to state positively whether the child was dead or alive, his answer to the question propounded being that "the preponderance of my belief or recollection is that the child was living." Besides appellant, one other person present states the child was alive when taken by the physician from under the bed cover, but that witness is shown by several others to have made a contradictory statement on the subject.

On the other hand, two witnesses introduced by defendant, who were present, state positively the child was dead when born.

Appellant's mother-in-law had dower right to one-third of the land in controversy, and, at death of Nancy Jane Thomas, inherited from her all of it, subject to courtesy of appellant in two-thirds thereof, if he was really entitled thereto. He resided on the land with her until 1877 or 1878, when he left the State and continued absent until after her death in 1891, when he returned and brought this action, claiming an estate for life in all the land.

It does not clearly appear upon what terms he resided on the land with his mother-in-law ater death of his wife, but it is hard to reconcile his entire abandonment of claim and possession for about fourteen years, with his present assertion of right, made after her death. In fact his conduct is so inconsistent with the claim he now sets up as to make it almost conclusive he was aware of the fact their was no issue of his marriage with Nancy Jane Thomas born alive. We, therefore, think that even if the evidence of witnesses preponderated in his favor, his own conduct would be sufficient to disprove the essential fact it was incumbent upon him nto show.

Judgment affirmed.

SPIRES' ADM'R v. LANGFORD, &c.

(Filed March 10, 1894—Not to be reported.)

1. When appellant fails to prosecute his appeal and file a brief the appellee upon motion is entitled to a dismissal of the appeal.

2. Advancements—Evidence—The settlement of the accounts of advancements received by the children of testator was correctly made in this case.

John D. Fogle for appellant.

W. J. Lisle and Avritt & Russell for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

J. D. Spires, administrator, with will annexed, of Joel Spires, brought this action for settlement of his accounts, sale of land and distribution of porceeds so as to make equality among the devisees by proper charge of advancements.

There was controversy in the lower court about a note executed to the testator by W. N. Langford, husband of Rachael, one of the tesator's children, and also whether Mollie Langford, another child, should be charged with any amount received as advancement.

The lower court rendered a judgment in favor of each of those children upon the issue involved, and though this appeal was taken by the administrator, no brief has been filed in his behalf and appellees would have been entitled to dismissal of that appeal if a motion to dismiss had been made.

It appears that the testator had contracted for purchase of a tract of land for his daughter, Rachael, at the price of $1,500, of which her husband paid $1,000, and the testator paid or advanced $500, the deed being made to her.

The evidence shows to our satisfaction that the sum of $500 paid by the testator was intended as an advancement, and though a note was given therefor, he never expected or required it to be paid until after his death, nor that any interest on it should be charged or paid.

He made a will, the sole object of which, as stated in the will itself, seems to have been to charge advancements previously made against children who had received any and to preserve evidence of advancements. But it sufficiently appears that subsequent to date of the will Rachael Langford or her husband had, by payments to other children, reduced the amount of advancements charged in the will against her to about the sum fixed in the judgment appealed from.

As to Mollie Langford, it does not seem to us the evidence is sufficient to show she had received any advancements for which she should be charged, and the lower court properly so adjudged.

Judgment affirmed.

BOARD OF TRUSTEES OF BEATTYVILLE, &c. v. DANIEL.

(Filed March 15, 1894—No to be reported.)

1. Constitutional law—Title of act—An act, entitled "an act to change the boundary line of the town of Beattyville, and to increase the license of vendors of spirituous, vinous or malt liquors, and so forth," embraces in its title only one subject, viz., the town of Beattyville, and is not unconstitutional.

2. Municipal corporations—Extension of limits—Taxation—The evidence shows that the town of Beattyville was growing rapidly at the time its limits were so extended as to embrace the property of appellee; that he has voted in town elections since the extension; that improvements of streets and alleys near his property have been and are now being made by the town; that stores are located further out than his property; that he works at mills in the town, as do men who board with him; therefore, this court can not

hold that the extension of the limits was for the unlawful purpose of merely embracing his property within the taxable limits of the town, and of lessening the burden of taxation of its inhabitants; nor does it appear that appellee derives no benefit from the town commensurable with the burden of taxation imposed.

H. L. Wheeler for appellants.

J. M. Beatty for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hazelrigg.

Contending that he was not a citizen of Beattyville, or the owner of property therein, the appellee enjoined the collection of taxes levied for general purposes and sought to be enforced against him by the town authorities. His contention rests on the supposed unconstitutionality of an act of the General Assembly extending the limits of the town, which extension embraces his property.

The ground of the appellee's objection to the act is that more than one subject is embraced in its title. The title is: "An act to change the boundary line of the town of Beattyville, and increase te license of vendors of spirituous, vinous or malt liquors, and so forth.'

It can not be seriously contended, and it is not so claimed in the argument, that the increase of "the license of vendors of spirituous, vinous and malt liquors" does not apply alone, and was not intended to apply alone to such an increase in the town of Beattyville. It would require a vivid imagination to apply the regulation as to such vendors as made in the title or in the body of the act to any other town than Beattyville. The subject related to, therefore, is the town of Beattyville, and no other.

Suppose the act had been entited an "act to amend the charter of the town of Beattyville." Then it might have been argued that the words "and to extend its boundary" should have been added, as suggestive of the purpose in view; we should then have had precisely the state of case considered in Swift & Co. v. City of Newport, 7 Bush, 88.

There this court decided that an act, entitled "an act to amend the charter of the city of Newport,' " which was passed for the sole purpose of extending the limits of that city, was constitutional, and was not void on account of "delusiveness or want of true significance of its title."

If, under an act to amend the charter of the town of Beattyville, any and all legislation pertaining to the town, although on different subjects, may be upheld, as is indicated in the case supra, then certainly such legislation is constitutional if the title of the act specifically point out the subjects to be affected.

The title of the act in question indicates that an extension of the town boundary is the subject of the proposed legislation, and also that there is to be an increase of the license tax on the sales of lipuors therein. We say "therein," because such is the necessary inference, and any other application of the phraseology in the title would be far fetched and inconsistent with the context.

It is also suggested that no streets had been opened up of which the appellee got the advantage, and that the extension was solely for the purpose of increasing the revenue of the city and lessening the burden of taxation on the inhabitants within the old boundary at the expense of the appellee and other others, without conferring any corresponding benefit. We think that the proof shows the contrary.

Prior to the filing of his petition the appellee exercised his right to vote in the town elections. He is not, therefore, subjected to taxation without representation. The city authorities have made improvements on the streets in the vicinity of the appellee's property, and are pushing the construction of streets and alleys in the direction of and near to his property. The town is growing rapidly. The town marshal lives near by him, as well as one of the trustees. Storehouses are being erected further out and close to the appellee, where goods are now being sold.

Appellee's residence is on the old country road, but will be on Arlington street when extended. He is not assigned for work on any county road. He has kept boarders who worked in the mills of the town which is a lumber center, and on other public improvements. His own work was in and about the town at the mills. We do not think that the legitimate object of improving the town has been lost sight of in this extension, and that the motive or the extenion was improper or violative of the contitutional rights of the appellee.

In the case cited heretofore it is said: "As in ordinary cases of taxation, in which the reciprocal benefits are deemed commensurable, so the subjection of land included in the town extension to the burden of a municipal tax, is not considered an unlawful appropriation of private property to public use unless the legitimate object of improving the town has been palpably perverted to the unauthoirzed purpose only of lessening the burden of taxation on the inhabitants, who will not be otherwise benefited by the extension." (Board of Trustees of Elkton v. Gill, 14 Ky. Law Rep., 755.)

Certainly there has been no palpable perversion of the constitutional right to extend the boundary of the town to any unauthorized or unlawful purpose.

We can not measure accurately the quantum of the benefit to be enjoyed by each citizen, but on this account merely we can not say that the exercise of the power of dedication, a power conceded to be within the legislative competency, has been so abused as to render the act under consideration void or violative of the fundamental guaranty of private property against appropriation to public use without just compensation.

The act must be regarded as constitutional, and the benefits of the extension commensurable with the burden of taxation imposed.

The judgment perpetuating the injunction is reversed, with directions to dismiss the appellee's petition.

SCOTT, &c. v. BEST.

(Filed March 15, 1894—Not to be reported.)

Construction of devise—Dying without heirs—A testator, after providing for his widow and directing his executors to divide the remainder of his land between his two sons when the younger son became of age, added this clause to his will: "In the event my children should both die without heirs it is my will that my wife should enjoy the whole estate during her life." remainder to the children of testator's sister. After the younger son became of age he married, and died, leaving a wife and two children. The other son is unmarried. Held—The children of the testator's sister took a remainder interest only in the event of the death of the sons without heirs, before attaining the age of twenty-one years; therefore, since both sons lived beyond that period the remaindermen have no interest in the estate devised.

W. O. Bradley for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hazelrigg.

This appeal involves the construction of the will of Ebenezer Best, who died in 1888, leaving a wife and two minor sons.

The instrument was written in 1878, when the children were quite young. After providing for the payment of his debts by a sale of the personalty and certain of his lands, he directed that his wife hold the remainder of his lands and use the rents for her support, after applying a sufficient amount of them to educate and clothe the children, as might be agreed on by the executors and herself. He then says:

Fifth: "It is my will, as soon as my oldest son, William, is thought competent by my executors to control my lands, that he have control of same, subject to the advice of my executors; and that as soon as my second son, Humphrey, becomes of age, that my lands be divided equally between them, after setting apart a sufficiency for the comfortable and independent support of my wife, subject to the judgment of my executors.

Sixth. "In the event my children should both die without heirs, it is my will that my wife enjoy the whole estate during her life, and at her death it descends to my sister's children."

When the youngest son reached his majority, some 170 acres of the land were set apart for the widow, and the balance divided equally between the two sons. Thereafter Humphrey died, leaving a wife and two children. This action to quiet his title is brought by the son William, who, as yet, has no children, against the children of his father's sister and others, who are alleged to be asserting some interest in the lands under the will upon the event he (William) should die without issue.

The chancellor decided that the son, William, under the will of his father, his brother Humphrey having died leaving children and heirs, is vested with the fee simple title to the lands alloted to him, and also to the fee in one-half the lands allotted to his mother, subject to her occupancy and use during life.

In this conclusion we concur; but not, as seems to be intimated in the judgment, because Humphrey died leaving issue, and, therefore, the event of both William and Humphrey dying without issue, could not happen. We think the testator meant the remainder people to take only in the event that his sons died before reaching their majority.

The time when the testator contemplated they might die without issue was while their mother would likely be alive to take. He provides that she was to enjoy the lands in the event of their so dying; but if they reached their majority, then the lands were to be equally divided, each was to have his own, and we do not think he meant to say that they should not thereafter hold them in fee; but whether William takes the fee because the death of his brother, leaving children, renders the condition of the will, that both must die without issue before the remainderman could take, impossibile of fulfillment, or takes the fee because they lived beyond the time when it was contemplated they might die without issue, is immaterial. The result is the same.

Judgment affirmed.

JONES v. COMMONWEALTH.

(Filed March 15, 1894—Not to be reported.)

The evidence shows that appellant was unquestionably guilty of murder, but the verdict convicting him of manslaughter can not be reversed, no error of law prejudicial to his substantial rights having occurred on the trial.

C. B. Lyttle for appellant.

W. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, John L. Jones, having been, jointly with Wm. Lankford, indicted for murder of Milton Jones, was convicted of manslaughter and sentenced to the penitentiary for twenty-one years.

The evidence shows that long enough before the homicide, for Lankford and appellant to walk three-quarters of a mile from the place and return with a gun and pistol, a difficulty had occurred in which a blow was given by William Jones, father of Milton, to Lankford, who appears to have fled immediately after the killing and never been arrested; and that when they came back Lankford and appellant, after taking a drink apiece of liquor, came out of the saloon, and, seeing William Jones standing on the platform of another saloon across the street, Lankford asked him if he was ready, but without waiting for reply fired a shot at him which, however, did not touch him; and then the deceasd, standing near his father, fired a pistol shot at Lankford, whereupon both he and appellant, John L. Jones, began firing at Milton, inflicting two mortal wounds, of which he very soon died.

According to the evidence apellant was unquestionably guilty of murder; but as the jury has mercifully returned a verdict of manslaughter, it must of course stand, if no error of law occured on the trial to the prejudice of his substantial rights.

No brief has been filed for him, and we will, therefore, consider the grounds filed on motion for a new trial.

The error of court in respect to alleged incompetent evidence, is not complained of except in general terms, nor do we perceive in what particlar there was any. The instructions are, so far as we can see, full and accurate. Certainly appellant was not prejudiced by them in the form given. The other grounds relate to alleged misconduct of the jury after the case was submitted and of the officer in charge; but even if this court could take cognizance of the matters made ground of complaint, the affidavits filed show both the jury and officer not at all guilty of the charge against them.

Judgment affirmed.

DELANEY v. COMMONEWALTH.

(Filed March 17, 1894—Not to be reported.)

1. Criminal law—Instructions—Aider and abetter—An instruction authorizing the conviction of appellant as aider and abettor to murder, "provided he was present at the shooting and killing, and in his mind or will assented thereto, and by words or conduct encouraged said party to shoot or kill the deceased," is substantially unobjectionable, the use of the word "assent"

In the expression "in his mind or will assented" (whatever that may mean), was not objectionable since the subsequent clause was added, "and by words or conduct encouraged said party to shoot or kill."

2. Same—Right of one to attempt to rescue his brother from abductors—One who has information that certain parties intend by force and violation to abduct his brother, or the purpose of compelling him to marry a certain female, has a right to openly bear arms for the protection of his brother and to prevent the abduction. After the abduction is effected he has a right to arm himself and in company with his friends pursue the abductors for the purpose of effecting the release of his brother, and to effect such release and save his brother from death or serious harm he has a right to use such force as reasonably appears to him to be necessary.

3. Same—Instructions—Where the rescuers suddenly and unexpectedly met the abductors after the latter had, in effect, dischargd their prisoner, and a fight occurred in which one of the abductors was shot and killed, on the trial of appellant (who went along armed for the purpose of releasing his brother) for murder an instruction holding him guilty if he entered into a mutual understanding with the rescuers that they would pursue the abductors and if overtaken would either kill, wound or assault them, or any of them, with deadly weapons, and if pursuant and to such understanding they did pursue and some one of them did shoot and kill the deceased, is erroneous and prejudicial, because it overlooks the right of the rescuers to attempt to rescue the person abducted, and their right to repel force by force if necessary in order to effect the release.

4. Same—An instruction that the accused had the right to devise peaceable means to prevent the violent abduction of his brother was prejudicial under all the circumstances of the case.

5. Same—If some one of the rescuing party recklessly and indiscriminately fired upon the abductors, after one of the abductors had suddenly and without cause shot at the rescuers, and if accused did not aid, encourage or abet such act, he can not be held guilty of manslaughter.

6. Same—Evidence—The evidence of one who was unarmed some distance from the rescuing party and not one of them or acting in concert with them, was competent, and its rejection prejudicial to accused.

7. Same—Where the Commonwealth has been permitted to prove that accused met others of the rescuing party several time before the abduction, and the purpose of this evidence was to raise a presumption of the existence of a conspiracy on their part, proof of proceeding instituted in a court to bind one of the abductors over to keep the peace should have been admitted, because it tended to show the lawful purpose of such meetings.

S. C. Hughes, J. A. Spalding and H. X. Morton for appellant.

W. J. Hendrick for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Hazelrigg.

The principal facts of this case appear in the opinion of the court in Omer v. Commonwealth, 15 Ky. Law Rep., 694, and need not be repeated here.

The present appellant was the brother of Henry Delaney, who was forcibly seized in the night time and carried off in a surrey by the Olivers, and, on the night of the abduction, followed, with Omer and others toward Morganfield, for the purpose, as we may assume, of rescuing him from his extreme peril. Whether he did any of the shooting at the time of the sudden and, as we think, unexpected meeting on Teer's hill, was a question left in grave doubt by the testimony. He was found guilty of murder and sentenced to the penitentiary for life.

We will notice the alleged erorrs of which he complains in such order as seems best for their comprehension. We assume it to have been in nowise violative of the law for the appellant, upon learning that his brother, while quietly at work in his store, had been seized, shot at and hurried into the surrey by these armed violators of the law, to arm himself and, with such friends as he could procure, pursue the parties having his brother in charge for the purpose and the only purpose of effecting his rescue.

It follows, further, that if the pursuers and the pursued, the latter having in effect discharged the prisoner and ceased to use further coercion, unexpectedly met, then such members of the pursuing party as precipitated the fight, if any did so, or engaged in it or aided or encouraged the participants therein, are to be held alone responsible for the result, and amenable to the law. In other words, so far as the pursuers are concerned, if the purpose of the combination or confederation they formed and of the pursuit they undertook was a lawful one to be effected only by lawful means, and an unexpected meeting and fight ensued, as is evident in this case, each man is to be held responsible for his own unlawful conduct and not for the conduct of others unless he aided or encouraged such unlawful conduct.

Turning to the instructions, we find that in the first the question submitted is simply whether the accused shot and killed the deceased with malice aforethought; and this is unobjectionable, so far as the principles we are discussing are affected. In the second, the accused is held to be guilty if any one of the parties with him shot and killed the deceased with malice aforethought, provided he was present at the shooting and killing, and in his mind or will assented thereto, and by words or conduct at the time encouraged said party to shoot or kill the deceased.

This instruction seems substantially unobjectionable. The criticisms on the word "assent," in True v. Commonwealth, 90 Ky., 655, and Omer v. Commonwealth, supra, are not applicable, because, in addition to "assenting in his mind or will" (whatever that may mean), the accused must have encouraged the shooting and killing by "words and conduct."

The third instruction holds the accused guilty if he entered into a mutual understanding with Omer and the others that the party would pursue the Olivers, and if overtaken would either kill, wound or assault them or any of them with deadly weapons; and in pursuance of this understanding they did pursue the Olivers, and some one of them did shoot and kill the deceased.

The gravamen of the crime denounced in this instruction lies in the supposed existence of a pre-arranged understanding that the Olivers, when overtaken, were to be assaulted with deadly weapons; but suppose, in pursuance of their plan to rescue the prisoner from his peril, or to save him from death or serious bodily harm, it became necessary to use force or repel force with force, shall we say they might not lawfully do so? They may not use more force than was necessary to effect the rescue, but that they might do that much, and do it in pursuance of an understanding to that effect, we do not doubt. The instruction clearly overlooks this principle, and is, therefore, erroneous.

The fourth defines the punishment prescribed by the statute, and the fifth is as follows: "If prior to the night of the killing of Abbie Oliver the defendant, George Delaney, had received information that Mr. and Mrs. Oliver contemplated capturing Henry Delaney, and by force and against his will compel him to

marry Abbie Oliver, he, the defendant, had the right to freely discuss that matter with Henry Delaney and others, and to devise such peaceable means as he deemed proper to prevent its consummation; and after Henry Delaney was captured and carried away he had a right to pursue with like intent; therefore, though the jury may believe, to the exclusion of a reasonable doubt, that George Delaney, or some one of the defendants named in the indictment, while acting in concert with George Delaney, shot and killed Abbie Oliver, yet if they believe from the evidence that George Delaney and those with him were pursuing the Olivers, not for the purpose of doing either of them harm, but only for the purpose of releasing from them Henry Delaney in a peaceable and lawful way, and suddenly and unexpectedly met the Olivers, and without any hostile demonstration on the part of George Delaney, or those with him, Taylor Oliver shot at or attempted to shoot at them, and they, because thereof, suddenly and without malice aforethought, and not aiming or intending to shoot Abbie Oliver, recklessly and indiscriminately shot and killed her, then they will find not guilty as charged, but guilty of manslaughter," etc.

Upon the hypothesis put in the beginning of this instruction, if the Olivers were about to commit a felony upon the brother of the accused, we are told he might discuss the matter freely with his brother and others, and might devise some peaceful means to prevent the capture.

Why might he not arm himself and use his arms to resist the abduction? What are we to understand by peaceful means to prevent the consummation of the seizure and forcible detention of the brother?

Testimony was introduced by the State to show that the accused was seen with arms about the time of the expected attack and seizure of Henry, and this proof was no doubt used in view of this instruction to place the accused in the attitude of a conspirator, a wrongdoer and a violator of the law. Certainly the act of arming himself could easily be construed to be inconsistent with means commonly termed "peaceful." Moreover, upon the assumption of this instruction the brother of the prisoner was in the peaceable pursuit of his captors for the sole purpose of effecting his release, having no intention to harm his abductors, and no knowledge of any such intention on the part of others.

Without the accused or any of his party making any hostile demonstration, they are suddenly shot at by Taylor Oliver, and because the crowd shot back recklessly and indiscriminately, but without his aiding, abetting or encouraging such act, the accused is held to be guilty of manslaughter; and further, if there was a hostile demonstration upon meeting the surrey, such, we may suppose, as the exclamation of Frank Holt to "halt," and Oliver fired upon them and they returned the fire, then the accused is guilty, not of manslaughter but of murder, although the demonstration was not made by him or under his advisement, and although he did not participate in or aid or encourage the shooting.

As indicated before, the accused had a right to bear arms openly for the protection of his brother, and to prevent his threatened capture. After his brother was carried off, he had the right to pursue for the purpose of releasing him, and he had the right to use such force as reasonably appeared to him to be necessary to effect the rescue and save his brother from death or serious harm. He had the right to demand the release of his brother or make inquiry of those in the surrey as to his where-

abouts, and, if he was first fired on by Oliver, he had the right to return the fire, if to do so appeared necessary to save his own life.

Again, we think that the testimony of W. H. Holt was competent. He and Thomason, an important witness for the Commonwealth, were unarmed and in a buggy going over to Morganfield to see that Frank Holt, brother of W. H., got into no trouble. They were far behind the parties on horseback when the shooting occurred; in fact were not in hearing of the shots. No conspiracy or unlawful purpose is any where disclosed against him.

In view of the meetings at the drug store and vicinity, intended to produce or raise the presumption of the existence of a conspiracy, we think the proof of the proceedings in the police court, for the purpose of binding Oliver over to keep the peace, should have been admitted. It showed the lawful purpose of the meetings.

We need not consider the propriety of the speech of the attorney for the Commonwealth complained of, or the alleged bias of the jury. These features can not well occur again.

For the reasons indicated the judgment is reversed and a new trial awarded.

NEWSOME v. NEWSOME.

(Filed March 17, 1894.)

1. Where a divorce is granted the husband, because he and his wife have lived apart for five consecutive years next before the application, the court may require him to pay the costs of both parties, including a reasonable attorney's fee for the wife.

2. Same—Alimony—The statute authorizing the allowance of alimony to the wife "on a divorce obtained by her," where it appears "she is not in fault, etc.," was intended to deny alimony to the wife in case the divorce obtained by the husband involves fault on her part. Even where the divorce is granted the husband, alimony may be allowed the wife where the cause of divorce is a living apart without cohabitation for five years.

3. Same—Where the husband is worth about $20,000 and has an annual increase of from $1,000 to $3,000, and the wife has no minor children and owns about $3,000, an allowance of $400 annually as alimony is improper under all the circumstances of the parties. She should be allowed the gross sum of $1,000 as alimony.

Morris Eskridge for appellant.

Sprigg & Chelf for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, Annie Newsome, brought this action for divorce from bed and board for alleged cause of habitual behavior towards her by the husband, Robt. L. Newsome, for not less than six months, in such cruel and inhuman manner as indicates settled aversion to her. But he made his answer a counterclaim, asking judgment for absolute divorce for the cause they had lived apart without cohabitation for five consecutive years next before the application.

The lower court dismissed her petition, but rendered judgment for divorce as prayed for in his counterclaim. It was, however, further adjudged that he pay $100, fee of her attorney in the action; also $400 annually during her life or widowhood as alimony, and from that part of the judgment he has appealed.

Section 28, chapter 26, General Statutes, provides that "in actions for alimony and divorce the husband shall pay costs of each party, unless it shall be made to appear in the action the wife is in fault and has ample estate to pay the same."

And section 6, article 3, chapter 52, contains this provision: "If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable."

It will be observed that in the first section quoted one of the conditions of requiring the husband to pay all costs is that it does not appear the wife is in fault, while it is provided in the other that an allowance for alimony can be made only on a divorce obtained by her, and the question arises whether either proviso has application in a case like this.

Section 1, article 3, chapter 52, provides that for two special causes a divorce may be granted, to both husband and wife: First, such impotency or malformation as prevents sexual intercourse; second, living apart without cohabitation for five consecutive years next before application. But all other causes are therein classified thus: First, causes for which the party not in fault may have a divorce—such as adultery, abandonment, etc.; second, causes for which the wife, when not in like fault, may have a divorce—such as confirmed drunkenness, cruel behavior, etc.; third, causes for which the husband may have a divorce, as when the wife is pregant by another man without the husband's knowledge at the time of marriage, or when she is guilty of such lewd behavior as proves her unchaste.

Existence of each one of the causes so classified necessarily involves fault on the part of the defendant in an action for divorce. And neither husband or wife can maintain an action for any one of those causes if in like fault. But either may sue for and obtain a divorce by simply alleging and proving the fact they have lived apart without any cohabitation for five consecutive years, no judicial investigation respecting cause of separation nor inquiry as to who is in fault in meaning of the statute being required in order to determine the right to divorce.

It, therefore, seems to us, giving the statute a reasonable construction, the husband is required, in a case like this, to pay costs of each party without inquiring whether the wife is in fault. And as it is well settled an allowance for services of the wife's attorney when legally authorized may be taxed as costs, and no complaint is or could be fairly made the amount is excessive, it was not error to make it.

It seems to us equally manifest that provision of the statute denying alimony to the wife except "on a divorce obtained by her" was intended to apply in that class of cases where a divorce obtained by the husband involves fault of the wife; not in cases like this, whereas either may maintain the action, it is not a material or legitimate inquiry in determining the right, who is in fault.

The evidence shows the husband possessed of an estate worth about $20,000, consisting of houses and lots, rents from which, when added to what he earns otherwise, make a yearly income of from $1,000 to $3,000, there being much conflict of testimony on the subject. The wife owns a lot, upon which are two dwelling houses worth about $2,500, heretofore purchasd for her by the husband. She has also about $500 in money.

The children are all of full age and none of them except the youngest daughter, who lives with her father, are dependent upon him for support.

In our opinion it would be oppressive and probably in the end ruinous to require appellant to pay $400 annually during appellee's life or widowhood; for she may, in due course of nature, live unmarried twenty years, while he can not be reasonably expected to earn money by his own labor more than comparatively a few years longer, thus taxing his houses, that will constantly need repairs and may deteriate, for the entire allowance. He should, therefore, be permitted and required to pay whatever may be amount of allowance in a gross sum and in a reasonable time, and we think, under all the circumstances, and in view of what he has already paid by order of court, the sum of $1,000, payable as of the date of the judgment appealed from, would be equitable.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

MITCHELL v. COMMONWEALTH.

(Filed March 17, 1894—Not to be reported.)

1. Criminal law—False swearing—Evidence—A statement, in an affidavit for a continuance of a civil case, by the cashier of a bank that a certain bill, negotiable and payable at his bank, had been returned to the bank after dishonor, when the fact was it had been returned before dishonor, was so obviously an innocent mistake that it would be a perversion of justice to base upon it a conviction of the crime of willfully and knowingly swearing falsely, it appearing that it was to the bank's interest for the affidavit to show the return of the note before dishonor, and the statement that it was returned after dishonor serving no interest whatever of the bank or the cashier.

2. Same—Evidence—Where the indictment charges the cashier with knowingly and willfully swearing falsely that a certain note was, in April, 1890, delivered by a bank, endorsed by the cashier in blank, to the New Farmers Bank, a letter written by the assignee of the first-named bank in July, 1890, containing what purported to be a copy of such note, is incompetent for any purpose, it not having been written by or in the presence of the accused.

3. Same—Where the statements contained in the amended petition in the action in which the alleged false affidavit was filed do not differ materially from the statements in the affidavit, its admission as evidence was prejudicial to accused, since the slight discrepancies in the two papers would tend to confuse the jury.

Wm. H. Holt, C. C. Turner and W. W. Robertson for appellant.

W. J. Hendrick for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Lewis.

The offense for which appellant was indicted and convicted is that of willfully and knowingly swearing that which is false, charged to have been committed substantially as follows: That in his affidavit, filed on a motion to continue an action of R. A. Mitchell, assignee of Fulton Bank, plaintiff v. C. F. Bowers, and Bowers & Carter, defendants, then pending in Hickman Common Pleas Court, he, before an officer authorized to administer the oath, knowingly and willfully made and swore to these false statements: "That in April, 1890, Fulton Bank sold, endorsed and delivered to New Farmers Bank the note for $5,000 sued on, with other negotiable paper, proceeds amounting to the sum of

$10,000, and then drew a draft on New Farmers Bank in favor of Louisville Banking Company, doing business at Louisville for said sum, and said draft was presented by and was paid to said Louisville Banking Company by New Farmers Bank; that New Farmers Bank books will show this transaction and said books were carefully kept, and he knows the entries were made of said transaction; and the note sued on with others, received by New Farmers Bank, endorsed in blank by A. T. Mitchell, cashier of said Fulton Bank; and after that the draft of $10,000 was received and paid, and that the $5,000 note sued on was, after dishonor, returned to the Fulton Bank and became its property; and that these facts are true when proven."

In the indictment each one of the recited facts is charged by distinct averment to be false and known to defendant to be false. But of the various statements of the affidavit in question, the Commonwealth endeavored on the trial to prove but two of them false, and the lower court instructed the jury upon the hypothesis of the falsity of them only. They are, first, that in April, 1890, Fulton Bank sold, endorsed and delivered to New Farmers Bank the note for $5,000 sued on, or that the note sued on was received by New Farmers Bank, endorsed A. T. Mitchell, cashier, in blank; and second, that the $5,000 note sued on was, after dishonor, returned to Fulton Bank and became its property. And whether the court permitted incompetent testimony to go to the jury in regard to these alleged false statements is the first question we will consider.

The $5,000 note was executed March 18, 1890, by C. T. Bowers, made payable six months after date to and negotiable in the office of Fulton Bank. On back of the note, as now appears, is a guaranty of payment of same date, signed by Bowers & Carter, the name A. T. Mitchell, cashier, being also endorsed in blank.

In his affidavit for continuance of the civil action mentioned, appellant stated he expected to prove by William Mitchell, cashier of New Farmers Bank, who was then absent, the fact that in April, 1890, the note was sold, endorsed and delivered to that bank by Fulton Bank. But why it became necessary to prove that transaction does not appear, as no part of the record of the civil action except an amended petition was made evidence on trial of this case. It is, however, not a material inquiry because it is enough for conviction that the Commonwealth show that statement of appellant was knowingly and willfully false.

No witness was introduced who had personal knowledge of the subject, but guilt was attempted to be established wholly by circumstantial evidence; and the first fact proved was that July 1, 1890, at request of Reid, assignee of C. T. Bowers, A. T. Mitchell wrote him from Fulton a letter, enclosing what purported to be a copy of the $5,000 note, to which was signature of C. T. Bowers and also that of Bowers & Carter, signed in blank. The purpose of that evidence was to show that the note at that date was in possession of Fulton Bank, and the name of A. T. Mitchell, cashier, was not then on it, and, consequently, was not sold, endorsed and delivered in April, 1890, to New Farmers Bank, as stated by appellant in his affidavit to be the fact. But in the first place such inference could not be fairly drawn from the copy made by A. T. Mitchell and sent to Reid, because he could very well copy the note, as he swears he did do, from the bill register, without having the note before him, and it was not necessary to put the name of A. T. Mitchell, cashier, on the copy sent Reid, because his object was, as he swears, simply to find out the liabilities of C. T. Bowers. But the evidence was not competent for any purpose, relating, as it did, to an occur-

ence without presence, knowledge or agency of appellant, who was then in Mt. Sterling, 200 miles away.

The court, in our opinion, erred in permitting the letter and alleged copy of the note to go to the jury; for nothing that was done or said respecting it by any of the witnesses without the presence and hearing of appellant could be legally made evidence against him.

There was no single witness who undertook to state, of his own personal knowledge, the note had not been sold, endorsed and delivered, as stated by appellant, about April, 1890, nor is there a single circumstance from which a reasonable inference could be drawn that the transaction did not take place. It is true two directors appointed to examine amounts of Fulton Bank state they saw the $5,000 note there between September 1 and 20, 1890. But that fact proves nothing, because the note was negotiable and payable in the office of that bank September 18th, and ought to have been sent there by New Farmers Bank at least by that date. Carter testified he saw the note about October 1, 1890, and took a copy of it, which was improperly permitted read as evidence. According to that copy the name of A. T. Mitchell was endorsed without annex of cashier. But that evidence was given by a witness who was originally bound for payment of the note, and, in consequence of having been adjudged to pay it, was, as he admits, hostile to appellant. Certainly not much, if any, credence should be given or importance attached to his statement. For not only is it intrinsically improbable A. T. Mitchell would have put his name on back of the note at all, except for the purpose of selling and endorsing it on behalf of Fulton Bank; but the note, when sued on, did have the word cashier on it. Besides, even if it be true that word had not been originally on the note, still, if there was a sale and delivery to New Farmers Bank, the bare name of A. T. Mitchell would have amounted practically to an enforcible endorsement.

We think it was also erorr to admit as evidence the amended petition filed in the civil action; for the statements therein contained do not materially differ from those of the affidavit, and it could not serve any other purpose than to confuse the jury and make the slight discrepancy between the two papers basis for fallacious argument, and appeal to prejudice, which the Commonwealth's attorney showed he was entirely too willing to indulge in.

In our opinion there was no comptetent evidence on part of the Commonwealth showing or tending to show that Fulton Bank did not, as stated in the affidavit, sell, endorse and deliver the $5,000 note to New Farmers Bank.

As to the other hypothesis, upon which the court instructed the jury to find appellant guilty, the evidence shows that the $5,000 note was not, as stated in the affidavit, returned to Fulton Bank after dishonor, but previously. Both the cashier and persons who examined the condition of that bank testify the note was there prior to Setember 18th, when it became due. But that statement is so obviously an innocent mistake made by appellant when he signed and swore to the affidavit that it would be trifling with liberty of a citizen as well as rank perversion of justice for the jury to find he was thereby guilty of willfully and knowingly swearing to that which was false. Appellant had been president of a bank, lawyer and a business man, and must have known the note had to be returned to the office of Fulton Bank, where it was payable before it could be dishonored. It is clear he could subserve no purpose whatever by falsely stating the note was not returned to Fulton Bank until after dishonor.

On the contrary, it was to his advantage, as assignee of that bank and plaintiff in the pending action, to show it was regularly dishonored and in due course of business became property of Fulton Bank. Besides, the affidavit was written by appellant's attorney, who, without appellant's suggestion, inadvertently and by mistake inserted in the affidavit the erroneous statement. And in this connection it is proper to state that two of appellant's attorneys and A. T. Mitchell were present in the room when the affidavit was prepared, and they testified on the trial that appellant hesitated about swearing to the affidavit, because he had no personal knowledge of the facts stated and would have to make it if at all upon information then given by A. T. Mitchell, who was familiar with the transaction. But he was assured by his attorney that he could properly make it upon such information, as all the law required was for him to have an unfeigned belief the facts stated were true.

In our opinion the lower court ought, at conclusion of evidence by the Commonwealth, to have instructed the jury to find the defendant not guilty; for there was a total failure of the Commonwealth to show by competent testimony, as it was required to do before conviction, that Fulton Bank did not, in April, 1890, sell, endorse and deliver the note for $5,000 to New Farmers Bank; and there was no evidence showing or tending to show appellant knowingly and willfully swore falsely about that or any other statement in the affidavit.

As to the other statement that the note was, after dishonor, returned to Fulton Bank, we think, for reasons already indicated, the court erred in instructing at all upon hypothesis of its falsity.

Wherefore, the judgment is reversed for a new trial consistent with this opinion.

GOLDSMITH v. OWEN, JUDGE, &c.

(Filed March 20, 1894—Not to be reported.)

C. S. Walker for appellant.

Powers & Atchison for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

There is a plain distinction between cases where a court is without jurisdiction and cases where the jurisdiction exists and the proceedings are erroneous or irregular.

In this case the Daviess Equity Court had undoubted jurisdiction to cancel a fraudulent assignment and also to appoint a receiver, and beause the facts alleged fail to state a cause of action, or if a cause of action is stated the testimony fails to support it, affords no ground for granting the writ of prohibition; if so, the writ would go in every case where the pleading upon which the recovery sought is based is bad on demurrer, or where the court has rendered an erroneous judgment. Whether the court erred is a question we have not considered. The application for the writ is denied.

WARE v. CROSTHWAITE, &c.

(Filed March 20, 1894—Not to be reported.)

1. Parties to action—Vendor and vendee—Where A. conveys a lot to B., reserving in the deed a lien for unpaid purchase money, and B. sells a part of such lot to C., who pays for such portion of the lot, and erects a dwelling house thereon in which he resides, and subsequently A. institutes suit against B. to subject the lot conveyed to B. to payment of purchase money which B. owes, to which suit C. is not made a party, C. is not bound or affected by the judgment in such suit or the proceedings had under the judgment.

2. Same—In such action, if C. is made a party to it, he may require every part of the property conveyed to B., and which he still owns, to be sold to satisfy the debt due A. before any part of his (C.'s) lot is subjected; and if B. has sold all the lot C. can require other parts of it to share with his part the burden of the unsatisfied lien debt.

Tanner & Forman for appellant.

Z. Gibbons for appellees.

Appeal from Fayette Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

G. D. Wilgus, being the owner of a quantity of unimproved ground on Clay and Chestnut streets, in the city of Lexington, on May 25, 1886, sold and conveyed it to B. H. Cozine in consideration of the sum of $1,350, of which one-third was due in four months, one-third in one year, and balance in two years after the date of purchase. Of this land Cozine sold and conveyed to the appellant, Ware, at the price of $278, substantially in cash, 125 feet fronting on Clay street and running back 156 feet on Sixth street.

Ware erected a dwelling house on his property in the fall of 1886, and has since continuously occupied it. Learning that the Crosthwaites, appellees here, were claiming it, in May, 1890, he brought this action against them and his vendor, Cozine, to quiet his title. The Crosthwaites answered that they bought the property at a decretal sale and were the owners of it by virtue of a commissioner's deed made to them on October 7, 1889, in the suit of Wilgus, &c. v. Cozine, an action which had been instituted in April, 1889, against Cozine in the Fayette Common Pleas Court, on one of the deferred purchase money notes, executed by Cozine to Wilgus, and to secure which a lien existed on all the property conveyed by the deed of May 25, 1886. This, Ware admitted, but set up that although his deed was of record, giving notice of his ownership and title, and he had built a house on it and was in the adverse possession, yet he was not made a party to the Wilgus-Cozine suit, and had no notice whatever of the proceedings to sell his property, and was not, therefore, affected by that suit; that as to him the order of sale and the deed to the Crosthwaites were void.

It does not appear from the pleadings or the proof in this case what amount remained due to Wilgus from Cozine of the original purchase money, although Cozine testifies that he had paid all of it but about $200 when the suit was brought against him. Nor does it appear what part of the land embraced in the deed of May 25, 1886, was sought to be sold or was sold in the proceedings against Cozine. So far as this record shows only some 312 feet on Clay street, embracing Ware's lot, were sold or sought to be sold in that suit, and this was bought by the Crosthwaites at the price of $646, including some interest on their bonds. This

was at the rate of $2.07 per foot, and the chancellor on final hearing adjudged that the Crosthwaites had a lien on Wares' lot of 125 feet for $258.75, and ordered it sold to pay that sum.

If this sum represented the unpaid balance of the Wilgus purchase money, or such part of it as the Ware lot should equitably be made to pay, we could understand the principle on which the chancellor proceeded. The Wilgus lien was of record, and although Ware had bought and paid for his property and improved it by the erection of valuable buildings, he could not complain if his lot be sold to discharge this unsatisfied lien.

In a proceeding, however, instituted by the lien holder for that purpose, he would have the right to require the lien satisfied out of other property still owned by his vendor, Cozine, if any remained undisposed of; or if all of it had been sold, he could make the whole property embraced in the Wilgus deed of May 25, 1886, share the burden of discharging the lien, and this we assume he could have done had he been made a party.

It is clear that the judgment of sale in the Wilgus-Cozine suit and the commissioner's deed therein do not affect Ware, and can not be used to defeat his right to the relief he asks in this action; but the Crosthwaites, as the representatives of the Wilgus purchase money, may subject the Ware lot, along with all the property described in the deed of May 25, 1886, to the payment of any unpaid balance, or, if the rights of the other owners have been adjusted, this lot may be subjected to its just share of this burden.

The chancellor will work out these equities upon a return of the case after the facts controlling them shall have been more fully ascertained.

The judgment is reversed for proceedings consistent with this opinion.

HUNDLEY, &c. v. TAYLOR.

(Filed March 27, 1894—Not to be reported.)

1. One claiming land as a purchaser at a sheriff's sale for taxes, in order to recover it from the delinquent taxpayer, must allege and prove a substantial compliance with all the requirements and conditions of the statute authorizing such sale.

In this case the allegations of plaintiff's petition were wholly insufficient to support a judgment for possession of this land.

2. A creditor of a decedent, asserting no line on any of decedent's lands, can not select a particular part, and by alleging that the debt was due him by decedent, and that decedent owned such land, acquire a lien upon it or obtain any right to an order for its sale to satisfy his debt.

H. P. Cooper for appellants.

W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee sued the appellants, the administrator, widow and heirs of John W. Hundley, deceased, for the possession of a tract of 50 acres of land, alleging that on October 1, 1888, it had been duly sold by the sheriff of Marion county for taxes for the year 1886 at the price of $4.89, and the sheriff, on the 17th day of

January, 1891, had made him a conveyance therefor. The deed was copied into the pleading. The petition also alleged that the deceased died intestate in 1882 owing him a note for the sum of $800, and in addition to owning the tract named owned a 25-acre parcel about a mile or so from the other, and asked that this be sold to pay his note.

The demurrers of the widow and the children were overruled. They answered, claiming homestead in the lands and asserting that there was personal property sufficient to pay the taxes, and that there had been no assessment, etc. Without proof or further preparation the case was submitted over the objection of the appellants and judgment for possession of the 50-acre tract and for the sale of the 25 acres was rendered. Manifestly the judgment should have been for the defendants.

In Maguiar v. Henry, &c., 84 Ky., 1, it is said: "When a litigant claims rights under the act of an officer, he should state the facts which show that the latter had the right to act. A tax deed results from the exercise of a statutory power; and if the necessary preliminary steps are not taken the power is not created."

So in the case of the Commonwealth, &c. v. Three Forks Coal Co., ante, 633, this court said of the statute regulating tax sales: "But to make a sale valid and to give, as a consequence, to the purchaser, whether the State or an individual, right to recover possession of land so sold for taxes, there must be a substantial compliance with all requirements and conditions of the statute," citing Whipple v. Earwhick, 14 Ky. Law Rep., 35, and Smith v. Ryan, 88 Ky., 636.

The allegations of the petition of the appellant are wholly insufficient to support the judgment for possession. Moreover, there is no reason shown why the 25-acre tract was subjected to this alleged debt due from J. W. Hundley. No lien is asserted against it, and a creditor of an estate may not thus select a portion of the real estate of a decedent and proceed to subject it to the payment of his debt. So far as the pleadings disclose there is nothing suggested to defeat the claim of the widow and children to a homestead embracing both tracts, and such should have been the judgment below.

Under the general prayer of the plaintiff, however, we think he is entitled to recover the amount of the taxes paid by him, aggregating some $14.47, for which he may be adjudged a lien on the lands, and unless paid may have judgment of sale.

Judgment reversed, with directions to proceed as herein indicated.

KENTUCKY SUPERIOR COURT

LOUISVILLE & NASHVILLE RAILROAD CO. v. HARVEY.

(Filed February 28, 1894.)

1. Master and servant—Discharge—One who was employed by a railroad company as brakeman for an indefinite time, having reported for duty and held himself in readiness to perform it, is entitled to recover of the company the agreed wages up to the time he was discharged, although he did no actual work. And the fact that the company failed to pay him his wages and ignored his letters demanding payment did not amount to a discharge or notice of a discharge. A discharge must be in unambiguous words or by actions clearly indicating the party's intent.

2. Evidence—As this was an action to recover agreed wages and not to recover damages for a wrongful discharge, the court properly refused to allow defendant to allege and prove the plaintiff's habits as to liquor.

8. Instructions to jury—Prejudicial error—As the evidence all tended to show the value of a brakemen's services was what the contract in this case by fair implication called for, the defendant was not prejudiced by an instruction authorizing the jury to find for plaintiff the value of a brakeman's services, as appeared from the evidence, although as matter of law the criterion of recovery was the contract price.

J. A. Mitchell for appellant.

Sims & Covington, W. T. Cox, H. B. Hines and E. W. Hines for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Brent.

In July, 1890, there was a strike at Wilder's, near Cincinnati, among the workmen employed by the appellant, the L. & N. R. R. Co.

The company, for the protection of its property and the expidition of its business, sought hands, among other places, at Bowling Green, Ky. Of those engaged there was L. K. Harvey, the appellee. His version of the contract is that he was employed by the appellant as a freight brakeman for an indefinite time, commencing in July, when he left Bowling Green, with no term fixed; that while engaged about the Cincinnati business he was to receive $5 a day, and on his return to Bowling Green the usual wages of a freight brakeman, about $56 a month.

It appears that on his return he reported to the yardmaster, whose duty it is to assign brakemen to their trains for assignment to duty. He was not assigned but was told the yardmaster had not gotten an order to put him to work; that he would let him (plaintiff) know when he wanted him. He told the yardmaster where he was staying. It is the custom or rule of the road to send for and notify men when it wanted them to go out on trains. He was then ready and willing to go to work under his contract, and from that time on up to the filing of his last ameded petition always held himself ready and willing to perform for appellant all the duties of a brakeman whenver called on or required to do so. He received no notice that his employment was not desired; that his services were not wanted until February, 1891; never had any formal notification of discharge. In July he was paid at Cincinnati $40 for eight days services. He returned to Bowling Green and there he was paid in August $32.85 as wages due him for the latter part of July. Having demanded by letter wages for August and September and receiving no reply, on October 9, 1890, plaintiff brought this suit for $112 as wages for those two months, and afterwards, the case coming on for preparation, in February, 1891, he amended and claimed wages for the months of October, November and December, 1890, and January, 1891, making his demand in all $336.

The defendant denied all the allegations of plaintiff's petition, both original and as amended, so far as it sought a recovery; denied that it had any contract with him except for the month of July, for which month there is no dispute as to his being paid. It is admitted that plaintiff did no actual physical work for the defendant after that month. By the trial the plaintiff got judgment for $150, and from that judgment the defendant has appealed to this court.

It will be seen at once that this suit is in contract and not in tort; is for wages and not for damages; not for a refusal to employ plaintiff after agreeing to do so, nor yet for a wrongful dismissal after employment begun, but for the amount of wages which plaintiff claims is due him by contract of employment. And the first and most imporant question is, can he recover wages for the time during which he did no actual work of any kind? The contract, facts and conduct of the parties being as set out above, we think he can.

The defendant hired him for an indefinite time. Such a contract terminates at the will of either party. While the contract continues, that is, until one party has notified the other that it is his will that it should terminate, the plaintiff's time belonged to the defendant. He was subject and liable to its call to duty at any and all moments. He could not work for defendant until assigned to duty and work furnished him, nor yet could he accept work from another without taking that time from the defendant, to whom it belonged instantly when required. He was only bound to work when required to do so by defendant.

If the defendant did not choose to call on him to perform services, and at the same time failed or refused to notify him that he was discharged, or that it had no longer any wish to control his time, what was he to do unless he choose to leave defendant's employ on his own motion, except to wait in constant readiness and willingness the defendant's commands within the scope of his employment?

The very essence of the contract was that he would work when required, and held himself in readiness so to do; and when he was waiting, ready and willing to perform service whenever called on, he was doing all that on his part he could do. He did thus in fact perform his part of the contract. Practically he rendered the defendant the service he stipulated for, and entitled himself to recover.

We see no error in the refusal of the court to allow the defendant to allege and prove the plaintiff's habits as to liquor. It neither refused to take him into its employ nor discharged him on that account, nor does it base any right or claim on the fact that he was so addicted, if we think he was.

Defendant's failure to pay plaintiff wages beyond July, and ignoring his letters demanding payment, was not a discharge or a notice of a discharge. A discharge must be in plain, at least not in ambiguous words, or by actions clearly indicating the party's intent.

We do not think the instruction as to criterion of recovery could be prejudicial to defendant. So far as the evidence went it all tended to show the value of a brakeman's services was what the contract in this case, by fair implication, called for, and so, whether the contract or the value of such services as appeared from the evidence was made the criterion, was a matter practically of indifference. Of course, as a matter of law, the criterion of recovery was the contract price.

Seeing, therefore, no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed with damages.

SUPERIOR COURT ABSTRACTS.

NEFF v. BURCH.

Filed March 7, 1894. Appeal from Jefferson Circuit Court, Law and Equity division. Opinion of the court by Judge Yost, reversing, Judge Barbour, dissenting.

1. Actions for recovery of personal property—Form of judgment—In an action for the recovery of specific personal property, if the property has been delivered to plaintiff and the defendant claims a return thereof, the verdict being for defendant, the judgment should be in the alternative for the return of the property or its value if a return can not be had. It was, therefore, error in this case, upon a verdict for defendant, to render judgment in his favor for the value of the property as found by the jury without any provision allowing plaintiff to discharge the judgment by a return of the property. And this court may determine there was error in this respect, although the evidence heard below has not been brought up, as it is not to be presumed the lower court heard evidence showing the property had been destroyed, such evidence being incompetent.

2. Reversible error—An appellate court may, without a motion for a new trial, reverse a judgment upon the ground that it was not authorized by the pleadings.

3. Mandate—As the only error is in the form of the judgment, the case is not remanded for a new trial, but for a judgment in conformity to the opinion of this court.

Judge Barbour, dissenting, holds that it would have been competent to show that the property had been destroyed or removed beyond the jurisdiction of the court, and, therefore, it must be presumed, in the absence of the evidence, that this was shown, and that a return of the property could not be had.

J. W. S. Clemments for appellant; O'Neal, Phelps & Pryor for appellee.

CLARK COUNTY NATIONAL BANK v. HOLLOWAY.

Filed March 7, 1894. Appeal from Clark Circuit Court. Opinion of the court by Judge Yost, reversing.

Separate estate—A married woman having executed her note for the purchase price of shares of stock purchased by her for her own benefit, it will be presumed that she intended to bind certain lands held by her as her separate estate, that being the only property she owned.

J. M. Benton for appellant; Isaac N. Cardwell for appellee.

THROOP v. BROADDUS.

Filed March 7, 1894. Appeal from Estill Circuit Court. Opinion of the court by Judge Yost, affirming.

1. In this action by a tenant against his landlord to recover damages for his eviction before the expiration of his term, as the defendant by his answer denied any other renting than by the month, and alleged that the plaintiff's term had expired at the time of his eviction, and there was testimony tending to sustain the defense, the court properly instructed the jury that if the renting was "by the month" no notice was necessary if the plaintiff was evicted at the end of the month.

2. Remote damages—Any damages arising from the possible profits plaintiff might have realized from his school or from keeping boarders were too remote to be considered.

White & Smith for appellant; Riddell & Riddell for appellee.

EAST TENNESSEE, &c., R. R. CO. v. CAMPBELL.

Filed March 14, 1894. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Brent, reversing.

1. Railroads—Injury to car inspector—Where an employe of a railroad company, in the discharge of his duty as car inspector, was standing off the track, facing the car he was inspecting, and thus in a position to see any danger that the movement of the train threatened in ample time to insure his safety, the employes in charge of the train were not called on to warn him of the movement of the train, and the failure to give such warning does not render the company liable for the injuries received by the car inspector, who stumbled and fell in moving away from the train to avoid being struck by the step of the caboose.

2. Master and servant—Gross negligence—Even though the servant, through whose negligence it was alleged the plaintiff was injured, was the superior of the plaintiff, there could be no recovery unless the negligence was gross, and it was error to give an instruction authorizing the jury to find for plaintiff if they believed defendant's employes were guilty of simple negligence.

Pirtle, Speed & Trabue for appellant; D. M. Rodman for appellee.

GRANT v. GRAN'TS ASS'EE.

Filed March 14, 1894. Appeal from Jefferson Circuit Court, Law and Equity division. Opinion of the court by Judge Barbour, affirming.

Attachment—Where an attachment was sued out upon the ground that the defendant did not have property subject to execution sufficient to pay plaintiff's debt, it was competent to prove the price which the property subsequently brought at public sale as tending to show its value at the time the attachment was issued, but such evidence was not conclusive, and the lower court having seen fit to adopt other evidence as the proper basis for fixing the value, and upon such evidence discharged the attachment, this court can not say that it was error to do so, especially as the record does not show when the property was sold or the circumstances of the sale further than that the time and place were well advertised.

Blain & Kinkead for appellant; Humphrey Marshall for appellee.

WESTERN UNION TELEGRAPH CO. v. DANIELS, &c.

Filed March 14, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Duty of telegraph company as to delivery of message—Where a person to whom a telegram was addressed resided two miles from the telegraph station, a small town, in an action by him against the company to recover damages on account of delay in delivering the message, it was error to instruct the jury that, if the telegram could have been received by plaintiff "by the exercise of ordinary diligence in searching for him in the town," in a reasonable time "after it should have been received at the office," the law was for plaintiff. As the plaintiff did not reside in town, and the company is not required to deliver messages to persons residing as far as two miles in the country unless it is paid or specially undertakes to do so, the only duty of the operator was to use ordinary diligence to learn whether plaintiff was in town, and, if so, then to use ordinary diligence to deliver the message to him. It is too much to require the company in such case to make diligent search for the party. And as the complaint in the petition was of the delay in delivering the message after it was received at the station to which it was addressed, and not of any delay in transmitting it, the delay mentioned in the instruction should have related to the time after its receipt at the station and not "after it should have been received" there.

2. Same—The expense of delivering a second message in the country having been guaranteed, it was error in instructing the jury as to the alleged

delay in delivering that message to tell them that "it was not due diligence to intrust a guaranteed message to a stranger to carry on foot a distance of two and one-half miles." The company having no messengers at that station for the purpose of delivering messages in the country, all that it was required to do was to select a trusty person for such purpose as occasion might require; and whether the person selected was a suitable person and whether he could have delivered the message sooner by waiting to find or hire a horse than by at once starting on foot were questions for the jury.

Hardin & Hardin for appellant; Nat Gaither & Caldwell and J. W. Hughes for appellees.

LOUISVILLE SOUTHERN R. R. CO. v. RAGLAND.

Filed March 14, 1894. Appeal from Jefferson Circuit Court, Chancery division. Opinion of the court by Judge Barbour, affirming.

1. An agreement will be enforced specifically where the specific thing or act contracted for and not mere pecuniary compensation is the redress practically required; and in such cases where there is good faith, valuable consideration, clean hands, and no unreasonable hardship to result to the defendant, it is as much a matter of course for the chancellor to decree specific performance of a contract as it is for a court of law to give damages for its breach, and specific performance will not be denied simply because the party asking for it may have the right to recover damages for the breach.

In this case an agreement by a railroad company to give to one an annual pass over its road during his life in consideration of his grant to it of the right of way through his lands is specifically enforced.

2. Liability of lessee of railroad for contracts of lessor—Construction of contract—Where the lessee of a railroad undertook to "perform each and every and all stipulations of every contract" theretofore entered into by the lessor, "including" certain other designated contracts with other companies relating to the operation of the road "as well as such other contracts as are not specifically mentioned herein," the obligation of the lessee was not limited to contracts of the lessor of the same kind as those specifically mentioned, and, therefore, included a contract by the lessor to give to another a pass over its road during his life, and to secure to him this right in the event there should be a change in the ownership of the road.

3. Suit against receivers—The lessee company having by order of the United States Circuit Court been placed in the hands of receivers who had taken the management and control of the leased road, the plaintiff had the right, by virtue of act of congress of August 13, 1888, to institute this action against the receivers without leave of the court by which they were appointed, and to have judgment requiring them to furnish him an annual pass so long as they should retain control of the road, and requiring the company which shall resume control of the road after the receivership ceases to likewise furnish plaintiff with a pass.

Pirtle, Speed & Trabue for appellant; Calloway & Miller for appellee.

HILL v. WILSON, &c.

Filed March 21, 1894. Appeal from Ballard Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Landlord and tenant—Duty to repair—Where a lease contained no provision exempting the tenants from liability, partially or wholly, in case they should by inevitable casualty be prevented from cultivating the farm, the fact that the land was overflowed by high water and that the fences were so destroyed as to leave the farm unenclosed, did not excuse the tenants from paying the full amount of their rent as they had contracted to do, there being no covenant upon the part of the landlord to keep up the fences or make other repairs. The provision in the lease for the return of the premises in as good condition as when received, "loss by fire or inevitable accident and ordinary wear excepted," was for the benefit of the landlord, and

imposed an obligation upon the tenants to prevent injury or destruction as far as they reasonably could.

2. The parties had the right to rescind the original contract and enter into a new one; and if after the flood the landlord and tenants agree that the tenants were to cultivate only so much as they reasonably could, and that they should be required to pay so much per acre for the land which they did cultivate and no more, such agreement was based on a sufficient considera tion and in effect rescinded the original contract.

3. Failure of proof—The averment in the answer that by the new agreement defendants were to pay plaintiff for the land actually cultivated at a certain rate per acre was not supported by proof that they were to pay for what they cultivated "at the same rate of the first contract," there being nothing to show the number of acres in the whole farm, and, therefore, nothing to show the "rate of the first contract."

J. B. Wickliffe and Thomas & Dishman for appellant; Nichols & Warden for appellee.

THE DOMESTIC SEWING MACHINE CO. v. MURPHY, &c.

Filed March 21, 1894. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Barbour, reversing.

Assignment—Burden of proof—In this action to enforce a mortgage lien in which the plaintiff alleged in his petition that he had assigned the mortgage debt to another to indemnify him on account of his suretyship for plaintiff, making the alleged assignee a party defendant, the appellant having filed its petition in the action setting up a judgment and return of "no property" against plaintiff and seeking to subject the mortgage debt to the satisfaction of its judgment, alleging that plaintiff had never assigned or delivered the mortgage debt as claimed in the petition, but was still the owner, and had always retained possession of it, the burden was on plaintiff and the alleged assignee to show a bona fide assignment; and, as there was no evidence that plaintiff had ever assigned the debt or that the alleged assignee ever so claimed or ever had it in his possession for any purpose, it was error to adjudge to him the benefit of the debt and thus in effect dismiss appellant's petition.

Rochester & Hodge for appellant; Blue & Blue and Nunn & Cruce for appellees.

CHESAPEAKE, &c., R. R. CO. v. STEPHENS, &c.

Filed March 21, 1894. Appeal from Greenup Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Killing of stock on track—Pleading—In this action against a railroad company for negligently running its train over and killing plaintiff's mules, it was not necessary for plaintiff to aver in his petition that he was not guilty of negligence.

2. Same—Evidence—It was competent for plaintiff to prove by one whose place of business was on the railroad near where the mules were killed that the train could be stopped in a certain distance when going at a high rate of speed, the witness stating that he had seen it stopped in that distance.

3. Reversible errors—This court can not consider an objection to an instruction, the giving of which was not made a ground for a new trial.

F. Bennet for appellant; B. E. Roe for appellees.

WILLIS' TRUSTEE v. MACKEY.

Filed March 28, 1894. Appeal from Madison Circuit Court. Opinion of the court by Presiding Judge Brent, affirming on original and reversing on cross appeal.

1. Construction of contract—Appellant, having rented a hotel, sublet the kitchen and dining-room to appellee, who undertook to furnish meals for

appellant's "bell boys, second bartender, porter and such other help as he might have to board, at the rate of $1.25 a week." Held—That appellant's clerk and first bartender are not included in the general term of "help," which must be regarded as meaning employes of the inferior kind specifically mentioned, and, therefore, for furnishing meals to the clerk and first bartender appellee is entitled to charge at the same rate charged regular boarders. And, besides, the parties have, by treating these two employes, as to meals, as other guests, placed that interpretation on their contract, the other help not being treated in that way.

2. Evidence—The appellee, having leased the kitchen furniture, is chargeable with the value of the articles he failed to return upon the expiration of the lease; and in determining the amount with which he should be charged the court properly took as a guide inventories made by the lessor at the beginning and again at the termination of the lease, for while the lessee was not concluded by them, there being no agreement that they should be made, and he not being present when they were made, still, in the absence of any proof on his part, they must be taken as true.

3. Resale of property by purchaser to vendor—The lessee, who at the beginning of his term, bought the dining room furniture from the lessor, having subsequently sold it back to the lessor at an agreed price, which was more than he gave for it, was entitled upon a settlement to credit by the amount thus agreed upon, without reference to what the furniture subsequently brought at a sale made by the lessor's assignee for creditors, there being nothing to show that the lessee ever rescinded the sale, or agreed to take, in satisfaction of his claim, what the furniture brought at assignee's sale.

A. R. Burnam for appellant; Smith & Moberly for appellee.

PHILLIPS' ADM'R, &c. v. PHILLIPS.

Filed April 4, 1894. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, affirming.

Partial transcript—Upon this appeal from a judgment confirming the report of a master commissioner allowing a claim presented by the appellee against the decedent's estate, as the most essential parts of the record bearing upon the questions raised are omitted, the judgment must be affirmed. While in a case like this an appellant is not required and ought not to bring up the whole record, still he must at his peril bring up all the pleadings and evidence bearing upon the questions involved in the appeal.

H. T. Noel for appellants; Thomas H. Hines and R. H. Tomlinson for appellee.

TEBBS v. LEWIS.

Filed April 4, 1894. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, overruling motion for appeal.

Appellate jurisdiction—Where the plaintiff sued for $2,500 and obtain a judgment for $90, a counterclaim for $1,400, pleaded by defendant, being denied, that judgment being reversed upon defendant's appeal, the appellee is not entitled to an appeal to the Court of Appeals as a matter of right, the amount in controversy, in the absence of a cross appeal, being only $1,490, while the amount necessary to authorize an appeal as a matter of right is $2,000, exclusive of interests and costs.

Blanton & Berry for appellant; Swinford & Evans for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. JUNE 1, 1894. No. 23

KENTUCKY COURT OF APPEALS.

THE COLEMAN-BUSH INVESTMENT CO. v. FIGG, TRUSTEE.

(Filed March 27, 1894.)

1. Power of trustee to sell land—Construction of deed—Specific execution—A husband conveyed land to a trustee to hold for the benefit of his wife during her life, remainder to their children, etc., with power given the trustee to sell the land and make a good title to the purchaser by the written consent of the wife, and to dispose of the purchase money as the wife may order in writing. The husband and wife have one child, and have been divorced. A successor of the original trustee sold the land to appellant, the wife and her child uniting with the trustee in the contract of sale, and in a deed of conveyance tendered in this action for specific execution of the contract, Held—The trustee under the deed has power to sell and convey with the consent of the wife, and where all of the parties are before the court the contract should be specifically executed, although the original trustee made no conveyance of title to his successor in the trust.

2. Construction of devise—Defeasible fee—A devise by a testator to three grandchildren, with the provision that if either grandchild died without issue then living, his estate is to go to the survivor or survivors of them, and if all died without issue then living, the property to go to testator's children and the issue of such of them as are or may then be dead, vests a defeasible fee in the grandchildren, subject to be defeated by their death without issue then living, in which event the survivor of the grandchildren takes such estate. The children of one of the grandchildren do not take as a "survivor" of one of the grandchildren, who died without issue.

James H. Bowden for appellant.

Barnett, Miller & Barnett and L. H. Noble for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Pryor.

On the 8th of August, in the year 1842, the will of Thomas Philips was admitted to probate in the Jefferson County Court. He owned a large landed estate, and devised 960 acres of his

realty, situated near the city of Louisville, to his grandchildren, who were the children of his son, David Philips.

The grandchildren were three in number, viz: Thomas I. Philips, Sallie Phillips and Mary E. Philips. His will has been heretofore in this court for construction, but the question then raised did not involve the points now necessary to be considered.

Benoni Figg, as trustee for Jane Philips, Jane Philips and her son David Ewell Philips sold 15 acres of this land to the Coleman-Bush Investment Company. They are now resisting the specific execution of the contract on the ground of a want of title in their vendors.

There was a partition of this land between the three grandchildren, by which each one received his or her share, and that part allotted to Thomas I. Philips contained 360 acres, and the 158 acres sold the investment company is a part of this 360 acres.

In the year 1862, or prior to that time, this land allotted to Thomas I. Philips (the whole of it) was sold under a decree of the Louisville Chancery Court for his debts and purchased by Mrs. Ann Philips, to whom a conveyance was made by the commissioner, she in this way acquiring all of Thomas I. Philips' title.

In the year 1865 Ann Philips and her husband conveyed this land back to Thomas I. Philips, and on the 11th of October, 1865, Thomas I. Philips conveyed it to one Robert Ernst, in trust for the sole and separate use of his (the grantor's) wife, Jane A. Philips, during her natural life, and after death to her children born of their marriage, and, if none, then to go to Thomas I. Philips. The conveyance further provided that his wife was to have the sole right to use and enjoy the premises, make leases, with the power given the trustee to sell and make a good title to the purchaser by the written consent of Jane A. Philips and to dispose of the purchase money as the wife may order in writing.

The trustee, Ernst, resigned and Benoni Figg was appointed in his stead, accepted the trust, and has been acting as such, but never gave bond.

Jane A Philips was divorced from her husband, and they had, prior to the divorce, one child, David Ewell Philips, who united with his mother and her trustee, Figg, in the sale of this land to the investment company.

It follows that whatever title Thomas I. Philips had originally to this land passed to his wife for life, coupled with the power of sale of the part of the trustee by and with the consent of the wife (Jane A. Philips) in writing. This she has done by uniting with the trustee and her son in the conveyance, and while the original trustee, Ernst, made no conveyance to the present trustee, Figg, the parties are in a court of equity and are asking the chancellor to allow them to do what the deed expressly authorizes, and the only child, as well as the father, Thomas I. Philips, are consenting, or have tendered deeds in this case necessarily confirming the action of the wife and her present trustee. And the power to the present trustee to sell under this provision of the deed can be given as well after as at the time of the appointment, and this the chancellor has done by enforcing the contract. Whatever title Thomas I. Philips acquired under the will of his grandfather, Thomas Philips, passes to this appellee, and what that title was depends upon the construction given the sixth clause of the testator's will under which this devise was made.

In this devise it is provided: "Should either of said grandchildren die without leaving lawful issue then living, the right and interest in the property devised to such grandchildren is to become the right and property of the survivor or survivors of them, and should they all depart this life without lawful issue

living at the time of their death, the property is then to vest in and become the right and property of my surviving children, and the issue of such of them as now are or may then be dead to be divided amongst them according to the laws of distribution of those dying intestate."

These grandchildren each took a defeasible fee, their estate subject to be defeated upon their death without leaving issue surviving, their interest in such event going to the survivor or survivors. All three of these devisees are married and have a child or children, still, if at their death there is no child or children surviving, the one so dying, his or her interest will go to the survivor or survivors. Then in what manner is the defendant to obtain the title, and has it obtained it by the proceedings in this case? We understand from the record that the devisees (the grandchildren) unite in the conveyance tendered this appellant, by which they relinquished all right and title to this land as survivors if the estate vested in either should be defeated by the happening of the contingency mentioned in the will. It is manifest that the three own the entire land, and are the only persons to take as survivors, and if their right and title is conveyed as such it makes the title perfect.

It is urged, however, that the words survivor or survivors embrace the children of these grandchildren, and, therefore, if one of the direct devisees should die, say Thomas I. Philips, and at his death one of his sisters should be dead, leaving children, that the children of the deceased sister would take as the survivor. We think not. The surviving sister or the surviving devisee would take only, and not the children of the grandchild of the testator, and, therefore, we find no contingent interests in this case except in case of all three of the devisees dying without issue, and then (if the devise is valid) it could pass by the will to the children of the testator and their descendants, but the appellants are willing to accept the deed with such a contingency resting upon the title.

There is often trouble in determining what meaning to attach to the words survivor or survivors, and we find conflicting opinions on this question. There is a seeming conflict between the cases of Best v. Commonwealth, in 10 Bush, 36, and that of Harris v. Berry, 7 Bush, 113.

It is at least a question of intention, and, as said in Harris v. Berry, the word survivor is a flexible term, to be molded by the context and spirit of the will. Mr. Jarmon says, volume 2, section 289, on this subject: "We are now taught, by a series of decisions which outweigh any opposing dicta or opinions, that the word survivor, like any other term, when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning."

The main object in construing the words of a will is to carry out the intention of the devisor, and really this is the fixed rule to be applied to the construction of any such writing when presented, and a different meaning may be given to the same word or language used in different wills by reason of the context and the circumstances connected with its execution as gathered from the face of the instrument.

The evident purpose of the testator in this case was to create a defeasible fee in his grandchildren and nothing more. If he had designed that the children of one of his grandchildren should take an interest in the principal devised on the happening of the contingency, he would have said so, because he realized, or the draftsman of the will did, the necessity of using such language when intending his remote descendants to take. The will pro-

vides, by language used in this same provision, that if all of these grandchildren die without issue living at their death, then it is to vest in my surviving children and the issue of such of them as now are or may then be dead, thus providing in express terms for the children of his surviving children, manifesting clearly that the mind of the testator was upon that subject, and it is, therefore, reasonable to assume that in omitting to devise to the children of the grandchildren this contingent interest, in the event the parent was not living to take, he intended to confine the devise to the survivor or survivors of the three devisees. This, we think, is the rational construction of the instrument, and carries into effect the purpose of the testator.

Judgment affirmed.

POFF v. COMMONWEALTH.

(Filed March 27, 1894—Not to be reported.)

Criminal law—Conspiracy—Evidence—The evidence wholly fails to establish any conspiracy on the part of appellant with those who actually killed the deceased. Those who did the killing had a motive for it, while no motive for appellant to act in concert with them is shown, and he was on friendly terms with deceased, therefore, what others did or said about the crime, not in the presence of the accused, was incompetent against him.

J. D. Black for appellant.

W. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, John Poff, was jointly with seven others indicted for murder of James Tuggle in pursuance of a conspiracy to do so.

The killing occurred at a common schoolhouse where the appellant and others had, in pursuance of notice, assembled for purpose of repairing the building. There appears to have been no others besides those indicted present on the occasion, or able to state precisely who actually committed the homicide, or the circumstances under which it was done, and really the only facts legally proved upon which appellant could be directly or remotely connected with the crime was his presence at the time and place, and subsequent statement, after being arrested, in substance they had gotten in a bad scrape which it would take a long time for them to get out of; and it may be here remarked that if he did make that statement, about which there is great doubt, it does not show, or necessarily tend to show, he had done the killing or aided or encouraged it to be done. On the contrary, there is a total absence of proof showing he had any motive or inducement to kill or aid others in killing the deceased; for the evidence shows he was a man peaceably inclined and had been on friendly terms with James Tuggle, and neighborly acts of courtesy and kindness were common between families of the two men. Moreover, it is extremely improbable that eight men assembled at a schoolhouse near a public road, and near several dwelling houses, in pursuance of a concerted scheme to murder an old man who at least appellant did not know would be present on the occasion.

There was a motive that actuated the two persons who were shown to have killed deceased, which was revenge for death of

their father at his hands many years before, and they have fled from justice. But appellant is not shown to have, directly or indirectly, participated in the crime, or even to have known it was intended by the guilty parties. As, therefore, there was no proof whatever of a confederacy or conspiracy to kill James Tuggle, in which appellant took part, or was even cognizant of, it was error of the lower court to permit any evidence of acts and conversation of others, without presence and hearing of appellant, by those who did take his life, for though there is evidence of premeditation on part of the two persons who killed him, appellant is not shown to have either sanctioned or been aware of it. We, for the same reason, think it was error to admit evidence of the fact that one Phips went to the house of deceased day before the homicide and told him there was no water in one of his pastures, for, although it might be thereby inferred deceased would act upon that information and go to his pasture the day of the killing, passing by the schoolhouse, as it turned out he did do, it does not follow Phips gave the information for purpose of having him killed; much less can any evil intention on that account be attributed to appellant, who is not shown to have been aware of what had taken place between Phips and deceased, or to have expected the latter would be there.

As there was no motive on part of appellant to kill James Tuggle, or any evidence of conspiracy in which he took part or was aware of, it seems to us no evidence of what others did or said without his presence should have gone to the jury on trial of this case, but only such evidence is competent which directly tends to connect him as aider and abettor with the homicide.

For the error of permitting incompetent evidence to go to the jury, whereby appellant's substantial rights were prejudiced, the judgment is reversed and cause remanded for new trial consistent with this opinion.

JONES, &c. v. BIGSTAFF, &c.

(Filed March 27, 1894.)

1. Partition between devisees—Implied warranty—The implied warranty of title which arises from a partition of land by joint devisees survives to an heir of a parcener when the eviction by paramount title occurs after the partition and the death of the ancestor.

2. Same—But such implied warranty of title does not run with the land, so as to give a right of action for contribution to a vendee of one of the parceners when evicted by a superior title.

3. Same—Limitation—The statute of limitation does not begin to run against a partitioner or his heir for contribution against the co-partitioners until there has been an actual loss of land by paramount title.

Z. T. Young and Wm. H. Holt for appellants.

Stone & Sudduth for appellees.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Pryor.

John Jones, a resident of Bath county, died testate in March of the year 1851. He owned a large tract of land, and in the month of November of the same year (1851) a division of this

land was made between his children under an order of the Bath County Court. The report of division was confirmed, but no deed of partition ever executed by the parties, but each child took possession of his allotment and the division must be regarded as effective, as if a grant had been expressly made by the one to the other.

The testator left five children and two grandchildren, the children of his deceased daughter, Polly Jones. In the partition there was allotted to James R. Jones, one of the children and who was the father of these appellants, 366 acres and 2 roods of land; Nancy Jones, the widow of the testator, got 305 acres as her share; Daniel L. Jones, 330 acres; Lydia Boyd, 301 acres; Thos. Jones, 335 acres; Elizabeth Bridges, 334 acres, and the children of Polly Jones 332 acres. James R. Jones, who obtained in the partition 366 acres of land, died in the year 1859 leaving children, some of whom are the appellants in this case. In the tract of land of 366 acres allotted to James R. Jones was embraced land that was claimed by the heirs of one Tydings, and in the year 1868 the heirs of Tydings brought an action to recover it, and Daniel R. Jones, the principal appellant here, was a defendant to that action. His father, James R. Jones, had, by a regular conveyance in his lifetime, sold to his son, Daniel R. Jones, 175 acres of this land, the title to which was in dispute, and Daniel R. obtained 50 acres and a fraction by inheritance from his father, that was included in the original petition, that was also in dispute. The action instituted by the heirs of Tydings against Daniel R. Jones and others ended in the year 1881 in a recovery by Tydings' heirs of the 175 acres conveyed him by his father, and of the 50 acres that he had inherited from him and that had been allotted to his father in the original partition between the heirs or devisees of John Jones. The present action was instituted by Daniel R. Jones and James M. Jones, his brother, to recover, by way of contribution from the original partitioners under the will of John Jones, their proportion of the loss sustained by reason of the recovery of this land by Tydings' heirs, James M. Jones having lost in the recovery 15 acres that had been allotted in the original partition. Their action was dismissed. The contention of the appellees is, first, that James R. Jones, the father of the appellants and one of the original partitioners, by a verbal agreement with the other devisees under the will of John Jones, agreed to risk the title upon their giving him more land than was allotted the other devisees, knowing at the time the defect in the title.

Second. They can not maintain the action because the implied warranty arising from the partition does not run with the land, and operates only as between the original parceners or tenants to give the right to a redivision and nothing more.

Third. The statute of limitation that began to run as soon as the partition was made and confirmed. As to the first ground of defense relied on it is sufficient to say (if otherwise available) it is not sustained by the testimony, the proof conducing to show the land of the appellant's father was of no greater value than that allotted the other devisees, with other testimony showing that, while the defect in the title was talked of, it was at the time supposed that the co-devisees, if the land was lost, would be liable to contribute. There is nothing in this defense.

The second and third grounds of defense are questions of more importance, and have not been heretofore decided by this court.

Section 6 of chapter 28, General Statutes, provides: "When any real or personal estate shall be devised to any one of the heirs at law of the testator, and the title to the same, or any part thereof, shall prove invalid, such devisee shall have contribution from the others unless it shall appear from the will that such was not the intention of the testator."

By reason of this statutory regulation, as well as the rule of equality recognized by courts of chancery, one of these joint devisees, losing a part of the estate devised by a paramount title, would be entitled to contribution from the others, and the question as to whether an alienee from one of the devisees can recover contribution of the original devisees under this implied warranty of title to his vendor, arising from the partition, must first be determined.

The appellant, Daniel R. Jones, purchased from his father 175 acres of this land recovered by the Tydings, and obtained his father's fee, with a warranty of title. James M. Jones sold his right, he having lost 15 acres and his vendees are not before the court.

It is maintained by counsel for the appellants that an implied warranty of title arising by operation of law or from the statute upon the making of a partition by the judgment of court of competent jurisdiction, like an express covenant of warranty, runs with the land, and, therefore, the alienee of one partitioner, or one of the tenants in common, when wrongfully evicted may maintain the action for contribution.

In Venable, &c. v. Beauchamp, 3 Dana, 321, it is said: "To every partition of land the law annexes an implied warranty, whether expressed in the deed or not."

Each partitioner becomes the warrantor of the other; but, as said in the case cited, the warranty in such cases is special, not only with regard to the person or persons who may take advantage of it, but also with regard to the amount of recompense.

Under the common-law rule there was no such doctrine as that of an implied warranty as between joint tenants and tenants in common, because they could not be compelled to make partition, and when making voluntary partitions there was no reason why they could not contract for themselves, and insert express warranties to secure them against loss by a paramount title; but in case of co-parceners a partition could be compelled, and, therefore, the implied warranty arose by operation of law for the protection of parceners.

In this State a division could be compelled, although the devisees held as purchasers, and this division was had under an order of court with the jurisdiction to require the division in opposition to the wishes of any one of the devisees; and to what extent this implied warranty goes when the tenancy is severed, whether the parties are co-parceners, joint tenants or tenants in common is the question. Does the privity exist between the heirs of one of the tenants (dead) and the surviving tenants? And does it extend further and authorize a recovery by the vendee of one of the tenants after partition and an eviction of a superior title?

Where the tenant, whether holding as a co-parcener, joint tenant or in common, dies, his right as against his co-tenants, with reference to the joint title to land, passes to the heir either for the purpose of demanding partition or exacting contribution where there has been a partition and an eviction.

The privity of estate is not destroyed by the death of one of the tenants, where right and title pass by operation of law to his

heirs. Their right to recover if the ancestor could is not doubted; but we can not well see how the implied warranty passes to the alienee or vendee. The conveyance severs the relation and places the parties in a position where neither the co-tenant nor his vendee can demand a redivision. The law creating the division provides against loss by the implied warranty, but this extends only to the parties and their heirs, and not to those who become purchasers after division from one of the joint holders. He must secure himself by his contract. His covenant of warranty as an implied warranty runs only in favor of the tenants and their heirs.

The remedy, where loss is sustained, is by a redivision or by compensation in value for the actual loss. This would embrace the value of the land and the expenses of the litigation.

In a well-considered case (Sawyers, &c. v. Cator, 8 Humph., Tenn., 280), Turly, justice, says: "This implied warranty holds only in privity of estate, and, therefore, if either parcener aliens in fee and the alienee is evicted, the aliening parcener can not enter on the other allotment because, by the alienation, she has dismissed herself from having any part of the tenements as parceners by thus severing the connection which previously existed."

That case also establishes the doctrine that an alienee from one tenant may be entered upon by a co-tenant who has sustained loss for the reason that if such a rule was not recognized it would place it within the power of the parcener to defeat the remedy by making a conveyance of his parcel. That question, however, is not here.

It is well settled that parties to a petition, whether co-parceners, joint tenants or tenants in common, are liable upon an implied warranty of title when loss occurs after partition, and that this implied warranty does not, like an express covenant, run with the land.

In this case the appellant, Daniel R. Jones, being a purchaser from his father of 175 acres of this land, can not recover on the implied warranty created by operation of law on the division of the land of John Jones between his devisees, the father of appellants being one of them, nor can James M. Jones, another appellant, recover because he has sold his interest.

Then as to the 50 acres and a small fraction inherited by Daniel R. Jones from his father, that was a part of the allotment to the latter, his father, in the division of the land of John Jones, it follows a recovery may be had. It has been lost by a paramount title, and, as an heir of James R. Jones, the appellant, Daniel R. Jones, is entitled to its value at the date of the division.

It is said, however, that the statute of limitation is a bar to the recovery, and this case is said to be analogous to implied warranties in the sale of personalty. We think not. The implied warranty of title as to personalty is broken from the sale and delivery if no title exists, and while in cases of an express warranty, whether as to personalty or realty, the covenant is not broken until there is a recovery in the one case and an eviction in the other by a superior title; still the application of the same rule in regard to the limitation of actions for both realty and personalty is not sustained either by precedent or by any statutory regulation, and if, as the authorities all say, the implied warranty is for the protection of those compelled by law to make division, that protection is needed in cases of the partition of realty when an eviction takes place. The right to contribution never existed until the recovery by Tydings' heirs on a better title.

As to the 50 acres of land, each devisee should contribute his part of the loss, but as all of them are not before the court, only those defendants to the action can be compelled to contribute, and then only his part, on the basis that all are solvent and able to contribute. They are also liable for their part of the expenses in the proportion that the 50 acres will bear to the entire number recovered. The case of Sawyers v. Cator, supra, determines the question of limitation also.

This court has heretofore had the case of Tydings' heirs before it. Their right of recovery was clearly established, and the case made out for the appellant, D. R. Jones, to the extent indicated.

The judgment is affirmed as to James M. Jones and reversed as to Daniel R. Jones, with directions to render a judgment in accordance with this opinion.

SCHULTE v. DROEGE.

(Filed March 27, 1894—Not to be reported.)

Specific execution—Mistake—The chancellor found that when appellee accepted appellant's proposition to sell him certain stock he acted upon the mistaken belief that it was stock belonging to appellant's brother that he was purchasing, and this finding is sustained by some of the evidence, therefore, the refusal of the lower court to compel appellee to perform the contract must be affirmed.

Cleary & Cleary for appellant.

J. W. Byran for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Hazelrigg.

On February 8, 1892, the appellant, Schulte, a resident of Cincinnati, sent by mail to the appellee, Droege, a resident of Covington, the following proposition:

"Mr. John C. Droege, Covington, Ky.:

"Dear Sir—I propose to sell you my 80 shares of the G. B. Schulte Sons Co. stock, of $100 each, at $200 per share, making a total of $16,000, etc.

"Respectfully yours,

"H. JOS. SCHULTE."

On this proposition the appellee endorsed the words "accepted."

"JOHN C. DROEGE,

"2-10-92."

And returned it by mail to the appellant. Within a few days the parties met to consummate the trade, when the appellee discovered, as he says, for the first time, that he had by mistake signed the proposition to take 80 shares of the appellant's stock when he supposed he was accepting a proposition to sell him 80 shares of stock belonging to the brother of the appellant.

Upon declining to take the stock indicated in the writing the appellant brought this action to compel him to perform the contract. Besides a number of letters which passed between the parties there was no testimony introduced save that of the parties themselves. The issue was purely one of fact, and the chancellor, adopting the view of Droege, dismissed Schulte's petition.

The parties appear to have had a trade under consideration in the fall of 1891, but it seems to have been abandoned until on

January 11, 1892, Schulte wrote to Droege, saying: "I suppose you are under the impression that you would never hear from me regards matter you inquired for in yours of September 27, 1891. If you are still inclined, we may open up negotiations regards the stock owned by my deceased brother's estate."

Interpreting Droege's subsequent conduct in the light of this letter, and with reference to it, his contention seems very plausible, although the contrary view is borne out by other circumstances. The discussion of the various phases of the controversy would be unprofitable, as we can not disturb the finding of the chancellor in a case like this.

Judgment affirmed.

BAILEY v. COMMONWEALTH.

(Filed March 29, 1894—Not to be reported.)

The plea of self-defense is not available to one who has committed homicide unless the danger to him was impending, or apparently impending, at the time of its commission.

Where the evidence showed that the deceased had threatened the defendant with death, and pursued him with a pistol prior to the time when the homicide was committed, an instruction that if the jury believed "that deceased had threatened the life of the defendant, and laid in wait for him and attempted to kill him, and that defendant at the time he killed deceased, if he did kill him, had reasonable grounds to believe, and did believe from the facts aforesaid and from the acts or demonstrations of deceased, that he was then and there attempting to carry said threats into execution and about to inflict death or great bodily harm to defendant, the defendant had the right to use such force as was necessary to rid himself of such danger, or apparent danger," etc., was not erroneous.

W. E. & S. A. Russell for appellant.

W. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

In October last the appellant and the deceased quarrelled over a game of "craps" in a boarding car at Lebanon Junction, when the latter chased the former a considerable distance with pistol in hand, avowing an intention to kill him. On the day following this occurrence he again ran the appellant away from a point near the depot, where he was eating; and on several occasions sought the appellant for the purpose, as he said, of killing him unless he paid him $9.

Afterwards, while the deceased was standing on the streets of Lebanon, with his hands in his pockets, according to the proof of the State, he was shot and killed by the appellant.

Upon his trial the accused thus testified of the meeting: "When I first saw him his hands were in his pants pockets; as he saw me he jerked his hands out of them and put them quickly into his coat pockets, and I fired and killed him." The jury found him guilty of murder, and he was sentenced to the penitentiary for life, in accordance with their verdict.

The court gave the usual instructions on the law of murder and manslaughter, reasonable doubt, etc., and further instructed the jury that they could not acquit merely because they might be-

lieve from the evidence that the deceased had previously threatened to take the defendant's life or do him bodily harm, or had previously assaulted him with a pistol or attempted to carry out his threats, if they further believed from the evidence beyond a reasonable doubt that the defendant sought the deceased for the purpose of killing him.

They were further told that if they believed from the evidence "that deceased had threatened the life of the defendant, and laid in wait for him and attempted to kill him, and that the defendant at the time he killed deceased, if he did kill him, had reasonable grounds to believe and did believe from the facts aforesaid, and from the acts or demonstrations of deceased, that he was then and there attempting to carry said threats into execution and about to inflict death or great bodily harm to defendant, the defendant had the right to use such force as was necessary to rid himself of such danger, or apparent danger, even to the taking of the life of the deceased."

The objection urged to this last instruction is that the words "then and there" are used; but in Parsons v. Commonwealth, 78 Ky., 102, the use of these words, in an instruction like this one, is approved, as is done also in Kennedy v. Commonwealth, 14 Bush, 342.

We do not understand that any authority can be found in this State or elsewhere sustaining the contention that a man may slay another upon the plea of self-defense unless the danger is impending, or appears to be impending, at the time of the homicide. The threats against the accused and the facts attending the pursuit with the pistol, were properly allowed to go to the jury for the purpose of showing that there were grounds to believe the accused was then and there in danger of losing his life or suffering serious bodily harm.

If the instruction (B) asked for the defendant were the law, a man who has been threatened, or upon whom some assault has been made, may slay his enemy on sight, through fear of future danger or because he thinks himself always in danger. We perceive no error in the record.

Judgment affirmed.

LAYTON v. PREWITT, &c.

(Filed March 29, 1894—Not to be reported.)

Even if appellant had a right to vacate on petition the judgment against him without presenting a valid defense to the action in which the judgment was rendered, his petition was properly dismissed in this case because the evidence fails to sustain the appellant's contention as to the fraud practiced upon him, by which he alleged the judgment was obtained.

R. H. Tomlinson for appellant.

Wm. Herndon for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Lewis.

Appellee Prewitt, having recovered a judgment for debt against J. F. Watson, upon which an execution was issued and returned no property found, brought an action to enforce satisfaction by sale of a tract of land alleged to have been conveyed to his wife, Phe Watson, for the fraudulent purpose of cheating, hindering and delaying his creditors.

To that action appellant Layton, as well as Watson and wife,

were made defendants, and in the petition he was alleged to have conveyed the land to Phe Watson, though the consideration was paid by her husband, J. W. Watson. Though each of the defendants, including Layton, were duly served with summons, no answer was filed by either; and, consequently, a judgment was rendered by default for sale of the land as and for the purpose prayed for in the petition.

This action was brought after sale of the land had been made to set aside that judgment, appellee Prewitt being sole defendant. The only ground stated in the petition for vacating the judgment is fraud practiced by appellee in obtaining it. The allegation on that subject is in substance that he, appellant, was lulled and failed to make defense by reason of appellee's statement to him that he was satisfied the land had not been conveyed to Mrs. Watson, but was still property of appellant, and that the action would not be pressed but stopped.

The Civil Code provides that a judgment shall not be vacated on motion or petition until it be adjudged there is a valid defense to the action in which the judgment is rendered. But we need not determine as to that question, because appellant has failed to show by a preponderance of evidence appellee did, as alleged and denied, practice fraud in obtaining the judgment asked to be vacated, for, however complete a defense he may have had to the action whereon the judgment complained of was rendered, it can not now avail in the absence of satisfactory evidence to support his allegation of fraud on part of appellees.

Judgment affirmed.

CARR v. COMMONWEALTH.

(Filed March 31, 1894—Not to be reported.)

Criminal law—Verdict not sustained by evidence—The indictment charged the appellant and others with unlawfully confederating or banding themselves together and going forth disguised for the purpose of doing a felonious act. The evidence shows that appellant and another woman, disguised in men's clothes, went forth with two men for the purpose of stealing a few chickens or geese from farmers. Held—The evidence did not authorize a conviction. No intention to do a felonious act was shown, the crime defendant intended to commit being only petit larceny.

Lev. Russell for appllean t.

W. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

Eva Carr, appellant, and Lou Cowherd, females, and Henry Moss and Charles May were indicted for the crime of unlawfully confederating or banding themselves together and going forth armed or disguised for the purpose of doing a felonious act.

The offense described in section 90, chapter 182, of the statute under which the indictment in this case was presented, is as follows: "If two or more persons shall unlawfully confederate or

band themselves together and go forth armed or disguised for the purpose of intimidating or alarming any person, or to do any felonious act, they shall each, on conviction, be imprisoned in the penitentiary not less than six nor more than twelve months."

It is not charged in the indictment defendants went forth for the purpose of intimidating or alarming any person. And if such charge had been made it would not have been supported by the evidence, for, as held in Embry v. Commonwealth, 79 Ky., 489, intimidating or alarming, in the sense the words are obviously used, imply use of physical force or menace and involve breach of the peace. But the simple charge is they went forth so armed or disguised for the purpose of committing a felony. The evidence shows that a farmer was waked from sleep at night by noise among his chickens, who, upon going out of his house, saw two men running from the place the chickens roosted. He, with his son, pursued the men, and finally came up with them, in company with the two females indicted, who were dressed in male clothing. Next morning four or five geese were discovered in that vicinity near where a fire had been kindled, which defendants had evidently stolen. They were all arrested without resistance and practically confessed their purpose to steal a few chickens.

It seems to us the evidence totally fails to show the persons indicted went forth for the purpose of doing a felonious act in meaning of the statute, or that the object of the statute was to punish by confinement in the penitentiary for such acts as defendants were proved to have committed on that occasion; for, if so, every band of boys who might confederate and go forth armed or disguised to rob a melon patch or orchard, would be guilty of a felony and liable to confinement in the penitentiary. The statute makes every crime either a felony or misdemeanor, and distinguishes them by the manner of punishment imposed, such offenses as are punishable with death or confinement in the penitentiary being felonious, all other offenses being misdemeanors, punishable by fine and imprisonment.

If the purpose with which defendants went forth at the time referred to be judged by what they did do or attempted to do, they certainly intended not to commit a felonious act, but, at most, petit larceny, for which each of them might have been indicted and punished by confinement in the county jail.

It seems to us the court erred in instructing the jury they might find appellant guilty of the offense denounced by section 90, chapter 182, and fix her punishment at confinement in the penitenitary as was done.

Wherefore, the judgment is reversed and cause remanded for dismissal of the indictment.

COWHERD v. COMMONWEALTH.

(Filed March 31, 1894—Not to be reported.)

Lev. Russell for appellant.

W. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, Lou Cowherd, Eva Carr, Henry Moss and Charles May were indicted for the offense of unlawfully confederating or banding themselves together and going forth armed or disguised for the purpose of doing a felonious act.

The evidence in this case is the same as in the case of Eva Carr v. Commonwealth, jointly indicted with appellant, this day decided, and the opinion there rendered is adopted as opinion in this case.

Wherefore, the judgment of conviction against appellant is reversed and cause remanded for dismissal of the indictment.

WHITE, &c. v. MAYHALL, &c.

(Filed March 31, 1894—Not to be reported.)

1. While the law is settled that a legatee can not claim under a will and accept a bequest and subsequently deny the validity of the will, yet if the will was procured by the fraud and undue influence of some of the devisees from the testator at a time when he was mentally incompetent to make a will, all of which facts were unknown to the legatee when he accepted his bequest, and fraudulently concealed from him by the devisees, he may contest the validity of the will, notwithstanding his acceptance of the bequest.

2. Such legatee can contest the validity of the will and object to its probate without having first paid back to the estate of the testator the legacy received by him.

W. H. Julian for appellants.

John B. Lindsey and John W. Rodman for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

Owen Tapp died testate, leaving three daughters, Hallie, Anna and Ellen E. To Anna and Ellen E. he gave his entire estate, consisting of several tracts of land and some personal property, save that to Hallie he gave the sum of $200.

His will was probated on October 5, 1891, and on January 25, 1892, the executor paid to Hallie the sum given to her in the will, and took her receipt, in which her husband joined. The other sisters each gave her $100 in addition to this sum, and the aggregate amount was to be invested as might be directed by the daughter. In March, 1893, Hallie and her husband prosecuted an appeal from the order of the county court probating the will, filing a statement in which they attack the will on the ground of mental incapacity on the part of the testator to make it, and because of undue influence exercised over him by the favored sisters and others, inducing him to make it.

The appellees filed an anwser, in which these allegations were denied, and the receipt of Hallie and her husband filed and relied on in bar of the appeal.

The contestants replied, saying that the $200 was paid them as a balance due Hallie in a land trade with the testator during his lifetime, and not in payment of the devise; and also that they did not know, at the time they signed the receipt, of the incapacity of the testator, or of the fact that the will had been obtained by fraud and undue influence, but that when the receipt was procured, and prior thereto, the appellees knew of his inca-

pacity, and that he had been induced to make the will by their own fraud and undue influence, and that they fraudulenly concealed these facts from the appellants in order to induce them to sign same and not contest the will.

They claim nothing by reason of the receipt, and aver a willingness to return the sums paid them upon the cancellation of the alleged will. This court sustained a demurrer to this reply, and the contestants not pleading further, their appeal was dismissed.

The question is, are the contestants barred of the right of appeal because of their acceptance of the devise contained in the will? Ordinarily we may assume as uncontroverted law that a person may not take under a will, and yet deny its validity, but in this case it seems to us that the manner of the obtention of the receipt, if the facts are truly stated in the reply, relieve the daughter and her husband of the usual effect to be given the act of signing such a writing. By giving effect to it, we permit those guilty of a fraud to take advantage of their own wrong. They may not have given any positive assurances of the validity of the paper; but a person may procure another to act as well by a suppression of the truth as by fraudulent representations.

So while the alllegation is not in express terms that the appellees procured the writing and induced the appellants to accept the money by fraudulent representations, yet the suppression of the facts alleged to have been known to the appellees was none the less clearly a fraud.

It can not be contended that these daughters might procure by undue means the execution of the will, and allow their sister to act upon the assumption that they had done no wrong. Common justice would demand that they disclose to their sister, ignorant of the facts, their knowledge of the father's incompetency and their own fraudulent conduct. Of course we speak of the facts as alleged and not as they may really exist. Nor can we assent to the doctrine that this spurious writing must stand probated as the will, because the injured complainants do not pay back the money paid to them. They were induced to receive it by the fraud of the contestants, if we may believe the reply, and, when the fraud has been unearthed and the paper rejected, the court will see that what the daughter Hallie has received is charged to her.

The estate is alleged to be of the value of $15,000, and if the court is convinced that to retain the pittance received by the disinherited daughter may work an injustice to the favored devisees, he may put the appellant on such terms as may prevent the hardship.

The judgment is reversed, with directions to overrule the demurrer to the reply and have the appeal proceed in accordance with the principles of this opinion.

JACKSON v. ROBERTS, ADM'R, &c.

(Filed March 31, 1894.)

1. An administrator, who has obtained judgment on a note held by his decedent, may purchase realty of the defendant sold to satisfy such judgment, and it is his duty to hold it for the benefit of the estate.

Such administrator, after obtaining a sheriff's deed for the realty, has a right to institute and maintain proceedings to recover its possession. And the defendant can not complain if the administrator unites with himself in such proceedings the real representatives of his decedent.

2. In the sheriff's deed to plaintiff as "administrator" the term "administrator" is used merely as a description of the grantee.

Collins & Fenley for appellant.

B. F. Menefee for appellees.

Appeal from Grant Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

M. L. Roberts was the administrator of W. L. Roberts, and as such obtained a judgment at law against the appellant, Jackson, in the Grant Common Pleas Court for the sum of $85. He caused an execution thereon to be issued and levied on a house and lot belonging to Jackson, and at the sale thereof by the sheriff, on May 14, 1888, became the purchaser at the price of $167.20, which paid the judgment, including interest and costs.

This price was less than two-thirds of the appraised value of the property, but the defendant in the execution failing to redeem it, the sheriff, on May 16, 1892, executed and delivered a deed therefor to M. L. Roberts, administrator, who thereupon gave notice to the appellant that he would enter a motion in the Grant Common Pleas Court on September 5, 1892, for the possession of the property, as provided in chapter 38, article 12, section 9 of the General Statutes.

Jackson demurred specially to the notice and proceeding because Roberts had not capacity to sue or institute the proceedings, being only the administrator of the personal estate, and generally because the facts alleged in the notice were insufficient to entitle the plaintiff to recover because no deed had been exhibited and no allegation made that the time for redemption had expired, and because the levy and sale had not been set forth in the notice; of this general demurrer it is sufficient to say that the notice is in exact compliance with the statute named, and the court properly overruled the objection to it. The court, however, sustained the special demurrer as to Roberts' capacity to sue, and, over the objection of the appellant and at the instance of the heirs of W. L. Roberts, made them plaintiffs in the motion and proceedings for possession.

Jackson then filed his response, in which he denied the right of M. L. Roberts, administrator, to maintain the action of proceeding, or that all the heirs of W. L. Roberts had been made plaintiffs, and asserted further that he had paid the debt for which the judgment had been rendered prior to its rendition, etc. The court sustained a demurrer to the response, and entered a judgment for the plaintiffs for the possession of the land.

It is insisted that the judgment is erroneous because Roberts, administrator, could not maintain such a proceeding, or if he could, then the judgment should have given him the possession and not the heirs of W. L. Roberts; and, moreover, that the plaintiffs did not, on the trial, exhibit the judgment, the execution, its levy or the sheriff's deed.

As to this last contention we need say only that the notice referred to the execution and the sale thereunder, and the respondent in express terms admitted the existence of the deed to Roberts, administrator, and that it embraced the land in controversy. These exhibits are in the record, and whether filed or used as part of the notice or as evidence, we do not know. We assume they were used in the proceedings in some way, as there is no bill of exceptions filed by the appellant showing what was done, and the only thing we can consider is the sufficiency of the response.

Certainly the administrator has no right or interest in the real estate of the decedent, but this properly was no part of the real estate of the decedent. We think he had the right to purchase

it as the plaintiff in the execution and representative of the estate. He could not make a profit by the purchase, but was the trustee or agent of the heirs or creditors of the estate. The note on Jackson came to his hands, and he was only doing his duty in attempting its collection.

It makes no difference what form this asset took—it was only a part of the estate in the hands of the administrator, and it may be treated as personalty until the duty of the administrator touching it was performed, and that duty was to collect and hold its proceeds for distribution among the heirs or for the payment of debts.

It is said, however, that there were no debts, and that the administrator had settled his accounts; but no order to that effect is produced, and certainly his functions concerning this debt and its ultimate collection and disposition can not be said to have terminated; nor do we see in what respect it was error to allow the other heirs to be made parties. It was but the substitution of the real parties in interest, and of this the defendant in the execution can not complain.

His debt was paid by the sale of his land, and it seems to us his objections are purely technical; but if technical rules are applied he is in no better attitude. M. L. Roberts, administrator, was the purchaser, and to him the deed was made. He also gave the notice and made the motion. He is not said to be the administrator of W. L. Roberts, and the use of the term "administrator" after his name in the sheriff's deed to him may be, and must in strictness be, considered as merely a description of the person. His motion for possession was sustained, and it is a matter of no consequence to the defendant that he allowed others to share with him the benefit of his purchase.

Judgment affirmed.

COMMONWEALTH v. BERRY.

(Filed April 1, 1894.)

Official bonds—Concealment of material facts from sureties—Acceptance—A sheriff's county levy bond was signed by S. and A. as sureties, and by agreement made in open court the county judge agreed with them not to accept the bond until it was signed by certan other sureties named in the body of it; persons other than those so agreed upon signed the bond and the county court accepted and approved of it in violation of the agreement with S. and A. Subsequently, in pursuance of notice given by such other sureties, they were released and the sheriff was required to give an additional bond to the State and to indemnify his former sureties. Appellee H. signed this new bond as surety. In an action on this new bond, Held—

First. S. and A. were discharged from all liability by reason of the failure of the county court to comply with its agreement with them.

Second. The concealment from appellee B., at the time he signed the new bond, of the facts concerning the execution of the bond by S. and A. which released them, was a concealment of material facts, and he can not be held liable on his bond.

W. J. Hendrick and Reid Rogers for appellant.

Wm. Lindsay and J. W. Rodman for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The State revenue bond of Hawkins, sheriff of Franklin county, dated December 11, 1880, and conditioned for the faithful collection of the State revenue for the ensuing year and the payment of same to the persons entitled to receive it, was signed by said sheriff and by John W. Jackson, Peter Smith, William Anderson and R. D. Armstrong as his sureties.

By an order of the Franklin County Court, at its December term, December 20, 1880, this bond was filed and approved by the presiding judge of the court. On June 6th thereafter, in pursuance of notices given by Armstrong and Jackson, two of these sureties, the court required Hawkins to execute an additional bond on behalf of the State revenue, and providing indemnity for those making the motion to be released.

The appellee, by his attorney in fact, signed this additional or new bond as one of the sureties thereon, and upon Hawkins being sued upon it and the original bond, he pleaded that he was not bound by reason of a defect in the power of attorney. He succeeded below, but this court held the power of attorney sufficient. (Commonwealth v. Hawkins, &c., 83 Ky., 246.)

In the meantime Smith and Anderson, the two sureties who had not taken any steps for indemnity, but who supposedly remained bound with Berry for the acts of Hawkins, filed their separate answers to the effect that when they signed the bond of December 11, 1880, the names of Henry Smith and W. A. Moore were in the body of it, and by agreement in open court the bond was not to be finally accepted or approved until these persons signed it, as well as G. W. Craddock, Wm. Risk and Thomas Scott, whose names were not in the body of it, but that in violation of agreement with the presiding judge, and in defiance of the express conditions upon which, in open court, they had signed the bond, the court had subsequently and without their knowledge accepted and approved it. Upon the return of the case from this court Berry set up, by amended answer, the facts developed by the answers of his co-defendants, Smith and Anderson, and claimed that the contract he had undertaken was to take the place of the dissatisfied sureties, Armstrong and Jackson, and stand bound for any default of Hawkins, in conjunction with Smith and Anderson, and that as by the act of the court the latter were released, he also was released. The demurrer of the Commonwealth to this amended answer was overruled by the lower court, and the State declining to plead further, the proceeding was dismissed as to Berry. From this judgment the Commonwealth has appealed.

The answers of Smith and Anderson, filed in February, 1883, setting up the facts pertaining to the execution of the bond of December 11, 1880, and its wrongful acceptance and approval, have never been replied to by the Commonwealth or denied in any form. It appears to be conceded that the plaintiff can not recover from these sureties, but it is manifest that but for the wrongful acceptance and approval of this bond Smith and Anderson would have remained bound in conjunction with those signing the new bond for the default of Hawkins on the revenue bond for 1881. They took no steps to be relieved of any liability, and the court's order of acceptance and approval gave no intimation to Berry that the signers were only conditionally bound. We think Berry had the right to rely on this order accepting and approving the bond as indicating that although Jackson and Armstrong might get off upon their motion to that effect, yet that Smith and Anderson still remained bound in conjunction with him.

This order of acceptance and approval was of record and showed for itself, but had he looked up the bond he would still not have been put upon guard; for, while incomplete, yet subsequently to its date it had been finally accepted and approved by the court, and there was nothing to show that this had been done in violation of an agreement that it was not to be so executed. There was nothing in the record or on the face of the bond to vitiate it.

The records showed Smith and Anderson bound in June, 1881, when Berry acted, and he was entitled to know of the conditions, which, as later developments showed, operated to release them. If to the officer acting for the State any facts were known which materially affected Berry, was he not entitled to know them? The case is thus aptly put by counsel for the appellee. It is manifest that the contract the Commonwealth is seeking to enforce is not the one that Berry intended to make or believed he had made. The contract sought to be enforced is an undertaking by Berry to answer for the default of Hawkins without regard to the joint liability of Smith and Anderson, who confessedly are not liable with him. The contract he intended to make and supposed he had made, and the contract, as prima facie evidence by the county court records was that in conjunction with Smith and Anderson he (Berry) would answer for the default of Hawkins. Upon abundant authority the sureties, Smith and Anderson, seem to have been discharged from liability by the action of the county court (Commonwealth v. Magoffin, &c., ante, 775), and, if so, that action or agreement should have been divulged to the surety.

Mr. Story thus puts it: "Thus if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist." (1 Story's Equity Jurisprudence, section 215; Graves v. The Lebanon National Bank, 10 Bush, 23.)

Judgment affirmed.

COLLINS v. COMMONWEALTH.

(Filed April 12, 1894—Not to be reported.)

Criminal law—Evidence—Instructions—The evidence in this case authorized the verdict finding defendant guilty of tearing up and displacing a railroad track so as to throw the locomotive and cars from the track and injure the lives of persons thereon. His statements, as proven, amounted to a confession, and the instruction given by the court concerning the weight to be given to a confession was as favorable as appellant was entitled to.

Eversole & Reid for appellant.

W. J. Hendrick for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was tried and convicted under an indictment found under section 5, article 14, chapter 29 of the General Statutes, the provisions of which make it a felony for tearing up or

displacing a railroad track so as to throw the locomotive or cars off the track and imperil the lives of persons thereon.

The most serious objection urged by counsel to rulings of the court on the trial below is that the court instructed the jury that "a confession of the defendant, if the jury believed beyond a resonable doubt that he made one, unless made in open court, would not warrant a conviction unless accompanied by other proof that such an offense had been committed and participated in by the defendant."

The contention is not that this is not the law considered abstractly, but that there was, in fact, no confession made by the defendant and especially none in open court, and that, therefore, it was misleading to so instruct.

The statements of the accused were, first, to the effect that he knew nothing of the crime; that he stayed at his brother's house the night of its occurrence, but on his brother denying this he stated that he and Ballou had stayed out all night near his brother's, Ballou being very drunk, but the place where he said they stayed showing no signs of this. He finally stated that he and Ballou, after stealing a ride on the road from Rockcastle county, were put off at Hazlepatch after night and there Ballou had broken open the toolhouse and taken out a clawbar and wrench; that they then came to the place of the wreck, a steep fill.

He then gave a detailed statement of how Ballou wrecked the train, for the purpose of robbing the dead, for the persons not killed by the wreck were to be killed by Ballou. It is true that the accused denied breaking into the toolhouse or pulling the spikes from the rails, but he confesses to accompanying Ballou to the house and to the place of the wreck, and is manifestly as guilty as his companion. These statements may be properly characterized as confessions, and the instruction was properly given and was as favorable to the accused as it should have been.

We perceive no error in the record by which the appellant was deprived of a fair trial.

Judgment affirmed.

NEVIN v. ALLEN.

(Filed April 12, 1894—Not to be reported.)

1. Under a city charter creating a lien on adjacent property for street improvements, a homestead which is exempt by law from liability for its owner's debts may be subjected to pay the assessment for such improvement for which it is liable.

2. Same—Abandonment of wife by husband pending suit to enforce lien on homestead—While a suit was pending to enforce such a lien on a homestead the husband deserted the wife, leaving her in possession of the property, and a judgment and order of sale against the property was had without any knowledge on the part of the wife of the proceedings. Held—Even after the expiration of the period allowed the owner to redeem his property in such cases the chancellor should protect the rights of the wife by allowing her to redeem the homestead by paying the debts, interest and all the costs of the suit.

Lane & Burnett for appellant.

Polk & Hulsowede for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The charter of the city of Louisville gives a lien for street improvements upon the adjacent property on the original construction, and there is no doubt but the lien exists in this case unless the homestead exemption applies, and if applied as was done by the court below the remaining property is made, subject to a greater burden, with the benefits resulting as much to the homestead as to the property required to pay for the improvement.

The legislature, in providing for assessments, imposes the burden upon the owners of lots without any exception, and in the case of Broadway Baptist Church v. McAteer, 8 Bush, 508, church property was made subject to the payment of a like tax. It is said that a statute exempting property from taxation does not exempt it from a local assessment, and as said by Elliott in his work on Streets and Roads, a general improvement being ordered within a certain boundary, authorizes an assessment on all the lands within the territory, although some of it may be exempt from taxation.

Statutory liens of this character are not affected by general laws relieving a debtor from liability as against the claims of creditors unless by express terms, and it, therefore, follows that this property was liable to the assessment, and must pay for its part of the improvements.

This property was assessed at the sum of $64, and was its proportion of the costs of the improvements, and for which, with the interest and costs, judgment was obtained against the husband of the present appellee. It seems that the action was pending against him for several years before judgment, and after judgment he failed to redeem within the two years provided by law, and a deed was executed to the appellant, the contractor, who had purchased under the judgment.

While this litigation was pending the husband abandoned the wife, leaving her and her children in the possession. It was a case of desertion if the facts alleged are true, and a sale of the house and lot, with the wife in possession, without the knowledge on her part that the suit was pending or a sale made. She certainly had some equities or rights that should be regarded in a case like this, and instead of giving her the homestead the chancellor should have required her to pay the debt, interest and all costs to the defendant, and with this he ought to be satisfied, and, if not paid, resell the property. Whether these facts alleged are true depends upon proof.

When the case was submitted no answer was in, but one lodged in the clerk's office, and if an answer had been properly in, the case would have been sent back to hear proof. The answer now in should be treated as filed, and the case proceed to trial as herein indicated.

Judgment reversed and remanded for proceedings consistent with this opinion.

PRICE v. COMMONWEALTH.

(Filed April 12, 1894—Not to be reported.)

Criminal law—"Outhouse"—A chicken house on the same lot as the dwelling house, and owned and used by the owner of the dwelling house, is an "outhouse" within the meaning of the statute denouncing the crime of "feloniously breaking into any dwelling house or any part thereof, or any outhouse belonging to or used with any dwelling house," and feloniously taking away therefrom anything of value.

B. R. Jouett for appellant.

W. J. Hendrick for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Lewis.

Appellant was indicted and convicted for the offense of housebreaking, described in following provision of the statute: "If any person shall feloniously break any dwelling house or part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

The evidence shows a chicken house was broken and four chickens carried away by appellant. But it is contended that the chicken house in question is not, in meaning of the statute, an "outhouse," and, consequently, he was not guilty of the offense for which he was indicted.

The chicken house broken is on the same lot as the dwelling house, both being owned and in the possession of the same person. It adjoins the stable of same person and is about sixty yards from the dwelling house, there being between them a garden enclosed by a wire fence and through which there is a passway from one to the other.

As is manifest from language of the statute an "outhouse" is not to be understood as being part of the dwelling house; but it must be a house belonging to or used with the dwelling house or, in language used in Bishop on Statutory Crimes, "contributory to habitation."

It seems to us the statute itself plainly enough shows that a chicken house, like a meat house or ice house, was intended to be regarded and treated as an "outhouse," to break which and take away anything of value is made a felony; for unquestionably it does, in meaning of the statute, belong to and is used with a dwelling house.

Judgment affirmed.

THOMPSON v. COMMONWEALTH.

(Filed April 12, 1894—Not to be reported.)

A plea of former jeopardy is not sustained by proof of a former mistrial and subsequent return of a new indictment for the same offense because the first indictment was lost, or the name of the owner of certain property was erroneously given in it.

Ewell & Eversole for appellant.

W. J. Hendrick for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted in the Laurel Circuit Court for burning the barn of one of her neighbors. She has been tried and convicted.

The testimony authorized the finding by the jury, and no error is found in the record to her prejudice. In fact there is no ques-

tion in the record except the defense of former jeopardy alluded to by counsel in his oral argument. Nor is the plea of former jeopardy sustained, because there never was a trial or the discharge of the jury after the defendant had been placed on trial that constituted such a defense.

There was a mistrial, the jury failing to agree, and after this a new indictment was returned at the instance of the attorney for the State, either because the former indictment was lost or for the reason the name of the owner of the porperty destroyed was erroneously stated. This did not amount to former jeopardy, and the court properly refused to instruct in regard to it. (Criminal Code, sections 124, 129; White v. Commonwealth, 9 Bush, 178.)

Judgment affirmed.

HARLAMMERT, &c. v. MOODY'S ADM'R.

(Filed April 12, 1894—Not to be reported.)

1. Summon—Nonresident defendant of unsound mind—A warning order entered in conformity with the provisions of the Civil Code is sufficient to bring a nonresident defendant constructively before the court, whether such defendant be of sound or unsound mind. Where the defendant is a nonresident, the proceedings to bring him before the court are the same, whether he is sane or insane.

2. Warning order—Mode of entering by the clerk—A substantial compliance with section 57 of the Code, requiring that the warning order be made upon the petition by the clerk, is all that is required. Therefore, it is sufficient if the warning order is made upon a separate piece of paper which is subsequently attached to the petition.

3. Settlement of decedent's estate—Order of sale of realty to pay debts—If the court is satisfied that the personal estate of a decedent is not sufficient to pay his debts, it may order the decedent's real estate sold for that purpose before an order is made referring the case to a commissioner for proof of debts, or before a report by a commissioner showing the amount of such debts.

Lytle Buchanan for appellants.

Geo. B. Eastin for appellee.

Appeal from Jefferson Circuit Court, law and equity division.

Opinion of the court by Judge Lewis.

This action was brought by the administrator of Sarah C. Moody, with will annexed, for settlement of her estate; and from judgment of the lower court directing sale of two tracts of land for payment of debts against her estate, and ordering J. H. Harlammert, purchaser of one of them, to execute bonds for purchase money, he appeals.

It appears that testator left three children and devisees, one of them, John B. Moody, being of unsound mind, not resident of this State; and one of the grounds of reversal is the court did not have jurisdiction, because he was not brought properly before the court. As required by the Civil Code, an affidavit he was a nonresident was duly made, and the clerk thereupon made proper order of warning and appointed an attorney to defend for him. That proceeding is all that is required by the Code to summon a nonresident, though he may labor under disability, and if done the prescribed time before trial of an action he is, in legal con-

templation, duly summoned and before the court. But it is objected that the warning order in question was not, as required by section 57, actually made upon the petition filed by the plaintiff, being written upon a separate paper, though subsequently attached to the affidavit. A substantial compliance with that section is all that is necessary or was intended. And as the order attached to the affidavit was filed with and became part of the petition, it should, in true meaning of the Code, be regarded as having been made on it.

Section 430 provides that in such action as this the court shall make an order for the creditors of the decedent to appear before a commissioner and prove their claims before a certain day named in the order, notice of which shall be given by advertisement. But such reference is not indispensable to the validity of a judgment directing sale of real estate of a decedent under title 3, article 10, Civil Code, nor need it always precede the judgment, for section 429 authorized the court to order the real property to be sold for the payment of residue of debts if it shall appear to satisfaction of court the personal estate is insufficient for payment of all debts, no matter whether it appear from report of the commissioner or from the pleadings. Of course it is necessary for the court to know certainly or approximately the amount of demands against the estate in order to determine whether to sell all the realty or part only. But that turned out in this case to be an immaterial inquiry, because the debts exceeded the aggregate amount realized from sale of all the land left by the testator.

Whatever may be amount of back taxes may be ascertained and paid out of purchase price of the real estate without prejudicing rights of those who bought it.

In our opinion there was no error in judgment of sale of the property, order of confirmation or in any other proceeding disclosed by the records, and the deed, when made, will pass to appellants a good title if the testator had such title.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

LOCKE, &c. v. COMMONWEALTH, BY, &c.

(Filed April 27, 1894.)

1. Amendment of record of city council—Even conceding that the board of trustees of a town may order the record of its own proceedings at a former meeting to be corrected according to the facts (a question, however, not decided), such an amendment of the record can not be made by a new board in respect to the official action of its predecessor.

2. Same—Signing of minutes by chairman who has gone out of office—The provision of a town charter directing the minutes of the proceedings of each meeting of the board of trustees to be signed by the chairman must be regarded as directory merely, and where the person who acted as chairman omits to sign the minutes at the proper time, he should be permitted afterward to sign them, even though he has ceased to be the chairman.

3. Parol evidence to show acceptance of officer's bond—The execution and acceptance of the bond of a town officer may, in an action on the bond, be

shown by parol evidence where the record which the trustees may make of their proceedings is not made by the charter the only evidence of these facts.

4. Tax collector—Damages—In this action, brought in September, 1890, upon the bond of a tax collector who was appointed in January, 1890, to recover the balance shown to be due by the collector in his settlement made in August, 1890, it was error to award 10 per cent. damages against the defendants, as the town charter under which the collector was appointed authorized damages only where collector failed to pay over the taxes collected on the 1st of January succeeding his appointment, and for this error alone the judgment is reversed.

Boles & Duff and G. M. Bohannon for appellants.

Lewis McQuown and W. J. Hendrick for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Barbour.

The trustees of the town of Glasgow, by virtue of various acts of the general assembly, had authority to levy a tax to pay interest upon certain outstanding bonds of the town, and to appoint a collector of the tax and take from him a bond for the faithful performance of his duties and the payment of the money so collected. In pursuance of this power the trustees appointed one George W. Read collector on January 2d, 1890, when he, with the appellants, Locke & Raubold, as his sureties, appeared befor the trustees and executed the required bond.

Read having failed to pay over a part of the taxes collected, this suit for its recovery was brought upon the bond by the appellees, the commissioners of the sinking fund of the town. The appellants answering, denied that the bond was ever approved and accepted by the trustees of the town. This defense presents the only question of importance in the case. The bond on its face shows that it was attested by the clerk of the board of trustees. It is further shown that the bond was recorded in a book kept for the purpose of recording bonds, etc. The minutes kept by the trustees, or rather the clerk, of the meetings of the board, show that on January 2d, 1890, "the board of trustees met. Present, B. A. Myers, chairman; W. B. Smith, F. S. Page, F. Morris, J. T. Wooten and F. P. Dickinson. G. W. Read, marshal, offered the following bond for the collection of the railroad tax falling due January 1st, 1890, with W. N. Locke and Henry Raubold his sureties: F. S. Page, J. T. Wooten, W. B. Smith and T. P. Dickinson voting for and Morris voting against the acceptance of the same. The bond was declared accepted and approved, and ordered to be recorded, which is now done."

These minutes were not signed by the chairman or any other member of the board. But after this action was instituted the record book of the board of trustees shows that on September 23d, 1890, "the board of trustees met. Present, F. Morris, chairman; F. S. Page, B. A. Myers, L. W. Cardue and J. T. Carter. On motion of F. S. Page, it is ordered by the board that the record of the proceedings of this board of date January 2, 1890, be amended after the words 'attest: Thos. Dickinson, clerk,' so as to read as follows: 'The board then adjourned. Attest: Thos. Dickinson, clerk; B. A. Myers, chairman.' "

We assume that the charter of the town of Glasgow requires the trustees to keep a correct record of the proceedings of the

board, and that the chairman is required to sign the minutes of the proceedings of each meeting. Mr. Dillon, in his work on Municipal Corporations, section 297, says that "the council, unless private rights have attached, may doubtless order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts." And in his notes to section 293, he says that "the signature of the chairman to minutes affixed at a day subsequent to the meeting is sufficient under a statute requiring the minutes of corporate meetings to be signed by the chairman."

These rules apply where the amendment is proposed by the same council at a meeting subsequent to that at which the record proposed to be amended was made, and to the signing by the chairman while he is acting as such. But in this State the Court of Appeals, without determining the extent of the power of the same council at a subsequent meeting to correct errors and omissions in the journal entry of proceedings at a previous meeting, decided that this could not be done by an entirely new board in respect to the official action of their predecessors. (City of Covington v. Ludlow, 1 Met., 295.) And it is argued that for the same reason a chairman, after he has retired from his official position, can not, by affixing his signature give verity to what purported to be a minute of the proceedings of a meeting when he was chairman.

It appears that the board in office in September, 1890, was not the same that was in office in January in 1890. While three of the members were on both boards, still the boards were different, and, upon the authority of the City of Covington v. Ludlow, we feel constrained to hold that the action of the board in September was, as such, a mere nullity and conferred upon Myers, the ex-chairman, no greater right to sign the minutes than he had without such action. Now, whether Myers, who was chairman when the bond was executed, could, after he ceased to be chairman, by the mere clerical act of signing his name to the minutes of the proceedings of January 2d, which were drawn up in due time, but which he omitted to sign at the proper time, give to it the force of a complete record, is a question which we have not been able to find decided by any court. But it seems to us that the signing by the ex-chairman under the circumstances is not that character of an amendment which is condemned in the Covington and Ludlow case. Nor is it like the case of Louisville v. McKegney, 7 Bush, 652. The minutes had been written out in full, and the only objection was that they had not been signed by the chairman. And we are inclined to think that when no actual wrong would be done to any one he should be allowed to sign the minutes, and we should think in a proper case, where the interest of others was jeopardized by his omission, he could be required to do it.

As we have said, we have found no case directly in point. The cases most like it are those where judgments sought to be enforced have been resisted on the ground that the record had not been signed by the judge. Our statutes provide that the proceedings of each day "shall be drawn up by the clerk from his minutes, * * * and shall be signed by the presiding judge."

Some of the other States have substantially the same provision, and Mr. Freeman, in his work on Judgments, section 50, says that most of the courts hold that the statutory provision in regard to the signing of the orders is directory merely, but refers to Raymond v. Smith, 1 Met., 65, as holding to the contrary.

Johnson v. Commonwealth, 80 Ky., 378, citing Raymond v. Smith, says "that where the minutes are written out at length

on the order book and signed they then constitute the proper records of the court, and until signed by the judge they can not with propriety be considered the record." But both of these cases were extreme cases, and in fact in neither was there any evidence that the court had rendered a judgment. In the Raymond case there was no mention of a judgment in the minute or order book. The only thing relied on was a paper in the handwriting of an attorney which was found lodged in the papers and purported to be a judgment. In the Johnson case the record upon which the defendant was sent to and confined in the penitentary was this memorandum on the minute book: "Commonwealth v. Johnson. Written order or judgment."

So the question of the necessity of the judges signing the orders did not arise in either case. The court never meant in either case to be understood as holding that a judgment could have no validity unless the record or the order book was signed by the judge at the conclusion of each day's business, or on the morning of the succeeding day, when, as a preliminary step to the continuance of the court's business, the orders are read. And we take it that when the orders are signed, though not signed until some time after they should have been, the signing relates back to the making of the order or judgment and gives validity to all actions taken under it.

Whether, in a case where the judge had died or gone out of office without signing the orders, the court would, to the end that the rights of parties might be preserved, require the orders to be signed in his name by a commissioner is a question we need not determine, for it seems to us that there is a distinction between the records of a court and the records of the proceedings of the trustees of a town. The latter are often made and kept by inexperienced persons, and the same accuracy in statement and certainty in authentication ought not to be required. And we are of opinion that the provision of the statute directing the minutes to be signed by the chairman should be regarded as directory merely, and that the person who acted as chairman should be permitted to sign the minutes, even though he had ceased to be the chairman. But if we are mistaken in this, we find no provision in any of the acts expressly requiring the approval, acceptance or execution of the bond to be made a matter of record. The only provision bearing on the question is in section 9 of the act of February 8, 1870, which is that "the collector of the taxes levied and imposed for sinking fund purposes under this act by the trustees of Glasgow shall execute a bond with good security." Therefore, the record which the trustees may make of the execution and acceptance of the bond not being made the only evidence of those facts, they may be shown by parol evidence.

Dillon on Municipal Corporations, section 300, says "a distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated on the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence."

In Bank v. Danbridge, 12 Wheat., 64, the court says: "Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporaiton? If such omission would not be fatal to the plaintiff in suits against the corporation as, in our opinion, it would not be, it establishes the fact that acts of the corporation not recorded may be established by parol proof, and, of course, by presumptive proofs. In reason and justice there does not seem any valid ground why a corporation may not, in

case of the omission of its officers to preserve a written record, give such proof to support its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence. * * * We do not admit as a general proposition that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or gives to them an obligatory force. If the statute imposes such restriction it must be obeyed." (U. S. v. Fillebrown, 7 Peters, 28.)

The court rightly held the appellants liable on their bond, but the judgment was erroneous in awarding 10 per cent. damages against them. Damages were only authorized where the collector failed to pay over the taxes collected on the 1st of January succeeding his appointment. Read was appointed and gave bond January 2, 1890. This action was brought in September, 1890 to recover the balance shown to be due by the collector in his settlement made in August, 1890.

For the error in awarding damages the judgment is reversed and the court is directed to enter judgment for $447, with interest from January 1, 1891.

SUPERIOR COURT ABSTRACTS.

KRIEGER, &c. v. GERMANIA SAFETY VAULT & TRUST CO.

Filed April 4, 1894. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Brent, affirming.

Instuctions to jury—Although the instructions to the jury were erroneous, yet as appellee was entitled to a peremptoy instruction, there can be no reversal on that account.

Lane & Burnett and William Krieger for appellants; Helm & Bruce for appellee.

GLASER, &c. v. FRANKS.

Filed April 4, 1894. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Attachment for debt not due—Power of court to issue—Under the amendment of April 5, 1888, to section 238 of the Civil Code, which gives the clerk as well as the judge of the court in which is pending an action for debt not due the power to "grant" an attachment, the clerk has no power to issue the attachment until he has first made a formal order granting it. The power to issue comes from the granting order.

H. M. Woodford for appellants; J. J. Cornelison for appellee.

COOPER v. TOEBE.

Filed April 4, 1894. Appeal from Mason Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Slander—In actions of slander it is immaterial whether the charge contained in the slanderous words purported to be made upon defendant's own

knowledge or upon information given him by another. Therefore, in this action in which plaintiff alleged in the first paragraph of her petition that defendant had said that he had seen her and B. commit the offense of fornication at a given time and place, and in the second paragraph that he had said that his sister had seen her and B. commit the same offense at the same time and place, the two paragraphs contained substantially the same charge, and although the defendant denied the allegations of the first paragraph, yet as he admitted that he spoke the words set out in the second paragraph, and in justification alleged that they were true, the burden of proof was on him.

2. Same—Burden of proof—Where the party upon whom is the burden of proof permits the other party without objection to first introduce his evidence, he thereby waives his right to the concluding argument to the jury.

Thomas R. Phister and E. L. Worthington for appellant; Cochran & Son for appellee.

FOOR v. COOMBS.

Filed April 4, 1894. Appeal from Daviess Circuit Court. Opinion of the court by Judge Yost, affirming.

1. There is no authority for the arrest of a debtor in a civil action unless he is about to leave the State, and with intent to defraud his creditors has so concealed or removed his property that the process of the court after judgment can not be executed; or has money or property in his possession and is about to leave the State without paying the plaintiff's debt. Where a debtor at the instance of his creditor was arrested by a policeman without legal process of any kind and held in restraint by that officer until he made a payment on the debt, he had a right of action against the creditor for the false arrest.

2. False arrest and imprisonment consist in unlawfully restraining a person's freedom without legal authority, and a party causing the arrest of another without just cause or where it is not warranted by law is civilly liable in damages, and the plaintiff without proof of special damage is entitled to more than nominal damages.

In this action to recover damages for false arrest a verdict for $800 was not so excessive as to indicate passion or prejudice.

3. Prejudicial error—Although the court may have erred in overruling defendant's exceptions to a deposition taken by plaintiff upon the ground that it was taken without notice to defendant, yet as defendant afterward took the deposition of the same witness and read it on the trial he was not prejudiced.

Sweeney, Ellis & Sweeney for appellant; Martin Ewell and Reuben A. Miller for appellee.

COLLIER v. KANT'S ADM'R.

Filed April 4, 1894. Appeal from Carter Circuit Court. Opinion of the court by Judge Yost, reversing.

Decedents' estate—Vendor's lien—In this action to settle the estate of a decedent the evidence established the existence of a vendor's lien asserted by appellant upon a sawmill and its fixtures belonging to the estate, and, therefore, the court erred in setting apart to the widow and her infant children the proceeds of the mill in lieu of certain articles of personal property not on hand.

R. D. Davis and Wm. H. Holt for appellant; R. C. Burns for appellee.

CREAM CITY SASH AND DOOR CO. v. COCHRAN.

Filed April 4, 1894. Appeal from Jefferson Circuit Court, Common Pleas division.

Separation of conclusions of law and fact—In this common law action in which the law and facts were submitted to the court without the interven-

tion of a jury, as the court did not state in writing the conclusions of fact found separately from the conclusions of law, the only question presented is whether the judgment was authorized by the pleadings.

James P. Gregory for appellant; G. W. Milburn for appellee.

WATT v. HUGHES.

Filed April 4, 1894. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Where amendments to pleadings are permitted to be filed in vacation the filing in the clerk's office could have no greater effect than an offer to file in court, and the amendment should not be regarded as a part of the record until filed or noted of record by an order of court.

2. Pleading—Error in striking out—Although in an action upon a promissory note the defendant had, by the first paragraph of his answer, alleged in general terms that the note was executed without consideration, the court erred in striking out a second paragraph alleging that defendant had executed the note upon plaintiff's representation that it was for the balance due upon a former note executed to plaintiff for a certain amount, upon which there was, in fact, nothing due, as shown by the payments specifically set out in the pleading. Although evidence to establish the facts set out in the second paragraph might have been competent under the first paragraph of the answer, still the defendant had the right to have these specific facts put in issue and to require of plaintiff a pleading either denying or admitting their truth.

John L. Scott & Son for appellant; B. G. Williams for appellee.

WALDEN v. WEBBER.

Filed April 4, 1894. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Action on bank check—Bad denial—In this action by the holder and indorsee of a bank check against a drawer, a denial in the answer that plaintiff is the holder and owner of the check is not good, there being no denial of the fact, as alleged in the petition, that the check was indorsed and delivered by the payee to one who indorsed it to the plaintiff.

2. Negotiable instruments—Want of consideration—As the check was first indorsed by the payee more than five years after its execution its character as commercial paper had then been lost, and the first indorsee as well as all subsequent indorsees took the paper subject to all the defenses which the drawer could have presented against it in the hands of the drawee. Therefore, the fact that there was no consideration for the check constitutes a good defense.

3. Same—The fact that after the check was drawn and delivered to the payee and before it was first indorsed by him the defendant and the payee had a full and complete settlement of all transactions and dealings between them, and defendant executed to the payee his note for a stated sum in full of all debts and demands, which note has been paid off, constitutes a good defense.

4. The court properly overruled a demurrer to the plea of limitation, the action not having been instituted until more than seven years after the execution of the check.

5. The last two defenses are not inconsistent, but if they were the objection should have been made by motion requiring defendant to elect which defense he would rely upon. The objection could not be reached by demurrer.

W. S. Hardin for appellant; J. T. Simon for appellee.

WOLF & CO. v. HUNTER.

Filed April 11, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Wrongful seizure of goods under attachment—Amendment of petition—Where a sheriff, before levying an attachment, undertook to take an indemnifying bond, and after a third person, to whom the goods levied on were subsequently adjudged to belong, brought this action originally on that bond, upon the plaintiff's discovery that, on account of some mistake of the sheriff, that bond was a nullity, the court properly permitted him to amend his petition and ignoring the bond to seek a recovery for the wrongful seizure, as this was not the setting up of a new cause of action, the cause of action, both in the original and amended petition, being the wrongful seizure and sale.

2. Same—The allegation that the levy and sale were caused by defendants to be made "without probable cause and wantonly and maliciously" was not essential to plaintiff's cause of action, but was only necessary to enable him to recover attorney's fees and other extraordinary costs incurred in asserting his claim, and though he failed to show any malice or want of probable cause, still as his goods were wrongfully seized he was entitled to recover the actual damages sustained by the seizure and sale.

3. Same—Measure of recovery—The price for which the goods were sold under the attachment having been paid over to him when it was adjudged that the goods were his, the measure of his recovery was the difference between the value of the goods and the amount for which they were sold.

4. Estoppel—The fact that plaintiff received the money which was in court as the proceeds of the sale did not estop him from suing to recover the damages sustained.

R. H. Cunningham for appellants; S. B. & R. D. Vance for appellee.

PAPENDICK v. MASONIC SAVINGS BANK, ASS'EE.

Filed April 11, 1894. Appeal from Jefferson Circuit Court, Criminal division.

Peremptory instruction—In this action upon a promissory note in which appellant, a surety in the note, defended upon the ground that it was agreed between him and the payee that the payee would cause the principals to execute a mortgage to appellant (which was done) and that the payee would look to this mortgage for payment of the note and would not proceed against appellant to enforce its collection, as there was no testimony tending to sustain the defense, the court properly instructed the jury to find for plaintiff. The question as to the competency of parol testimony to vary the writing is not presented.

E. F. Trabue and Bowden & Bowden for appellant; Helm & Bruce for appellee.

PARRISH, BY, &c. v. HATCHETT.

Filed April 11, 1894. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, affirming.

Power of foreign guardian to sue—Upon application by petition the county court of the county having jurisdiction to appoint a guardian may authorize a foreign guardian to sue for and recover any personal estate of his ward, or otherwise to act as a guardian in this State, but until this step is taken a guardian appointed in another State can not maintain an action in this State to recover property belonging to his ward, and as the foreign guardian suing in this case did not allege in his petition that he had ever applied to any county court in this State for authority to act as guardian, the court properly sustained a special demurrer to the petition.

George T. Duff for appellants; G. M. Bohannon for appellee.

MUD RIVER COAL, COKE AND IRON CO. v. WILLIAMS' ADM'R.

Filed April 11, 1894. Appeal from Muhlenberg Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Master and servant—In this action against a coal mining company to recover damages for personal injuries received by plaintiff while in its employment, alleged to have been caused by the breaking of a chain used for the purpose of drawing loaded cars up an incline, as the only evidence which tends to show a defect in the chain which might have been discovered by the master shows also that the plaintiff might, by the exercise of ordinary diligence, have discovered the defect, the plaintiff can not recover.

2. Punitive damages—As there was no testimony tending to show gross negligence the court erred in giving an instruction as to punitive damages.

Charles Eaves and Edward W. Hines for appellant; Johnson & Wickliffe for appellee.

SPARGER, HULETT & CO. v. HUFFMAN.

Filed April 11, 1894. Appeal from Carter Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

A vendor of goods has a lien upon them for the price so long as they remain in his possession and the purchaser neglects to pay the price according to the contract. But this lien is lost if the vendor has parted with the actual or constructive possession of the goods.

Where the owner of a tract of land sold to another all the timber upon it suitable for staves and permitted the timber to be cut down and carried to the purchaser's mill and there converted into staves, he can not claim a lien upon the staves for the purchase money as against one to whom the purchaser has sold them, although they have not been removed from the purchaser's mill.

R. D. Davis and Thomas W. Mitchell for appellants; E. B. Wilhoit, J. R. Botts and Wm. H. Holt for appellee.

BRADY v. COOPER, ASS'EE.

Filed April 11, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Assignment for creditors—At an assignee's sale the debtor's farm was bought in for him by another, who afterward accepted an advance on his bid. The debtor sued the purchaser and the court adjudged that the profits belonged to him. The purchaser had a claim against the debtor as against which the debtor was not entitled to the homestead exemption, and in the suit for the settlement of the assigned estate the purchaser was allowed to retain the amount of this claim out of the amount it had been adjudged he owed the debtor as profits realized on the purchase of his farm, and the amount he was thus allowed to retain was charged to the debtor on the amount to which he was entitled in lieu of his homestead exemption, and an equal sum out of the amount which had been set apart to the debtor in lieu of his homestead exemption was distributed among the general creditors. Held—That the court thus in effect took control of and distributed the profits on the sale of the farm, which profits were not assigned by the debtor and had not by any process been brought under the control of the court, which was error.

H. W. Rives for appellant; Thompson & McChord and S. A. Russell for appellee.

The Kentucky Law Reporter.

EDITOR:

W. J. CHINN . . . . . Frankfort, Ky.

Vol. 15. JUNE 15, 1894. No. 24

KENTUCKY COURT OF APPEALS.

FUQUA & SMITH v. MASSIE & SONS.

(Filed March 17, 1894.)

1. Where a servant by his own fraudulent conduct compels the master to discharge him before the expiration of the term, the master may recover damages from the servant for failure to comply with the contract of employment, even though the servant was always ready and willing to perform services.

2. When contract creates partnership—A contract whereby appellants, in consideration of the use of appellees' factory for a certain period, and the further consideration of the personal services to be rendered during the period by appellees to appellants, agreed to give appellees a certain percentum of interest in the commissions made by appellants in the business, was not intended to and did not create a partnership between the parties.

3. Same—Breach of contract—Damages—Where appellees by their fraudulent conduct compelled appellants to discharge them before the completion of the term of employment, the appellees are entitled to recover the actual value of the use of their property during the time appellants use it, and also the value of the services rendered up to the time of their discharge, less the damages sustained by appellants by reason of the failure of appellees to render all the services contracted for.

C. S. Walker for appellants.

Sweeney, Ellis & Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The appellants, Fuqua & Smith, made this contract with John Massie & Sons: "Whereas, Fuqua & Smith have secured an order for 400 or 500 hogsheads of strips, to be put up in Owensboro, Ky., now, in consideration of John Massie & Sons leasing to Fuqua & Smith their tobacco factory in the suburbs of the eastern part of Owensboro, and the further consideration of their putting in their services to assist in the purchase and putting up said tobacco, the said Fuqua & Smith agree to give them, John Massie

& Sons, one-half interest in the commissions on putting up said tobacco after paying all expenses.

"Said Massie & Sons agree that Fuqua & Smith shall take the prime leaf and lugs of their purchase already received at cost, originally paid by them, and Fuqua & Smith are to have the entire charge and management of the purchase and handling of said tobacco, and they are to assume the outstanding contracts of John Massie & Sons on all prime tobacco they may have contracted for in the county and not yet delivered."

This contract was evidenced by writing on the 1st of April, 1889, although entered into shortly before that date. On the 7th of August of that year Massie & Sons brought this action to recover on the tobacco sold the appellants under the contract, and also the value of some tobacco they had raised, as well as to recover damages for other breaches of the contract by the appellants, the main breach alleged being the discharge by the appellants of the appellees from their service, and their refusal to allow the appellees to assist in purchasing and putting up the 400 or 500 hogsheads of strips, for which the appellants were to allow the appellees one-half the commissions, that amounted, as is alleged, to $3,675, their half.

It is averred and the proof shows the appellees were discharged from the service of the appellants on the 18th of May, 1889, long before the tobacco was put up in hogsheads so as to comply with the order, and they are, therefore, claiming their right to the profits upon the terms set forth in the contract, alleging that their discharge was without cause, and averring a readiness on their part to comply with the agreement.

The defense, or that principally relied on, in regard to the tobacco of the appellees hanging in the barn at the time of the purchase, is that the tiers of tobacco on the outside of the barn were filled with good tobacco, and on the inside the tiers were filled with an indifferent quality of tobacco; that the tobacco at the time of the purchase was very dry and could be examined only on the outside, the plaintiffs (appellees) representing that it was all of a like quality, when they knew the tobacco on the inside was of an inferior quality; that the appellants relied on the representations of the appellees as to the quality of the tobacco on the inside of the barn, or beyond the front tiers, and made the purchase upon the belief and the representations of the appellees that the tobacco to be seen was a fair average of the quality.

As to their refusal to permit the appellees to remain in their service, or to comply wth their agreement to fill the order for the 500 hogsheads of tobacco, the appellants say they discovered the appellees, who were receiving and weighing the tobacco as delivered, were knowingly using false weights for the purpose of defrauding their partners, or those of whom the purchases had been made, giving them less wieghts than they were entitled to, etc.

The action was brought at law and transferred to equity, with the affirmative allegations of the answer traversed by the appellees. The chancellor, upon the hearing, found, as to the tobacco in the barn at the time of the purchase, that the representations made by the appellees as to the quality were false and fraudulent, and not being in a condition to be examined by the appellants, they relied on the representations of the appellees, and the appellees should account for the difference in the value as represented and as it was in fact. He fixed the value at $3.25 per hundred, and in this conclusion we concur, it being amply sustained by the testimony.

The appellants had paid $5,000 on the tobacco, and at $3.25 per

hundred there was an excess in payment of $1,212.88. He also adjudged the appellees used false weights or loaded peas in weighing and receiving the tobacco, and when discovered the appellants discharged them and ceased to buy tobacco to be handled in the factory.

The court further adjudged that the commissions to be paid by Bird & Co. to the appellants under the order were $2.50 per hundred pounds, and as appellants had stemmed or prepared 308,610 pounds, on which they made $3,600.25, the appellees were entitled to one-half. The court below concluded that the appellees and the appellants had embarked in a joint enterprise, and the interest the appellees had in it was still retained or not forfeited by reason of their discharge on account of their fraud and dishonesty in using false weights; that their discharge, however, ended all obligation on the part of the one to the other as to the performance of the contract, and while the appellees were entitled to their half commissions, less the cost of putting up tobacco, they were not liable in damages to the appellants for a failure to render the personal services agreed upon by the contract. It is proper to determine, first, the interest the appellee had in this contract. They were certainly not partners in the tobacco, as the court properly adjudged, nor were they partners in the commissions, but were entitled to a half interest in the commissions as a compensation for their services and the use of their tobacco factory. Their right to the one-half commissions depended on the performance of the services they had agreed to render, and, failing to render these services, they are entitled to a reasonable rental for the use of their factory so long as appellants used it, and to the value of their services actually rendered, less the damages, if any, the appellants sustained by reason of their abandoning the contract. The pleadings make this issue, and the fact the appellees were ready and willing to perform the service when properly discharged by the appellants affords no reason for denying to the appellants the right to recover for the failure of the appellees to perform the services. The chancellor, in his judgment below, gives to the appellees either a joint or partnership interest that can in no manner be lessened except by deducting the actual cost of putting up the tobacco, and if this is the proper version of the contract he is undoubtedly right; but we think it manifest that the one-half commissions was intended as compensation only for the use of the warehouse, and for the personal services to be rendered, and if no services had been rendered the only recovery would be for the use of the factory, less the damages sustained by reason of the failure to perform the services. The appellees had no interest in the tobacco. Their credit was in nowise involved. They had sold their tobacco to the appellants—not only the tobacco in the warehouse, but that they had purchased and had not been delivered.

The appellants had the entire charge and management of the purchase and handling the tobacco, and the appellees were only employes, at one-half of the commissions, to be paid when they did what they agreed to do. It was not intended by any of these parties to form a partnership. The appellees were not principals in the undertaking, but were to receive half commissions in reward for services. It is well established, says the court in Loomis v. Marshall, 12 Conn., 69, and other cases, "that a party who stipulates to receive a sum of money in proportion to a given quantum of profits as a consideration for his labor is not chargeable as a partner." (Denny v. Cabot, 6 Met., 82, Mass.)

In Bradley v. White, 10 Met., — (Mass.), where one agreed to

pay all expenses and furnish the goods, and the other agreed to carry on the business for one-half the profits as compensation, it was held that no partnership existed, and while the facts of that case might well evidence a partnership as to third parties, yet as between the parties to the agreement no partnership was intended, and the case before us manifests such a plain purpose as between the parties to give to the appellees as compensation only the one-half commissions for services that it is needless to pursue the inquiry further.

It is insisted, however, that as the appellees were always ready to perform the services that no damages can accrue to the appellants, as they voluntarily caused the appellees to abandon their agreement or refused to permit them to perform it.

We perceive no difference between a case where a party of his own volition refuses to comply with his contract and a case where, by his fraudulent conduct in its performance, he compels his employer to discharge him.

In Wood on Master and Servant, page 221, it is said: "The very nature of the relation imports trust and confidence, and its evident purpose is the advancement of the master's interests and profits by the servant's labor, therefore, if the servant violates this trust and confidence, or willfully does anything detrimental to the master's interests, or which involves him in loss, it is a breach of the contract which justifies his instant discharge," etc.

These appellees had violated their contract by such fraudulent conduct as compelled the appellants to discharge them. Their conduct was a more palpable breach than if they had abandoned their labor without any cause whatever. There was no voluntary discharge by the appellants, but they were compelled to require the appellees to leave their employ by reason of appellees' dishonest practices, that must have affected their business, and it is evident the right to recover damages exists, but to what extent is a question not involved here.

Whether this action, in so far as it attempts to recover for services, can be maintained at all, upon the facts of this case, is one of grave doubt, but as the appellees are entitled to rent for the use of their building, it may not be improper to hear the case upon the question as to the value of the services, less the damages sustained by the breach of the contract on the part of the appellees. The value of the services only up to the date of the discharge, and the use of the warehouse as long as appellants occupied it, are the questions to be determined, subject to the claim for damages by the appellants on account of the breach. These questions are remanded to the chancellor.

The judgment below is reversed for proceedings consistent with this opinion.

Affirmed on cross appeal.

JOHNSON v. WILSON.

(Filed April 3, 1894.)

1. The terms of office of all officers of municipal corporations, who were appointed or elected before the general election in November, 1893, expired at that general election or when their successors, then elected or appointed, qualified.

2. Even where no charter in conformity with the provisions of the Constitution of 1891 had been enacted for certain cities in November, 1893, the elec-

tion of all officers provided for by the old charter were required to be held at the general election in November, 1893.

Under the old charter of Lexington a treasurer was elected in March, 1892, who would have held office for two years under that charter. At the November, 1893, election a treasurer was elected in that city who qualified as such. Held—The term of the person elected in March, 1892, terminated with the election in November, 1893, and the qualification of the person then elected, even though no charter for cities of the second class, to which class Lexington belonged, had then been enacted.

J. R. Morton for appellant.

H. M. Buford for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

The controversy between the appellant and the appellee is shown by the following "agreed case" submitted by the parties to the lower court for adjudication, to-wit: "That on the first Saturday of March, 1892, and at the regular city election that year, defendant, D. V. Johnson, was duly elected treasurer of the city of Lexington, and duly qualified as such on April 14, 1892, and has since that time held said office and discharged the duties thereof; that at the regular election held on the 7th day of November, 1893, plaintiff, B. B. Wilson, was elected treasurer of the city of Lexington and has taken the oath required by law and executed bond for the faithful performance of his duties as treasurer; that plaintiff has demanded of defendant the possession of the office of treasurer of the city, together with the money in the hands of the defendant as treasurer, and defendant has refused to deliver the same, claiming that his term of office has not expired and does not expire upon the election and qualification of the plaintiff as by him claimed."

The judgment was for Wilson, and Johnson has appealed. Section 167 of the Constitution of 1891 provides that "all city and town officers in this State shall be elected or appointed as provided in the charter of each respective town and city until the general election in November, 1893, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire; and at that election, and thereafter as their terms of office may expire, all officers required to be elected in cities and towns by this Constitution, or by general laws enacted in conformity to its provisions, shall be elected at the general election in November, but only in the odd years, except members of municipal legislative boards, who may be elected either in even or odd years, or part in the even and part in the odd years," etc.

The treasurer of the city under the old charter was elected for a term of two years, and, therefore, unless it be otherwise provided in the foregoing section, Johnson's term would not terminate until in April, 1894.

We think that if effect be given the plain intent of this section the term of the treasurer expired in November, 1893. It is true he was to hold until the general election in November, 1893, and until his successor was elected and qualified. But this is the usual method provided to prevent a vacancy, when from some unforeseen circumstance no election has been held at the regular time, or some time must elapse until the succeeding officer shall qualify and be inducted into the office.

As said in Stevens v. Wyatt, 16 B. M., 542, "such continuation was manifestly designed to obviate any inconveniences that might attend vacancies accruing between the expiration of the term of the incumbent and the qualification of his successor."

Therefore, although Johnson's term under the old charter would not expire until in April, 1894, yet in view of the foregoing section he took the office "until the general election in November, 1893," but he might hold over until his successor should be elected and qualified. But it is said that there is no provision in the law for the election in November of a treasurer for cities of the second class; that the section provides only that at that election officers required to be elected in cities and towns by the Constitution (and there is no such requirement as to the office of treasurer) or by general laws enacted in conformity to its provisions (and there were none for this city) shall be elected at the general elections in November. In other words, that under section 160 the mayor or chief executive, police judges, members of legislative boards or councils of towns and cities shall be elected by the qualified voters thereof, but nothing is said of the election of treasurers, and, therefore, their election in November is not provided for under the Constitution, and moreover, that their election was not provided for by any general law enacted in conformity to the Constitution because of the failure of the general assembly to do so until after the election of 1893; and these two classes of officers are the only ones to be elected at the November election, 1893—that is, first, those officers required to be elected under the Constitution; and, second, those to be elected by virtue of some general law of the general assembly—and into neither of these classes does the office in question fall, though intended to be regulated by a general law as yet not enacted. This construction is over strict. Its adoption would lead to the absurd conclusion that after providing, in plain language, for the expiration of the term of all appointed and elected officers of cities and towns, yet the makers of the Constitution made no provision for the election of their successors, and intended certain of these "holdovers" to continue in office indefinitely, and in contravention, at least, to the spirit of the Constitution.

If the term of the appellant did not expire in November, 1893, it would seem that he must hold his office until in 1897, or at any rate until ousted by legislative enactment.

Under the provisions of section 166 of the Constitution the law of the city as embraced in its charter was continued in force, save in so far as inconsistent with the Constitution, and, therefore, the election for treasurer, provided for in the old instrument, was properly held under the new in November, 1893, when that officer's term expired, as it could not be held in March or April, 1894. Moreover, it would seem, by reason of the continuation of the provisions of the charter which required the election of the treasurer by the qualified voters, that his election was one required by the new instrument. The old law required his election, and this requirement was continued in the new by keeping the old law alive and in force, the time only of the election being changed and the expiration of the term. It was, therefore, an election under the new law of an officer required to be elected by the new law, because the new prolonged the old in this particular.

While some confusion has arisen by reason of the failure of the general assembly to pass, prior to November, 1893, the general laws contemplated by the framers of the Constitution, thus giving rise to the somewhat plausible contention of the appellant,

we are convinced that the construction adopted by the learned judge below is more nearly in accord with the intent and meaning of the new instrument.

Judgment affirmed.

PERRY v. ELGIN.

(Filed April 5, 1894—Not to be reported.)

1. Where a statutory guardian purchases for $5 at an execution sale land of his ward worth over $2,000, it is presumed he made the purchase for the benefit of his ward.

2. The statute of limitation begins to run against one claiming land as purchaser at an execution sale immediately after the expiration of the period allowed the defendant in the execution to redeem his land.

A purchaser of land at an execution sale can not now maintain an action to recover it when the period allowed defendant in the execution to redeem expired in 1830, the right of action being long since barred by the lapse of time.

A. H. Clark for appellant.

J. I. Landes for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1823 one James Pyle died, leaving a widow and one child, a daughter, who is the appellee, and who has since continued to live on the land for which the appellant sues in this action. Her claim and ownership, extending over a period of some seventy years, have been open, notorious and uninterrupted.

The appellant asserts title to the land by reason of a sheriff's deed made to her mother and others in 1845, purporting to convey certain land sold under an execution in 1829, and of which the appellant's grandfather is alleged to have been the purchaser.

The grandfather lived eleven years after this alleged purchase, and while he took a certificate of purchase he made no effort to obtain a deed for the land or take possession of it. He was the statutory guardian of the appellee, the owner of the land. It was worth some $5 per acre, and although there were some 400 acres of it, he bid in the whole tract for the sum of $5.

It is to be presumed he did so for the benefit of his ward, the appellee. There are many reasons why, on the merits of this controversy, the appellant has not shown herself entitled to this land, but waiving all these it is sufficient to say that the alleged claim has long been barred by the lapse of time.

After the expiration of the period within which the defendants in the execution might have redeemed the land, if there was in fact a genuine sale of it, the purchaser might have instituted his action for it and limitation then began to run. This must have been in about 1830, and neither by reason of any death nor the existence or continuance of any disability whatever might the period within which the action could be brought be extended beyond thirty years. (Section 4, article 1, chapter 71, General Statutes; Conner v. Downer, 4 Bush, 631.)

Nor will mere ignorance of her rights on the part of the appellant toll the statute. There is no proof whatever showing any fraud on the part of the appellee.

The judgment dismissing the petition is affirmed.

HALL v. COMMONWEALTH.

(Filed April 10, 1894—Not to be reported.)

An indictment for the statutory crime of unlawfully knowing a female against her will and consent must allege that the offense was done feloniously, otherwise it is bad on demurrer.

Dishman & Hays for appellant.

W. J. Hendrick for appellee.

Appeal from Harlan Circuit Court.

Opinion of the Court by Judge Hazelrigg.

The indictment to which the appellant's demurrer was overruled, and upon which he was then tried and convicted, charges that the accused, "on the 7th day of February, 1894, in the county aforesaid (Harlan), did unlawfully, carnally know Polly Clark, a female person of and above twelve years of age, against her will and consent, against the peace and dignity of the Commonwealth of Kentucky."

Because the act of the appellant is not charged in the indictment to have been done "feloniously," it is insisted for him that the court erred in overruling his demurrer, and in this we concur.

In Kessler v. Commonwealth, 12 Bush, 18, it is said: "But it is insisted that our statute on the subject abolishes the common-law crime of rape and substitutes for it a crime purely statutory in its nature and characteristics. The language of the statute is, 'whosoever shall unlawfully, carnally know a female of and above twelve years of age against her will or consent, or by force or while she is insensible, shall be guilty of rape.' (General Statutes, chapter 29, article 4, section 5). It seems to us that this statute, instead of abolishing or superseding the common law, expressly continues it in force."

The present statute, section — of the Kentucky Statutes, is but a repetition of the former one, and hence we must regard these statutes as merely declaratory of the common law on the subject under consideration.

In Kaelin v. Commonwealth, 84 Ky., 354, after a thorough consideration of the authorities and a review of the case of Jane v. Commonwealth, 3 Met., 22, which was supposed to support the contrary contention, this court held that an indictment for a common law felony should charge that the act was done "feloniously or with a felonious intent," and that the use of no other words would supply the omission of such an allegation.

We need not repeat the argument or recite the authority used in those cases to show the wisdom of the rule. The demurrer should have been sustained.

Judgment reversed, with directions for further proceedings consistent with this opinion.

GRADED SCHOOL DISTRICT NO. 2 v. TRUSTEES BRACKEN ACADEMY.

(Filed April 10, 1894.)

Constitutional law—Donation of land by State to seminary—By an act of 1798 certain land was donated to the trustees of Bracken Academy, which was to revert to the State if the trustees did not within ten years establish

a school with at least twelve scholars. It was also provided that the grant or appropriation "should be subject to any future order of the legislature, but no act shall be passed impairing any contract which shall be made by said trustees, * * * and provided always that the donation * * * shall forever continue appropriated to the use of seminaries." The original land was sold and its proceeds reinvested subsequently by the trustees under legislative authority. On May 24, 1890, an act was passed taking the title to such property out of the trustees of the academy and vesting it in the trustees of a common school. Held—The act of 1890 is unconstitutional and void. The legislature has no power to revoke the original grant or to now give the property to common schools.

J. B. Clarke, George Doniphan and Wm. H. Holt for appellant.

W. H. Wadsworth, Cockran & Son and J. R. Minor for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1798 the legislature of this State, with a view of affording greater facilities for education and to establish seminaries of learning in each county throughout the entire Commonwealth, donated to each county 6,000 acres of its vacant and unappropriated lands, located south of Green river, for that purpose.

The original act of December 19, 1798, specified many of the counties to which the donation was made, and designated the trustees in whom was vested the title and control of the fund or subject donated, subject to legislative control, and by the third section of the act the several counties not named, or in which a seminary had not been established, were entitled to the benefit of the law by establishing schools, the trustees to be subject to such regulations and rules as applied to the trustees who had been appointed by the legislature.

Bracken was one of the counties to which the donation was made, and Philip Buckner, Nathaniel Patterson, Samuel Brooks and others were constituted a body-politic and incorporate, and styled by the name of the trustees of the Bracken Academy. This was under the act of 1798, and these trustees and their successors have continued to hold the power and title as a corporate body of the thing donated or its proceeds, as well as the control of the seminary property, until the 5th of September, 1888, when, as trustees, they leased the seminary to P. B. Powers and others, who were the trustees of Graded Free School District No. 2, in the town of Augusta, for one year, and by an indorsement on the written lease the time was extended one year longer, and ended the 1st of September, 1890.

After the lease had expired the trustees of the Bracken Academy, the original lessor, demanded possession of their seminary and its grounds, and the appellants refused to deliver possession, denying the title of their landlord and claiming that the legislature of Kentucky, by an act passed on the 24th of May, 1890, had deprived them of their corporate existence, and had vested the right and title to the academy and its grounds in the trustees of Common School District No. 2, in Bracken county.

The appellees (trustees of Bracken Academy) sued out this writ of forcible detainer against their lessees, and during the progress of the case the trustees of the Common School District No. 2 were made parties defendant on their motion, and were in fact in the possession when the writ issued, claiming the property by reason of the act of May 24, 1890,

It is desired by all the parties to this appeal that the case should be decided on its merits, and we will not, therefore, take notice of the refusal of the lessees to regard the title of their lessor, or the surrender of the possession by them to the trustees of Common School District No. 2, with the knowledge on the part of the latter as to the manner in which the lessees of the appellees entered. The question then arises, did the act of May 24, 1890, deprive these appellees, who were the legitimate successors of the original trustees of Bracken Academy, of their right and title to the seminary and its grounds?

By the provisions of the second section of the act of 1798 there was donated to the original trustees and their successors 6,000 acres of these vacant lands for the benefit of the academy, and it was then stipulated that the land should not be leased by these trustees for a longer period than twenty years, and further stipulated that the lands should revert to the State if the trustees did not, within ten years, establish a school with at least twelve scholars.

It was also provided that the several grants and appropriations of land "should be subject to any future order of the legislature, but no act shall be passed to impair any contract which may be made by the trustees of any of the seminaries established by this act by virtue of the powers herein delegated to them; and provided, always, that the donation herein made shall forever continue appropriated to the use of seminaries." (2 Litt. Laws of Kentucky, 240, 246.) Under this section, providing that the several grants and appropriations of lands should be subject to any future order of the legislature, it is claimed the legislature derived its power to take this land from Bracken Academy or its trustees, and vest the title in the trustees of Common School District No. 2.

In the month of December, 1804, the legislature, exercising its power and control over these lands, authorized the trustees to sell one-half of the land to erect buildings, etc., and in the year 1815 empowered the trustees to sell all the land donated to them, and in December, 1822, Augusta College having been incorporated, the trustees of Bracken Academy appropriated $10,000 of the funds in their hands to this seminary, with the approval of the legislature (Session Acts 1822, page 163), and in 1834 the trustees of Bracken Academy were authorized to transfer to the trustees of Augusta College $10,000 in their hands, to be managed by the trustees of that college, and in case the college was not kept up the money to be refunded to the trustees of Bracken Academy.

It is said, and a fact not disputed, that the college no longer exists except as the Bracken Academy, the trustees of the academy having full possession of the grounds and buildings at the time the lease to the graded school was made.

This exercise of power by the legislature is alluded to for the purpose of construing that portion of the act in which the legislature reserved the right to make orders as to the grants of the lands donated. There was only one condition upon which the land was to revert to the State, and that was upon the failure of the trustees to have a school with as many as twelve scholars within the time fixed by the grant, and it is expressly provided that these donations should forever continue appropriated to the use of seminaries, and the land having been sold and the money appropriated as directed, the grant is irrevocable, with the power existing on the part of the judiciary when called upon to see that the trustees of this fund, or these grounds and the college, use it as a seminary for educational purposes, and to remove them by appointing others upon their failure in good faith to carry out the purposes of the donation.

It is not contended that the State has the power to make an endowment or donation to a particular county or college for educational purposes, and then by subsequent legislation recall it. Here was a plain and certain donation to these trustees and their successors forever of this 6,000 acres of land to Bracken Academy, and the proceeds, the land having been sold, was appropriated as directed by the legislature, and so long as the seminary exists the fund belongs to these trustees, and the legislature has no power to devote the building to common school purposes, or to vest in any common school district the title to this property.

Here was a contract with these trustees for a special purpose, and that was to enable them to have a seminary of learning in the county of Bracken. It was, in fact, designed to benefit the county, a like appropriation having been made to other counties, and to hold that the legislature had the power to make this building and its grounds a part of the common school fund would be a perversion of the purpose of the original donation, and, what is still more objectionable, would be giving this school fund or the buildings to one of the common school districts, where all would be entitled to the benefit of the law if otherwise constitutional.

These trustees and their successors, having been holding this fund as donors for the purposes contemplated for nearly a century, were authorized to add to the original gift by obtaining private subscriptions and otherwise, and after a control for so long a period are told that the legislature has divested them of title by transferring the right, use and title of the college and grounds to a school district.

The act is clearly unconstitutional, and if the trustees are recreant to their duty their conduct may be made the subject of judicial investigation. (Trustees of Dartmouth College v. Woodswill, 4 Wheaton, 518; City of Louisville v. Purch University, 15 B. M., 671; Auditor v. Holland, 14 Bush, 147; Trustees of Vincennes University v. State of Indiana, 14 Howard, 271.)

Judgment affirmed.

TAYLOR v. KLEIER.

(Filed April 12, 1894—Not to be reported.)

1. A release, while not technically a conveyance, will, when executed for a valuable consideration, pass the right and title of the releasor to real estate.

2. Deed of trust construed—Power of sale—A voluntary conveyance by a husband to a trustee for the benefit of the grantor's wife and child or children provided that the property might be sold "upon the express condition that the husband and the trustee and the wife join in the conveyance." The husband and the wife and the trustee joined in a conveyance of a part of the trust land. Held—Such conveyance passes the title in fee under the trust deed and not merely the title to the estate of the wife for life therein. The validity of the conveyance is not affected by the question as to whether the husband or the trustee received the consideration therefor. Nor was it necessary for the trustee to sign the deed in express terms as trustee for the children as well as for the wife.

Humphrey Marshall for appellant.

Gibson, Marshall & Lochre for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Pryor.

John F. Taylor made a voluntary convyance of some real estate in or adjacent to the city of Louisville for the benefit of his wife, Letitia, and her child then born and such other children as might thereafter be born. Robert W. Hays was the trustee, and vested with the title.

The conveyance was executed on April 18, 1871. The parties to the conveyance were J. L. Taylor, the grantor, of the first part, Robert W. Hays of the second part, and Letitia Taylor of the third part. The party of the first part (the husband) conveys to the second party, for the sole use and benefit of third party, Letitia, his wife, and her children, the following property (describing it).

It is provided in the conveyance that the party of the second part (Hays) is to hold the property on the following conditions and trusts: "Said property may be sold upon the express conditions that all the parties hereto join in the conveyance, but not to be encumbered in any manner for or liable to the debts of the party of the first part. Said second party is to hold the property for the exclusive use and benefit of the third party and her child, and such other children as she may hereafter have by the party of the first part."

It is also provided that the property may be sold for reinvestment, to be held in the same manner as the property conveyed.

The trust was accepted by Hays, and after its acceptance Hays, as trustee, the grantor, J. L. Talyor and his wife, Letitia Taylor, on October 8, 1871, sold and conveyed a part of this realty to Isaac Hanen and his wife, and the appellee, Kleier, has derived title through Hanen and wife.

The wife, Letitia Talyor, died, leaving two infant children, Thos. A. and Letitia Taylor.

Thos. A. Taylor, the son, having arrived at age, instituted this action against the appellee, making his sister (an infant) a defendant, claiming the land sold to Hanen and wife, and in the possession of the appellee, upon the ground that the deed to Hanen and wife only passed the life estate of their mother, Letitia, and that such was the intention of the parties and the effect of the deed made to Hanen.

The parties to the deed of trust are the grantor, Taylor, the trustee, Hays, and Letitia, the wife of the grantor. These parties were authorized, in express terms, to sell the land, and while the children were the beneficiaries, and entitled after the death of the mother, they were not parties to the instrument, and one of them not in being.

The sale and conveyance to Hanen and wife purports to be absolute, and passes the fee under the power given the parties by the trust deed. There is no language used that would authorize the conclusion the parties were selling only the life estate of Mrs. Talyor, but on the contrary the verbiage of the instrument would repel such an inference.

The money may have been paid to the husband. If so, it was a violation of the trust, for which Hanen is in nowise responsible. The trustee, it is true, held for both the wife and children, and while he signed the deed as trustee for Letitia Talyor, it passed the absolute fee, being signed also by Taylor and wife, the other parties to the trust deed.

For the purpose of showing the intention of the trustee, Hays, it is recited in the deed to Hanen and wife "that the said Robert W. Hays joins in this conveyance according to the terms of the deed above mentioned, to release any claim he may have on said trust property herein conveyed."

They were selling the trust property under an express power warranting the title to the vendee, and there was no necessity for the trustee signing as trustee for the children, in order to pass the fee. He was trustee by the deed for Letitia as well as the children, and to classify the objects of the grantor's bounty when signing the deed, or to express upon its face that it was the children's interest he was selling or conveying, was not requisite, as the deed purports to pass the fee and all claim the trustee had as such in the estate conveyed.

A casual reading of the deed will show the plain purpose of the parties, and it is manifest the trustee was parting with all the title he had, not as trustee for the life tenant, but as a trustee empowered to sell and pass all his right and title.

Robert Hays had to consent to the conveyance, and there is no limitation in his grant, as he conveys all the interest he has. A release, in a technical point of view, may not be a conveyance, but when one vested with the legal title, with the power to sell, releases for a consideration all claim he has upon the premises conveyed, it passes his right and title to the property.

The conveyance to Hanen and wife was in execution of the power and passed the title, and the appellee being the remote vendee of Hanen and wife, is the owner as against the claim of these appellants.

Judgment affirmed.

LILLIE v. HICKMAN.

(Filed April 12, 1894—Not to be reported.)

Division line—Pleadings—Champerty—In an action concerning the location of a disputed division line, where defendant alleged that he was in the actual, adverse possession of the land in controversy at the time plaintiff obtained his conveyance and the plaintiff does not deny the allegation, the court must hold that plaintiff's conveyance is champertous and, therefore, void, and render a judgment for defendant.

J. T. Simon and Swinford & Evans for appellant.

Ward & Kimbrough for appellee.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Hazelrigg.

The appellant and the appellee are the owners of adjoining lots, on the west side of Water street, in the town of Cynthiana. Appellant obtained his property by deed from Black on September 9, 1890, and appellee got his from Craig by deed of February 7th of the same year.

There appears to have been no fence between the two lots until some time during the year 1890, and each party claimed to their true line, wherever that was. The space between the houses situated on each lot was used by both as a passway; but in the last-named year, and prior to September 9th, the appellee proceeded to erect a fence on what he regarded as the true line between the lots, beginning at the river and running west about one-half the length of the lots, but Black, then owning the appellant's lot, thought the fence was over on him, and while he dug a post hole or so, and put up a post next to the street, did not build his

half of the fence because he was not willing to put it on the line as claimed by the appellee. The appellee then seems to have completed the fence and enclosed his lot, but just when he did this the bill of evidence does not clearly show.

In April, 1891, the appellant instituted his action in equity for the purpose of fixing the true line, and after amendments to the pleadings the case was transferred to the ordinary docket and tried as one in ejectment.

The appellee denied the appellant's title, claimed the ground in contest, and averred further that when the deed from Black to the appellant was executed and delivered he was in the actual, adverse possession of the ground in controversy. Upon an examination of the pleadings of the appellant we think he in effect admits this last plea. He charges that the appellee has erected a fence some four feet over on his line, and is claiming it as his own; that he has inclosed the said four feet with a fence within his own boundary, etc. His testimony is to the same effect.

We think the court properly instructed the jury to find for the defendant upon the conclusion of the plaintiff's testimony. The deed from Black to the appellant, so far as the four feet of ground in contest is concerned, is champertous, and, therefore, void.

Judgment affirmed.

NALL, &c. v. MILLER.

(Filed April 12, 1894.)

1. Contract between husband and wife—Improvement of wife's land by husband—Equity will not imply a promise on the part of a wife to pay her husband or to charge her land with the payment to her husband for the value of betterments or improvements put upon her land by the husband or for money advanced by him to remove an incumbrance therefrom when he has received rents and profits from the land or enjoyed the use of it.

Nor will an express promise by the wife to compensate the husband for such services, improvements or advance be enforced as a charge upon the wife's land after her death where the rents and profits received by the husband from the land, or the value of the use of it by him, or the value of the wife's personalty received by the husband reimbursed the expenditures.

2. Where a husband purchases land in the name of his wife, it is presumed to be an advancement or provision for her, and the court will not imply a promise on her part to pay her husband therefor.

3. Same—Consideration—Statute of frauds—A parol agreement by a wife to charge her land with the amount paid by her husband for improvements upon it, or to remove incumbrances from it, is within the statute of frauds, and, therefore, not enforceable; and if the husband had the use and enjoyment of the land such a contract is without consideration.

Laf. S. Pence, W. J. Lisle and Finley Shuck for appellants.

Samuel Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

July, 1864, J. M. Miller, having two children under age, married Eliza J. Ray, who had none; and soon after he removed to her farm of 150 acres, former homestead of her father, where they continued to reside until she died in 1890, there being no issue of their marriage.

The controversy in this case is between him and her heirs at law about certain demands he makes against her estate and an alleged contract with her he seeks to have enforced.

The account filed by him, running from 1865 to 1885, is for improvements and repairs on the farm, $800 paid by him in 1865 to her sister in order to equalize division of land left by their father; $500 paid on her subscription of stock for a turnpike road, and $70, price of an acre of land purchased for and conveyed to her, the whole amounting to about $2,500. Purport of the alleged contract being verbal is an agreement by her for him to retain possession and use of the farm for his life after her death in consideration of repairs and improvements done thereon by him during her coverture.

The lower court adjudged him "entitled to $900 on account of betterments of the farm, viz., $500 for turnpike stock, $50 for cistern and $350 for repairment of land outside the homestead," already set apart to him, and that the farm be sold to pay that sum."

From that judgment the heirs at law have appealed and he prays a cross appeal.

It does not appear Eliza J. Miller ever agreed to pay or charge her land with payment for improvements or repairs put upon it, or for any money paid or services rendered by her husband. Indeed such agreement is inconsistent with her alleged contract, according to which he was to have a life estate after her death in consideration of the same improvements and repairs.

There being then no agreement on her part to pay him for such services or advances of money, the law will not imply any. Nor do we see upon what principle of equity the judgment therefor was rendered, and the farm left by her subjected to satisfy it, equity will, under particular circumstances, give effect to a contract between husband and wife, even at his suit, if fair, just and founded upon a valuable consideration, but will not imply a promise by her to pay him for improvements or repairs on her land while possessed, used and enjoyed in virtue of his marital rights, nor even for money advanced by him to remove an incumbrance from it. On the contrary, a presumption arises in all such cases the consideration and motive of the husband was that he would be reimbursed by use and enjoyment of the land. (King's Heirs v. Morris & Snell, 2 B. M., 99.)

And in our opinion the wife's land should never be subjected to satisfy the husband's demands for services rendered or money advanced on account of it, though such claim be founded upon an express agreement with her, and however meritorious, if either he has received rents and profits of equal value, or she has left at her death sufficient personal estate to pay it.

In the case first cited there was, as here, a contest between heirs at law of a married woman and her husband as to his right to be reimbursed out of land of which she died owner the sum she was required under the will of her father to pay in order to get possession and which he paid for her. There the court said: "If the $1,600 be regarded as a personal debt of the wife, dum sola, remaining unpaid until her death, her choses in action, uncollected at her death, would of course be liable for its payment. And if the husband could be regarded as becoming a creditor by paying the debt during the coverture, there would be no propriety in allowing him to charge the real estate in the hands of the heir with the entire amount so long as he had any assets in his own hands as administrator. Nor would there be justice in allowing this, although the debt be secured by lien on the real estate of the wife, and if the land were placed under lien for payment of this debt before or during the marriage, and the husband,

by paying the debt during coverture, acquired the benefit of the lien to any extent, we do not perceive on what principle he could claim to stand on a better footing than an ordinary tenant for life, who, in discharging an incumbrance on the estate, is considered as discharging in part a burden upon his own interest and as having to that extent no just claim to remuneration. But we are of opinion that he was not entitled to charge the land to any extent for his reimbursement."

As said in the same case: "If a husband purchase an estate in name of his wife it shall be presumed in the first instance to be an advancement or provision for her," and that rule is decisive against appellee's claim for the $70 paid for the acre of land conveyed to his wife, for it is manifest he did not pay either that sum or the $800 with intention to become a creditor of his wife, or of looking to her land for reimbursement.

In that case the wife died without issue born in about one year after the marriage, and a few weeks after her husband had advanced and paid the money, which would have made strong reason for a court of equity to reimburse him but for the fact he had received by the marriage in right of his wife personalty of greater value than the sum paid for her.

In this case there is no real or apparent hardship, for although by reason of failure of issue of the marriage appellee was not entitled to courtesy, he was entitled to, and did have and enjoy, possession, control and profits of his wife's land during a period of about twenty-eight years. He was insolvent at the time of the marriage, or became so in 1865, and had no place of abode for himself and infant children except that owned by his wife, and at her death the appraised value of her personal property that went into his hand as administrator was about $4,500 after payment of all demands against her estate to which he is entitled. It is true counsel now contends he was real owner of all the personalty, though caused by him to be appraised as hers. But that is not a material question, because if he actually owned it the important fact is manifested that while she derived from her own land nothing more than subsistence, he had not only obtained a home and support during the entire period, but accumulated the surplus mentioned, which is more than amount of his account against the estate.

It, therefore, seems to us there is no merit in any of his demands, and especially there is no ground upon which the land in question can be subjected to pay them. There is, however, an apparent difference between his demand on account of payment of the turnpike stock and the others. But the same reasons for denying his right to subject the land to pay the others apply to that demand. For if a wife's real estate may be charged with such expenditures by the husband, there would be little protection left the inheritance against his extravagant advances and expenditures for other purposes.

As to the alleged contract little need be said. In the first place it is by no means satisfactorily proven; second, it is clearly within the statute of frauds and not enforcible; third, it is without consideration, for appellee was not entitled to charge for improvements, repairs on the farm, the use and enjoyment of it being full compensation.

But it appears that Eliza J. Miller was, by judgment of court, empowered like a feme sole to use, enjoy, sell her property, make contracts, etc., and it is, therefore, contended she was authorized to make the contract in question with appellee. It is not, however, necessary to here determine whether the statute was intended to

empowei a married woman to make valid and enforcible contracts with her husband, because, conceding Mrs. Miller was, appellee would have no more right than a stranger to enforce the contract in question, nor she or her heirs less right than if sued by a stranger to resist its enforcement if it be invalid and not binding, as for the three reasons mentioned is clearly the case.

The judgment is reversed on the appeal and affirmed on the cross appeal.

BERRY, &c. v. BERRY'S ADM'R.

(Filed June 1, 1893—Not to be reported)

Action against executor by devisee—Limitation—A testator, by will probated in 1857, gave freedom to all his slaves and directed that they be sent to Liberia by his estate. The executor of the will held them in bondage until 1865. In this action by the former slaves against the executor of the estate to recover the value of their services during the years they were unlawfully held in bondage, and to recover also a sum sufficient to take them to Liberia. Held—

First. The statute of limitation did not begin to run against plaintiff until they actually attained their freedom in 1865.

Second. More than twenty years having elapsed after the removal of all disabilities before the institution of this action by plaintiffs, limitation now bars their claim.

Reuben Gudgell & Son, Wallace S. Gudgell, Knott & Edelen and Hanson Kennedy for appellants.

Wm. H. Holt and Stone & Sudduth for appellee.

Appeal from Bath Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

John Berry, a resident of Bath county, Ky., died testate in the fall of 1856. The third clause of his will, and out of which this controversy grows, is as follows: "It is my will and desire that all slaves I may have at my death, or any interest I may have in slaves, or any slaves that may descend or be coming to me in any way before cr after my death, shall be set free, and sent to Liberia, in Africa, and a reasonable outfit, and something to help or start and set them up to live there, be levied and paid out of my estate." Upon the probation of this will, in February, 1857, the slaves owned by the decedent, and who are the present appellants, became freemen as a matter of right, though they must have been transported to Liberia before they could be freemen as a matter of fact. It is true that under the statute the executors could hold them as equitable assets for the payment of debts, provided it was necessary to do so. In this case the executor, William Berry, appears to have held them, either as executor or in his individual capacity, until their freedom was proclaimed by the president of the United States. This holding was in itself in plain violation of any supposed trust, and a renunciation of it. In November, 1883, they instituted this action against the present administrator of John Berry for the value of their hire during the years they were so held by William Berry, and for a sum alleged to be sufficient to have reasonably set them up in Liberia. Notwithstanding their undoubted right to have brought suit for the establishment of their freedom under the will within a reasonable time after its probation, we are wholly

disinclined to apply the statute of limitation against their cause of action until their actual freedom occurred, in 1865. Their bondage was, as a matter of fact, an insuperable bindrance to the assertion of their rights. But notwithstanding the fact that they are shown to have known their rights, yet nearly 20 years elapsed before they brought this action, and after all disability of infancy and bondage had been removed. We think the statute of limitation bars their claim; that it was sufficiently pleaded and their petition was properly dismissed.

Judgment affirmed.

ROCK SPRINGS DISTILLERY CO. v. MONARCH.

(Filed June 15, 1893—Not to be reported.)

Trade mark—Right to use one's own name in business—Injunction—A person has an absolute right to use his own name in good faith in business conducted either by himself alone or by himself in conjunction with others. But one can not use or permit others to use his name as a manufacturer of a commodity in such a manner as to simulate the brand or trade-mark of another and to thus fraudulently deceive and impose upon the public by selling his goods as the goods of another.

S. I. Monarch has a right to manufacture whisky and to brand his manufactured whisky in his own name of S. I. Monarch or in the name of S. I. Monarch & Co., but he can not use his own or his firm's name in branding whisky made by him in such a manner as to simulate the brand or trade-mark of R. Monarch & Co.

Weir, Weir & Walker and W. T. Ellis for appellant.

W. N. & J. J. Sweeney, Haycraft & Slack and Knott & Edelen for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1869 R. Monarch, S. I. Monarch and U. V. Monarch, brothers, were engaged in the business of distilling whisky in the county of Daviess. They had separate distilleries, and for a short period they ran a distillery in which all three had an interest. The appellee, R. Monarch, associated with him partners in his business, and in the summer of 1885 he, together with others, owned and were operating a distillery called the Daviess County Distilling Company. That distillery was being operated when this action was instituted under the name of R. Monarch. They made what is known as hand-made sour-mash whisky.

In 1880, U. V. Monarch was running his distillery, and making the same kind of whisky; also S. I. Monarch was operating his distillery. The proof satisfactorily shows that when the name of either of the Monarchs appeared on the head of the barrel as distilleries it gave a guaranty as to quality, and brought more than the whisky they made and branded in a different mode.

They seem to have different brands, such as Imperial, Jockey Club, Kentucky Tip, but what they called their "brand," burned into one end of the barrel, with the name of the distiller in the following manner:

HAND-MADE

SOUR-MASH

R. MONARCH & CO.

OWENSBORO, KY.

WHISKEY.

was regarded as the best article of whisky, and commanded the highest price in the market. The averments of the petition, sustained by the testimony, show that the whisky of R. Monarch & Co. had an extensive sale, particularly in the State of Texas; and so of the brothers marked in the same way with the introduction of their name instead of R. Monarch.

The appellants, Rosenfield and Hersch, had been manufacturing whisky in Daviess county, when their distillery burned, leaving on hand a considerable quantity of whisky. After the burning of their distillery they formed a corporation under the General Statutes, in the name of the Rock Spring Distillery Co., with S. I. Monarch & Co., proprietors.

After the formation of this corporation Rosenfield and Hersch caused the whisky manufactured by them in the distillery that had been destroyed by fire, as well as that made by the new corporation, to be marked as that of R. Monarch & Co., inserting in the place of R. Monarch & Co. the name of S. I. Monarch & Co., and inserting the words "copper distilled" in addition.

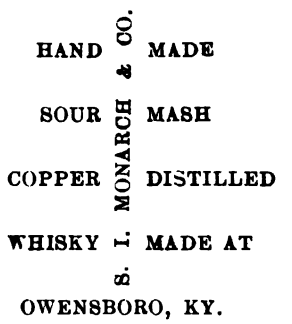
S. I. Monarch, who had united with Rosenfield and Hersch in making the new corporation, lived in the State of Texas at the time; was a man of limited means, and had been selling the whisky of R. Monarch & Co. all over the State. After the formation of the partnership he began selling for the firm in which he was employed the whisky made by the firm of which S. I. Monarch & Co. were the proprietors, and established a demand at once that supplanted that of the whisky made by R. Monarch & Co. S. I. Monarch sold to Rosenfield and Hersch the use of his name, to be used as one of the proprietors, for which they agreed to pay him 75 cents upon every barrel that was sold, and this was the extent of his interest as a partner with Resenfield and Hersch.

The appellee, R. Monarch, upon this state of facts, instituted the present action in equity, alleging that the arrangements made by Rosenfield and Hersch with S. I. Monarch, of Texas, was to enable them, by the use of his name upon the head of the barrels, to procure the custom and trade of those who were in the habit of buying the whisky of R. Monarch & Co., and that with this fraudulent purpose in view they were selling the whisky made by them as the whisky of R. Monarch & Co.; that purchasers were being deceived by the manner in which the name of the proprietors of the new corporation was placed on the head of the barrel, and this was being done fraudulently and with a view of destroying plaintiff's trade, and inducing purchasers to pay as high a price for the whisky of defendant as that of R. Monarch & Co., when it was not worth near as much; and in

simulating plaintiff's brand had greatly injured plaintiff's trade and the reputation of his whisky.

An injunction was obtained, and on final judgment made perpetual, enjoining the appellant from making whisky or doing business "in the name of S. I. Monarch & Co., or of advertising or holding themselves out as engaged in said business under said name or names."

During the progress of the case, the testimony showing that S. I. Monarch had purchased a number of shares of the stock of the corporation, an amended answer was filed, disavowing, as was done in the original answer, any purpose to defraud the plaintiff or to simulate his brand, and proposing to change the brand on the head of the whisky made by them so as to remove any cause of complaint, and to make it read in this manner:



There is much testimony in this case on both sides, a careful consideration of which authorizes the conclusion that the object of Rosenfield and Hersch in obtaining the name of S. I. Monarch was to supplant R. Monarch in the Texas trade and to enable them to sell their whisky as that of R. Monarch & Co. by marking the head of the barrels so as to make the one appear to be the manufacture of the other. Such was the chancellor's view of the facts, and while there is so much conflict in the testimony, we are not disposed to disturb his finding.

It seems to us, however, in view of the testimony in this case and in the effort to protect the rights of the appellee, the court below went too far in the order of injunction in prohibiting the appellants from doing business under the name of S. I Monarch or S. I. Monarch & Co.

The evident purpose of this litigation was to establish the name Monarch or the trade-mark of the three brothers, and to prevent any other Monarch from using his name in the sale and manufacture of whisky. S. I. Monarch has the undoubted right to use his name in business, and to place his name on goods of his own manufacture, or that of the firm to which he belongs, but he has no right by a deception like this of the mark on his manufacture to sell his goods as the goods of another, or by the similitude of the brands to mislead and deceive the public. This case, as found by the chancellor, shows a purpose by the similitude of the marks on the brands to fraudulently represent on the part of the appellants their whisky as the manufacture of R. Monarch, and to this extent the injunction should have gone, prohibiting such a false representation as was attempted to be made by the defendants. S. I. Monarch had the right to place his

real name on his barrels or that of his firm, and his co-appellants to use that name, when done in good faith, and not in a mode devised for the purpose of injuring others. The right to use one's own name in his business must be conceded, and is established by one unbroken line of authority; and while the effect of the use in good faith may affect the trade of others, it results in an injury without a remedy, (Gilman v. Hunnewell, 122 Mass., 139; McLean v. Fleming, 96 U. S., 245; Meneely v. Meneely, 62 N. Y., 427.)

The brands, when placed side by side on the whisky barrels of the plaintiff and defendants, appeared in this manner:

And enabled, as the proof conduces to show, the defendants to injure the trade of plaintiff by deceiving the public and selling the one whisky as the make of the other; and the peculiar character of the contract made by Rosenfield and Hersch with S. I. Monarch, connected with other facts, indicate that such was the purpose in using the name of S. I. Monarch on the barrels, and perhaps induced the formation of the corporation.

This case, however, does not involve that character of fraud as would justify the chancellor, if he can do so in any case, in prohibiting the party in the wrong from further transacting any like business in his own name. S. I. Monarch was a man of business experience, and well known in the State of Texas, and there is much proof conducing to show that his character and standing as a business man influenced his co-defendants to seek him as a partner, and, besides, much testimony to the effect that the trade in Texas recognized the difference between the brand of the defendants and that of the plaintiff, and purchased with such knowledge; still it is manifest that the appellants, Rosenfield and Hersch, used the name of S. I. Monarch, their co-defendant, with a view of obtaining the trade of the plaintiff, and paid him for the use of his name for that purpose. Under the facts of this case, however, the injunction should not have placed an absolute prohibition on the defendant, S. I. Monarch, of the use of his name in the whisky trade, whether in conjunction with Rosenfield and Hersch or with others, if done in good faith in the legitimate course of his business. He must not use his name or the word Monarch alone as a part of the brand on the head of his whisky barrels or otherwise as to simulate the brand of the plaintiff, or adopt any device in the nature of a brand or symbol that would tend to mislead the public so as to induce them to buy his whisky as the make of the plaintiff. The effect of the injunction in this case is to prevent S. I. Monarch, the defendant, from using his own name in his own whisky manufacture, either in his individual right or as partners of others,

when he has the undoubted right to use it in either instance in a legitimate way. This judgment must be affirmed as to Rosenfield and Hersch, but reversed as to S. I. Monarch, with directions to enjoin the latter from making any brand on the head of his barrels simulating the brands of the plaintiffs, or adopting such a brand as would be calculated to deceive the public into buying the defendant's whisky for that of the plaintiff.

Judgment reversed as to S. I. Monarch, with directions to modify the judgment below as herein indicated.

COLLOPY v. CLOHERTY.

(Filed February 20, 1894.)

1. Action to recover possession of municipal office—Pleadings—In an action to recover a municipal office, alleged to have been usurped by another, plaintiff is not required to set out the whole of the ordinance creating such office. It is sufficient for him to aver the substance of so much thereof as shows prima facie his title and right to recover.

2. Same—Authority of council to create certain office—A city charter in one section providing that the legislative, executive and municipal authority of the city should be vested in a mayor and board of councilmen, city clerk, treasurer, attorney, engineer, marshal, physician, assessor * * * and such necessary deputies or assistants as may be required, was not intended to limit or take away the right from the city council to create and elect officers other than those named in such section. Therefore, the council had the right to create the office of "foreman of street repairs and overseer of the poor"—an office not mentioned in said section.

3. An allegation that a quorum of the board of council was present at an election and that plaintiff received a majority of the votes is sufficient to show prima facie that he was elected.

Root & Root for appellant.

Charles J. Helm for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action to recover possession of the office of "foreman of street repairs and overseer of the poor," in the city of Newport, alleged to have been usurped and then illegally held by appellee. And this is an appeal from a judgment sustaining general demurrer to the petition and dismissing the action.

1st. It was not, as argued by counsel, necessary to set forth the entire ordinance of the board of councilmen creating the office in question, but to state substantially only so much thereof as is necessary to show prima facie his title and right to recover.

It is alleged that in 1888 an ordinance was duly passed by said board providing for election of a person to act as foreman of street repairs and overseer of the poor in that city, and also sufficiently stated that the term of office was to be for one year, beginning first day of each February; that one Roll was, in January, 1891, elected for one term, but before expiration thereof tendered his resignation, which was accepted, and appellee was thereupon appointed by the board of councilmen to hold said office thus made vacant during residue of the term ending February 1, 1892; that in January the board of councilmen duly

elected appellant to said office for the term beginning February 1, 1892, and ending February 1, 1893, whereupon he took the oath of office and executed the bond required by law. But that although he thereafter and in due time demanded of appellee possession of the office, he refused and still illegally holds it.

It seems to us there is enough stated in that connection to constitute a cause of action if the petition be not defective in any other respect.

2d. It is contended the board of councilmen had no authority to create the office in question, because it is not mentioned or provided for in the following section of the charter: "The legislative, executive and ministerial power of said city shall be vested in a mayor and a board of councilmen, consisting of two members from each ward, a city clerk, treasurer, attorney, engineer, marshal, physician, assessor, market master, weigher and measurer, wharf master and jailer, and such necessary deputies or assistants as may be required, each to possess the qualifications and serve for the terms hereinafter prescribed."

It would be an unreasonable construction of the charter to deny authority to the board of councilmen to create other offices beside those enumerated in that section, even if the power to appoint necessary deputies or assistants was not thereby in express terms given, for it would result that there could be neither a keeper of a poorhouse, workhouse or of a police station, although by section 6 of the charter each one of these places is provided for, and the board of councilmen is empowered to appoint officers to manage and superintend them. And though authority to create the office of foreman of street repairs is not so expressly given, still, as by section 12, public ways in said city are put under exclusive management and control of the board of councilmen and improvements may be made and done as prescribed, either by ordinance or contract; power to create all offices necessary to successful conduct of the business, when done by ordinance, must be necessarily implied. In our opinion, therefore, the board of councilmen had authority to create the office in question and to require of an incumbent to perform the duties of foreman of street repairs, and also those of a keeper of the poorhouse.

3d. It does not seem to us to have been necessary for appellant to allege in terms he was eligible to the place; for it was not duty of the board of councilmen to prescribe in terms any specific conditions or qualifications for such an office, and consequently the election of appellant, which he alleges took place duly and regularly, is conclusive in this case of his eligibility.

4th. It is alleged a quorum of the board of councilmen was present when appellant was elected to the office and he received a majority of the votes which was, we think, all he need have alleged on that subject, for whether a majority of a quorum was sufficient number of votes to elect is a question to be determined by reference to the charter and rules of the board not inconsistent therewith.

In our opinion all facts necessary to constitute a cause of action in favor of appellant against appellee were stated in the petition, and it was error to sustain the general demurrer.

Wherefore the judgment is reversed and cause remanded for proceedings consistent with this opinion.

NORTON v. NORTON, &c.

(Filed March 22, 1894—Not to be reported.)

1. Trespass—Agreed division of land between widow and heirs—Where the evidence shows that there was an agreed division of decedent's lands, whether by writing or in parol, whereby certain land was allotted to the widow as dower and certain other land was allotted to one of the heirs, the widow has no right of action for trespass against such heir who enters upon the land so assigned to him outside of that allotted to the widow.

2. Same—Eivdence—Parol eivdence of a judgment subsequently obtained by the widow extending the limits of her dower land so as to include that in possession of the heirs is incompetent, because the judgment itself is the best evidence and it does not appear the heir was a party to such judgment, and such judgment was not pleaded in the action.

Grant E. Lilly for appellant.

White & Smith for appellees.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, P. A. B. Norton, brought this action, alleging she was owner and entitled to possession of a parcel of land described in the petition containing 80 acres; that appellee, S. D. Norton, and his tenant, Blackwell, without right and by force, entered upon and was cultivating and using said land, having so entered without her knowledge or consent.

The specific relief prayed for was judgment for $100 by reason of said wrongful act, and an injunction restraining defendant's trespassing on the land.

The answer contained a denial plaintiff was owner and entitled to immediate possession, and that defendant, without right or by force, or without plaintiff's knowledge or consent, entered upon the land. For further answer defendant, S. D. Norton, states that the land in contest is outside the boundary, possession of which plaintiff is entitled to, and is that part of the land of defendant's father which was allotted and laid off to defendant as one of the heirs, being lot 7, containing $6\frac{1}{2}$ acres, and "bounded on north and northeast by the Kentucky river, and adjoining the dower land of P. A. B. Norton on the east, by the lands of A. H. Norton on south and land of H. C. Norton on west."

He also says he does not claim nor did he enter upon or cultivate any land outside of the parcel of $6\frac{1}{2}$ acres.

It does not appear from the answer whether the division of lands of defendant's father was by parol or in writing. Nor does it, in our opinion, make any difference, for if such division was agreed to and in pursuance of it the parcel of $6\frac{1}{2}$ acres was reallotted to and taken possession of by defendant, he had prima facie right to cultivate and use it, and being, as alleged, outside the boundary of dower land allotted to plaintiff at the same time, she could not maintain this action.

As then the answer contained affirmative allegations which constituted a defense to the action, failure of the plaintiff to file a reply denying them necessarily entitled the defendant to a verdict on the pleadings. But it seems each party introduced testimony, and one of the grounds of complaint by appellant is that the court confined the evidence of each party to the question of

trespass. We are inclined to the opinion that as the specific relief prayed for in the petition was judgment for damages only, the question of title did not arise on trial. But without deciding as to that, we think the court properly sustained objection to parol evidence of a judgment in an action of Fruity v. P. A. B. Norton, &c., under which dower land of appellant was so extended beyond the boundary previously agreed on by the heirs as to include the parcel of $6\frac{1}{2}$ acres, for, in the first place, the record in that action was the best evidence; second, it does not appear appellee, S. D. Norton, was a party thereto; third, the judgment had not been pleaded and relied upon by appellant, but the statements of the answer stood undenied.

The instruction may not have been entirely consistent with the previous ruling of the court as to the true issue; but appellant was not thereby prejudiced, because, as the pleadings stand, appellee was entitled to a peremptory instruction.

Judgment affirmed.

Judge Lewis delivered the following response to a petition for rehearing:

It was incorrectly stated in the opinion that plaintiff failed to file a reply denying affirmative allegations contained in the answer, as now appears to us from a re-examination of the record. But as the alleged facts were proven on the trial, and the jury, under instructions of the court, found them to be true, the mistake we made can make no difference.

If, as is alleged and proved, there was an agreed division of the land of plaintiff's husband and defendant's father, in which the $6\frac{1}{2}$ acres in controversy was allotted to him, and not included in the part allotted to her as dower, and she had knowledge of and consented to that division, then defendant's possession of the parcel in controversy was lawful and plaintiff can not maintain this action of trespass against him, especially as she gave no notice to quit.

It does not, therefore, make any difference whether subsequently a judgment was rendered extending boundary of plaintiff's dower land so as to include the $6\frac{1}{2}$ acres or not, so far as this action may be affected.

Petition for rehearing overruled.

HOWARD v. COMMONWEALTH.

(Filed April 12, 1894—Not to be reported.)

1. Criminal law—Verdict supported by evidence—The evidence shows that appellant deliberately and maliciously shot and killed deceased, and the verdict finding him guilty of murder and sentencing him to the penitentiary for life was authorized.

2. Same—Change of venue—Discretion of trial court—The trial court has a sound discretion in determining whether or not a motion for a change of venue should be sustained, and its determination will not be reversed except where it appears it has been abused.

3. Same—Continuance—The evidence of the absent witnesses was merely cumulative as to previous threats made by deceased against defendant, and defendant was not prejudiced by the failure to allow him a continuance.

P. B. Thompson, Sr., L. W. McKee, W. P. Marsh and C. B. Butner for appellant.

W. J Hendrick for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Lewis.

James Howard, having been convicted of murder of John C. Morgan and sentenced to confinement in the penitentiary for life, appeals.

It appears that after eating his supper he went to the residence of a neighbor in the village of Tyrone and borrowed a gun, with the avowed intention to kill a "big white dog," and after getting the gun, which he was assured was loaded, went directly to the saloon of Arther, formerly owned by Morgan, and where the evidence tends strongly to show he knew Morgan was in the habit of staying. He entered in rear of the building and through a door of the pool-room where Morgan was sitting in a chair leaned against the wall reading a book or paper. Upon entering he said to Morgan "now damn you and I have you," and immediately shot him so that death in a short time followed. He states, however, that Morgan, not he, used the words quoted. But Morgan had sometime before received an injury to his wrist which to some extent disabled him; was, at the time, unarmed and not in a position to attack appellant, nor did he make any, and besides the evidence does not show or tend to show he expected appellant would at that time and place approach him. So it shows very clearly appellant killed Morgan deliberately and maliciously, and the jury were bound to return the verdict now complained of.

It, however, appears he and Morgan had a personal encounter about two months previously, in which Morgan was the aggressor, and shot twice at him.

There is also evidence Morgan had subsequently made threats of taking his life, and also upon meeting him used disrespectful language to his wife. But these threats and improper speeches had been made some time previously, and serve to show not that appellant shot and killed him in sudden heat and passion, but deliberately, and they consequently confirm rather than render doubtful the jury's verdict.

The evidence shows there was hostile feeling created in the vicinity against appellant, as might have been reasonably expected; that Morgan had relatives of some influence in the county of Anderson, where the homicide took place, while appellant had little influence himself, and no relatives of much weight in the county; and whether danger of mob violence was imminent or not appellant was for his protection against it removed by officials to the jail of Fayette county, where he was kept until the August term of court, 1893, when his trial was had. These facts were fully presented on his motion for change of venue, and numerous witnesses were examined at the same time. But while most or all of them testified there was or had been considerable feeling of prejudice against appellant on account of the killing, nearly all of them expressed the opinion he could get a fair and impartial trial in Anderson county. The circuit judge has a sound discretion in deciding such motion, and, of course, better opportunity of properly estimating credibility of witnesses and weight of evidence than this court; and, therefore, while we have authority to revise and reverse his judgment on such motion it is not, nor ought to be, done except when we are satisfied that discretion has been abused.

Appellant was not, we think, prejudiced by the order overruling his motion for a continuance, because the testimony of the ab-

sent witness would have been merely cumulative on the subject of threats by the deceased. The lower court ought to have passed on the motion to require Commonwealth's attorney to admit the statements contained in the affidavit as true, and would, no doubt, have done so if his attention had been called to the subject about which appellant and himself seemed to have been careless and indifferent. There is some complaint of error of the court in refusing to permit witnesses to testify as to all that was said on certain occasions. But we think in each instance all that was material in any of such conversations was substantially heard by the jury.

We perceive from the record no such conduct on part of the Commonwealth's attorney in his closing argument as was calculated to mislead or confuse the jury as to the manner in which the killing occurred, or the character of punishment they were required under instructions of the court and according to facts proved to inflict.

There does not appear to us any error in the instructions, certainly none by which appellant could have been prejudiced.

Judgment affirmed.

SUPERIOR COURT ABSTRACTS.

MATTINGLY v. RUSSELL.

Filed March 28, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Warranty—Pleading—Where the owner of a stallion induced the owner of a large number of mares to breed them to his stallion, representing that the stallion was a good breeder and sure foal-getter, and when it was too late to breed elsewhere for that season the stallion proved not to be a sure foal-getter, thus causing the owner of the mares to lose the income from them for that season, the owner of the stallion is not liable for such loss unless he knew or ought to have known that the animal was defective and not fit and sufficient for the purposes for which he was warranted; and, therefore, to entitle the owner of the mares to recover he must allege that the owner of the stallion knew or ought to have known that fact. And he must also allege that the mares were actually bred to the horse; the allegation that there was an agreement to breed them is not sufficient.

H. W. Rives for appellant; S. A. Russell for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. BEAM.

Filed March 28, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Contract as to fencing right of way—Set-off—The appellant railroad company having furnished appellee the material with which to build, on his land and for his benefit, a switch or side track, diverging from its main track, under the agreement that it was to have a lien on the switch and the land on which it was built to secure payment for the material furnished, in this action to enforce that lien in which the appellee pleads as a set-off the amount which it will cost to build a fence on each side of appellant's right of way through the land, alleging that appellant had, in consideration of the grant by him of the right of way, agreed to build such a

fence, but had failed to do so, the appellee is entitled to the set off only in the event he builds the fence within a reasonable time, and the case should be kept on the docket for that purpose; and if he fails to build the fence within reasonable time his set-off should be dismissed without prejudice. And the judgment should further provide that after the fence is built appellee shall maintain it at his own cost.

2. Parties to contract—Although the contract as to the right of way was made in the name of the "Middle Division of the C. & O. R. R. Co.," yet, as it was made by appellant's agents and appellant has from the very beginning been the only party interested in the road, it is bound by the contract.

John S. Kelley for appellant; John D. Wickliffe for appellee.

DEGMAN v. MASON COUNTY.

Filed March 28, 1894. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, affirming.

Fraud—Where a county obligated itself to pay to a turnpike road company a certain sum per mile for the building of its road, and after the road was built the county, upon report of commissioners that the road was two miles and four rods long, paid over to appellant, as president of the road, the amount due upon that basis, if appellant knew that the road was in fact only one and three-fourths miles long his demanding and receiving of the county pay for two miles and four rods, even though technically based upon the report of the commissioners, should be treated as a fraudulent representation, and he is liable to the county for the amount paid him in excess of what was due upon the basis of the actual length of the road. And it is immaterial whether or not he derived benefit.

Cochran & Son and T. C. Campbell for appellant; C. D. Newell and Coons & McGill for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. THOMAS.

Filed March 28, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Motion to quash return on summons—Appearance—Where a defendant, by answer or motion to quash the return on the summons, objects to the jurisdiction of his person, although he answers to the merits after his objection is improperly overruled, he does not thereby waive his objection to the want of jurisdiction or service of process, and may, upon appeal from final judgment against him, insist that the court below never acquired jurisdiction of his person. But as the defendant in this case voluntarily answered to the merits before the court had taken any action upon its motion to quash the return on the summons, it must be regarded as having entered its appearance and can not now object to the service of process, although the order filing answer recited that defendant did not waive its right to quash the service of summons.

2. Appraisement of stock killed by railroad train—Under the statute which provides that after giving notice the owner of stock killed by a railroad train may have the animals appraised, and if the company fails to pay the amount of the appraisement within sixty days he may recover 25 per cent. additional. If he succeeds in obtaining a verdict for the amount of the appraisement, it is not necessary for the plaintiff to set out in his petition the notice in hæc verba, or, in fact, to make any more specific allegation than that notice was served and the property duly appraised, as the fact of notice and appraisement is not for the consideration of the jury, but comes up upon motion after the verdict.

3. Same—While the notice must specify the time and place of the appraisement, yet in the absence of a bill of exceptions this court must assume, in support of the judgment, that both the notice and appraisement were in accordance with the statute.

4. Verdict for more than was claimed—As the verdict was for $25 more than was claimed in the petition, in the absence of any evidence this court must assume that this was a mistake which could be plainly corrected by the court with the data before it; and as plaintiff remitted the $25 and judgment was rendered for only the amount claimed in the petition, this court can not reverse on that ground.

P. H. Darby and John C. Gates for appellant; Montgomery Merritt for appellee.

LOUISVILLE COURIER JOURNAL CO. v. POPE.

Filed April 11, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Libel—Evidence—In an action against the publisher of a newspaper for libel, the publication complained of being in substance that W. had been poisoned by his wife and was expected to die, and that he suspected improper relations between his wife and plaintiff, and that plaintiff was charged with furnishing the wife with the poison, the defendant having been permitted to prove by the brother of W. that W. charged when he was taken suddenly ill that his wife had administered poison to him and that she had been instigated thereto by plaintiff, and that the wife had confessed that she did administer the poison, it was competent for plaintiff to prove by the wife of the deceased that her husband never charged that there was any criminal intimacy between her and plaintiff or that plaintiff was concerned in the poisoning, and that he did not make any charge against her of having poisoned him, and that she did not make any confession, except under threats of violence, and that she immediately thereafter told her husband in her brother's presence that he had made her confess to a thing she had never done.

2. Same—The court properly refused to allow defendant to prove the contents of a letter claimed to have been written by the wife of the deceased to plaintiff, as the letter was never delivered to plaintiff, but was burned by the writer.

3. Same—Special damage—Where the libelous language is actionable per se it is not necessary to enable the party to show special injury that he should plead it with that particularity which is required in an action where special damages only can be recovered.

In this case, as the petition alleges that the publication has injured the plaintiff, a physician, in his business, it was proper to instruct the jury that he might recover for such injury, if any.

4. Punitive damages—To authorize the jury to award punitive damages in an action for libel it is not necessary that an intention to injure should be shown.

5. Same—Instructions to jury—While it would have been better perhaps if the court had not attempted by its instructions to separate the compensatory damages from the punitive damages, and simply have told the jury if they found for the plaintiff they might award him such damages as they should deem proper and just from all the facts and circumstances proved in the case, yet the defendant can not complain, as this separation was suggested by it in the instructions which it requested the court to give to the jury.

F. Hagan for appellant; Geo. S. Fulton, E. E. McKay and John D. Wickliffe for appellee.

BOAZ v. WADE.

Filed April 18, 1894. Appeal from Fulton Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Sales of personal property—Passing of title—Where the purchaser of a stock of goods agreed to take only such goods as were "merchantable," and was to pay cost for them, it is evident an invoice was contemplated by the parties, and the title did not pass until the invoice was made. But an in-

voice having been made, the fact that there were a few articles as to the price of which the purchaser was dissatisfied, and for the purpose of adjusting which the seller promised he would look over the invoice, did not prevent the title from passing. Nor was it necessary that the invoice should be footed up in order to pass the title.

J. C. Flournoy for appellant; Smith, Robbins & Thomas for appellee.

HANAUER, KOHN & CO., &c. v. OBERLIN.

Filed April 18, 1894. Appeal from Laurel Circuit Court. Opinion of the court by Presiding Judge Brent, dismissing appeal.

Appellate practice—Statement of parties—A statement of parties naming "Hanauer, Kohn & Co., &c., as appellants is so indefinite that the appeal must be dismissed. Even if the statement would be sufficient to make any Hanauer and any Kohn, who were before the lower court, parties to the appeal, it does not appear that any person bearing either of those names was before the court or that judgment was rendered against any person bearing either of those names. Besides, the statement says there are two judgments appealed from, and yet only one judgment appears in the record.

Ewell & Smith for appellants; Thomas H. Hines for appellee.

COCKESHAM, JR. v. MILLER.

Filed April 18, 1894. Appeal from Wolfe Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

1. A sale of standing trees, in contemplation of their immediate separation from the soil by either the vendor or the vendee, where they are selected and marked by the purchaser with the knowledge and consent of the vendor, is a constructive severance and delivery of them, and the contract is enforceable not only against the owner of the land, but against any subsequent purchaser thereof with notice of the sale. But if one purchases land for a valuable consideration and acquires title thereto without notice of any such sale of the trees standing thereon, he is entitled to them, and the purchaser of the trees must look to his vendor for damages.

In this case the vendor of land having reserved 100,000 feet of poplar and ash, to be severed by a certain time, giving the vendee notice that he had sold that much timber upon condition that it was removed by the time specified, and telling him that it was to be his if not removed by that time, the time specified having passed without the timber having been severed, the purchaser of the timber can not enforce the contract against the purchaser of the land, although his purchase may, in fact, have been unconditional, the purchaser of the land having notice only of a conditional sale of the timber.

2. Same—Passing of title—A sale of enough trees upon the vendor's land to make 100,000 feet did not pass the title to any particular trees nor give to the purchaser the right to enter and cut the timber without the consent of the vendor.

Wood & Day for appellant; T. C. Johnson, Z. T. Hurst, W. W. McGuire and Wm. H. Holt for appellee.

SAYLOR v. SAYLOR.

Filed April 18, 1894. Appeal from Harlan Circuit Court. Opinion of the court by Judge Yost, reversing.

Divorce—In this action by the wife for maintenance and alimony, in which the husband, by his answer, which was made a counterclaim, alleged that the wife had been guilty of adultery and prayed an absolute divorce, the evidence was sufficient to entitle the husband to the relief sought.

Weller & Hays, G. A. Eversole, W. J. Saylor and Wm. H. Holt for appellant.

CLAYTON, &c. v. BALLARD, &c.

Filed April 18, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, affirming.

Husband and wife—Sale of wife's land—Rescission—When husband and wife united in a sale of the wife's land, executing a bond of conveyance therefor, and the wife dying without having conveyed, the land was recovered from the purchaser by her heirs, the husband's estate is not liable to the purchaser for the value of the improvements put upon the land.

H. W. Rives for appellants; W. J. Lisle for appellees.

NORTHCUTT, &c. v. EMISON.

Filed April 18, 1894. Appeal from Scott Circuit Court. Opinion of the court by Judge Barbour, affirming.

Principal and surety—In this controversy between appellants and appellee as to whether appellants were principals in a certain note and appellee, their surety, or whether appellee was principal and appellants his sureties, although appellee's name was the first on the note, it was competent for him to show by parol proof that he was, in fact, only a surety, and the evidence is sufficient to support the finding of the lower court that his contention is correct.

V. F. Bradley and H. P. Montgomery for appellants; James E. Cantrill for appellee.

MURRAY & BARNES v. DE JARNETTE.

Filed April 18, 1894. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Appellate practice—Where the law and facts in an ordinary action are submitted to the court, this court can not review the rulings of the court upon the trial unless there is both a separation of the conclusions of law and fact and a motion for a new trial. And as there was no motion for a new trial in this case, nothing is presented for consideration except the sufficiency of the pleadings to support the judgment.

2. Attorneys—Where goods upon which an attachment had been levied were sold by the sheriff, under order of the county judge pending the litigation, and the sheriff, upon the representation of the attorney who brought the suit that he was the agent of plaintiffs, and that the proceeds of sale should be paid to him, was induced to pay the money to the attorney, the attachment having subsequently been discharged and the sheriff required to account to the defendants for the proceeds of the attached property, in this action brought for that purpose the sheriff was entitled to judgment against the attorney for the amount paid to him, the attorney having no right to collect the money at the time and under the circumstances he did. And it constitutes no defense to the attorney that he paid the money to his clients, nor were the clients necessary parties, and the court properly refused to have them made parties.

Murray & Barnes for appellants; N. McC. Mercer for appellee.

MAPLES v. TRADERS DEPOSIT BANK.

Filed April 18, 1894. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. A negotiable note, payable at a regularly chartered bank of this State, and which is indorsed in blank by the payee, and before its maturity discounted by the indorser in the usual course of business to the bank where it is made payable, is thereby placed upon the footing of a bill of exchange, although not indorsed by the indorsee.

2. Waiver of notice of nonpayment may be either oral or written.

J. J. Cornelison for appellant; O'Rear & Bigstaff for appellee.

TRUSTEES OF COMMON SCHOOL DISTRICT NO. 18, KENTON COUNTY v. LOUISVILLE & NASHVILLE R. R. CO.

Filed April 18, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Taxation of railroads for school purposes—Prior to the amendment of April, 1890, to article 3, chapter 92, General Statutes, the statute made no provision for ascertaining the length and value of that part of a railroad within a school district; and in this action against a railroad company to recover taxes levied by a school district in the year 1888 the averment of length and value in the petition can not avail, as the court can not by evidence ascertain and fix values for taxation in any case, and much less where, as in this case, the law requires it to be ascertained and fixed by the railroad commissioners upon the reports of the chief officers of the road.

2. Same—Even if the value had been ascertained and a proper allegation made on that point the petition is fatally defective in that it fails to aver that the auditor had notified the defendant and the county clerk of the amount assessed against the defendant. And this defect makes it impossible also to recover taxes leived for the years 1890 and 1891.

3. Same—The petition is further defective in so far as it attempts to state a cause of action under the act of April, 1890, in that it does not allege that the county superintendent had furnished the defendant with the boundary of the district.

4. Same—Although an amended petition offered by plaintiff did not cure the defects in the original petition the court should, instead of rejecting it, have permitted it to be filed and sustained a demurrer to the petition as amended. But as the amendment is made part of the record, and plainly does not cure the defects of the petition, this court will presume it was rejected for that reason, and as the court below did not dismiss the petition until plaintiffs had refused to plead further, plaintiffs were not prejudiced by the irregular practice.

5. Same—Under the common school law of 1888 which provides for the imposition of a tax where any schoolhouse "has been condemned and needs repairing" the word "repairing" means resorting or renewing to any extent, even to rebuilding.

Tisdale & Gray for appellants; J. W. Bryan for appellee.

FUCHNER v. SCHULTEN, &c.

Filed May 9, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Assignment by operation of law—It is an anomaly for a mortgagee himself to appeal to court to have the mortgage executed to him by his debtor declared to operate as an assignment for the benefit of all the mortgagor's creditors. But even if a mortgagee could thus attack his own mortgage there is no pleading in this case which would authorize the court to render such a judgment.

2. Fraudulent mortgage—The evidence is sufficient to show that the mortgage executed to appellant was without consideration and executed with the design to defraud the mortgagor's creditors.

Cleary & Cleary and H. I. Gausephol for appellant; J. M. Dial for appellees.

INDEX TO VOLUME XV.

ACCEPTANCE— Page.
action on acceptance—plea of non est factum—evidence of written contemporaneous agreement to pay conditionally not admissible. 751
ACCIDENT INSURANCE—See Insurance, 7, 8, 9, 12, 13, 14.
ACTIONS—See Arrest of Debtors, 2; Decedents' Estates, 2; Dogs, 1: Executors and Administrators, 8; Neglect, 28, 30; Railroads, 26; Tax Sales, 6—
1. to require railroad to run trains between two towns, as required by act of incorporation, must be instituted by Commonwealth—neither town has right of action against railroad to recover damages therefor 314
2. mortgagor can not maintain action to set aside mortgage on grdund that the debt thereby secured was obtained by fraud unless he also seeks to set aside the contract creating the debt.... 388
3. plaintiff has absolute right to dismiss without prejudice at any time before a final submission 394
4. county may maintain action against sheriff and his sureties for his failure to pay over taxes collected remaining in his hands after creditors of county are paid by him 405
5. county has no cause for action for unlawful trespass on a public road which has become a part of a municipal corporation 577
6. action in one county quia timet as to land in two counties—subsequent action may be maintained in other county for trespass while first action is still pending 614
7. plaintiff has right to dismiss without prejudice at any time before a final submission 680
8. when there is a final submission 680
9. widow or minor child of one killed through careless use of firearms may maintain action to recover damages—constitutional law 782
ACTION TO QUIET TITLE—
1. owner of land may maintain action to set aside a deed which constitutes a cloud upon his title, even when not in actual possession, 211
2. plaintiffs had right to have certain commissioner's deed for their land cancelled whether they were in possession or not 511
ADVANCEMENTS—See Decedents' Estates, 6, 7; Husband and Wife, 6—
1. children properly made to account for advancements received from their mother in certain case 749
2. advancement by father to son not a fraud on wife's marital rights. 755
3. settlement of accounts of advancements correctly made 792
ADVERSE POSSESSION—See Boundary, 6; Joint Tenants, 2; Landlord and Tenant, 2; Partition, 6; Patents, 1, 5—
1. patent void if issued for land that had been enclosed and held adversely by another for fifteen years, although not embraced in deed under which he claims 3
2. of fifteen years sufficient to maintain trespass 113
3. possession of defendant amicable until within ten years before action to recover land, plaintiff entitled to recover 171
4. burial of dead in cemetery lot and erection of gravestones evidence of adverse claim of easement in lot 337
5. right of burial in a cemetery lot may be acquired by prescription. 337
6. possession of one who has buried his dead in lot not ousted by intruder who allows gravestones to stand 337
7. entry upon interference by junior patentee—extent of constructive possession 402
8. declarations as to nature of possession made to third party by a defendant, who claims by adverse possession, competent to show his claim was friendly and not adverse 46

Page.
AFFIDAVIT—
sufficient, although name of affiant does not appear in body of writing 161
AGREED CASE—
where agreed facts are submitted to court no necessity exists for a separation of conclusions of law and fact 506
AIDERS AND ABETTORS—See Appeals, 21; Instructions, 27, 32, 33—
1. in commission of statutory offenses—when they may be convicted as principals 253
2. one may be convicted as aider and abettor of one committing manslaughter 502
ALIMONY—See Divorce, 2, 7—
1. wife may be allowed alimony, although the divorce was obtained by the husband 439
2. certain allowance as alimony reasonable 439
3. defendant, by replying, waived right to object to wife's answer claiming alimony because not styled a counterclaim 439
4. when allowed to wife when divorce is granted to husband 801
5. certain allowance as alimony excessive and unreasonable 801
ALLEGATION AND PROOF—See Landlord and Tenant, 29.
ALLEYS—See Streets and Alleys.
ALTERATION OF WRITTEN INSTRUMENTS—
1. change of name of payee in note, after it is signed by surety without his consent, releases him 270
2. note executed for land purchased—insertion by payee of words "deed to be made when notes are paid" not a material alteration. 607
3. addition of words "with interest from date" a material alteration of a note 784
4. party relying upon alteration of a note as a defense must plead it. 784
5. alteration of note can not be proven under plea of non est factum, 784
APPEALS—See Agreed Case; Attachments, 15; Bill of Exceptions, 1, 3, 6; Bonds, 5. Evidence, 26, 32, 41; Guardian and Ward, 14; Husband and Wife, 10; Mandate, 1; Partnership, 15, 16; Pleadings, 46; Practice in Civil Cases, 11; Prohibition, Writ of, 3; Railroads, 3—
1. that lower court improperly dismissed a paragraph of petition no ground for cross appeal 59
2. such dismissed cause of action can be set up in another action 60
3. on a particular record Superior Court can not determine that lower court erred in construing will 61
4. appeal lies to circuit court from order refusing to probate will, whether for want of jurisdiction or other cause 130
5. no reversal for error not made ground for new trial 158
6. no reversal for rejection of evidence in absence of avowal as to what witness would state 158
7. neither bill of exceptions nor motion for new trial necessary to enable appellate court to review judgment on verdict pursuant to peremptory instruction where no evidence was introduced 175
8. appeal lies from judgment dissolving injunction on final hearing. 180
9. in the absence of an exception to exclusion of testimony the correctness of the court's ruling can not be inquired into 206
10. waiver of right to object to want of notice of filing of mandate of appellate court 206
11. rejection of evidence not assigned as ground for new trial is not a reversible error 207
12. cross appeal can not be granted against one not an appellant 208
13. judgment of chancellor on question of fact supported by evidence. 215
14. judgment finding entry upon land was with owner's consent sustained by evidence 218
15. presumed on appeal, where the record does not show otherwise, that trial of defendant in criminal case was in all respects regular, 256
16. the record not showing the contrary, it is presumed on appeal that defendant was tried at a regular term 256
17. decision of trial court on challenge to panel can not be reviewed on appeal 341
18. certain appeal taken and transcript filed as required by law 348
19. appeal can not be dismissed for want of assignment of errors 348
20. weight on appeal of verdict of properly-instructed jury in criminal cases 357

APPEALS—Continued. Page.
21. where verdict convicting of manslaughter as a principal is entirely unauthorized by evidence, on appeal it will not be assumed that defendant was convicted as aider when he is not so charged in indictment, and preponderance of evidence would not authorize even that verdict 857
22. in absence of bill of evidence it is presumed on appeal that the evidence authorized the judgment below 889
23. in criminal cases judgment will be reversed only for error of law prejudicial to defendant's substantial rights 487
24. criminal case reversed only for errors of law occurring on trial ... 477
25. no reversal in such case can be granted for refusal of trial court to grant a new trial on account of newly-discovered evidence 477
26. when only question on appeal is right of debtor to $20, as exempt under homestead law, Court of Appeals has no jurisdiction to entertain appeal 490
27. verdict of jury as to facts in criminal case not set aside if supported by any evidence 536
28. when judgment of conviction in criminal case may be reversed because of insufficiency of evidence to sustain verdict 552
29. judgment on verdict convicting of murder not sustained by any evidence 552
30. statement of parties to appeal, naming "T., etc.," as appellees, makes only T. an appellee 578
31. only those mentioned in "statement" treated as parties to an appeal—right to amend statement 605
32. failure to file such statement not ground for dismissal of appeal, but merely for striking of case from docket 605
33. where record contains only part of evidence heard, presumed on appeal that instructions and verdict were authorized by evidence. 606
34. when evidence is conflicting verdict of jury will not be set aside on appeal 606
35. certain verdict authorized by evidence 605
36. pleading tendered but rejected not considered on appeal unless made part of record by order of court or bill of exceptions 649
37. judgment on appeal being set aside because appellee had died before date of submission—cause being revived and submitted again, former opinion adopted 653
38. case not reversed as to issue of fact in equity unless judgment is clearly against weight of evidence 679
39. ordinary action submitted to court—failure to file motion and grounds for new trial—question that may be considered on appeal 704
40. damages on appeal—when allowable 702
41. refusal of lower court to grant appeal—mandamus from Court of Appeals the proper remedy 718
42. appeal denied by lower court, appellate court will by mandamus compel granting of appeal 768
43. clerk of Court of Appeals can not grant appeal from judgment until after expiration of term of lower court at which it was rendered 768
44. appeal from judgment for Commonwealth in misdemeanor case can not be affirmed as a delay case 780
45. appeal in criminal case affirmed when there was no demurrer to indictment or motion for new trial 781
46. failure of appellant to prosecute appeal—dismissal 792
47. judgment not authorized by pleadings reversed without motion for new trial having been made 812
48. giving of an instruction, not made ground of new trial, not considered on appeal 815
49. appeal from judgment confirming commissioner's report affirmed where only partial transcript is brought up 816
50. presumed on appeal that steps required by statute were properly taken before a change of venue was granted 828
51. statement of parties, naming "H.," etc., as appellants, too indefinite 878

APPEARANCE—See Constitutional Law, 9—
1. appearance to amended or substituted petition is entered by filing of general demurrer to it 685

APPEARANCE—Continued. Page.
2. of nonresident entered by filing exceptions to commissioner's report ... 708
3. after entry of such appearance it is immaterial whether affidavit for warning order was sufficient ... 708
4. answer by defendant after overruling of a motion to quash return of summons not a voluntary entry of appearance ... 876
5. but answer before court acts upon motion to quash such return waives objection to service of process ... 876
APPRAISEMENT—See Executions, 11; Railroads, 71, 72—
of stock killed on railroad track ... 876
ARBITRATION AND AWARD—
1. valid award not rendered void by subsequent supplemental award, which is void, and attempted to be returned by arbitrators ... 434
2. parties having treated one side of an account as valid in 1879, and submitted other side to arbitration, are estopped in 1890, after death of some of parties, to attack side of account so agreed upon as valid ... 435
3. award requiring performance of acts by both parties—when failure of one to comply with award excused the other for his failure. 782
ARREST OF DEBTOR IN CIVIL ACTION—
1. when such arrest is authorized ... 845
2. debtor arrested without any process by policemen at instance of creditors has right of action for false arrest against such creditors. 845
3. what false arrest and imprisonment is ... 845
ARREST OF JUDGMENT—See Indictment, 3.
ASSESSOR—See Municipal Taxation, 1—
insanity of assessor creates vacancy in his office ... 276
ASSIGNMENT—See Burden of Proof, 10—
assignment of note to surety—under pleadings burden on him to show assignment was made when it purports to have been made. 158
ASSIGNMENT FOR BENEFIT OF CREDITORS—See Damages on Appeal—
1. president of certain corporation fully authorized to execute deed of assignment ... 457
2. assignee acquires equitable interest in assigned estate as soon as deed is executed and delivered and before it is lodged for record ... 448
3. such equity of assignee under unrecorded deed superior to equity acquired by attachment issued after deed of assignment is delivered ... 458
4. conveyance by debtor for benefit of creditors passes legal title to trustee ... 673
5. agreement by wife to convey potential right of dower in land previously conveyed by husband to trustee—no fraud practiced on wife—agreement being executed—release of dower right irrevocable ... 673
6. trust fund held by assignor traced to hands of assignee—assignee must account to cestui que trust for same ... 673
7. costs of certain appeal must be paid by assignee individually and not out of trust fund ... 702
8. after trustee has compromised and settled with assignor's creditors assignor may sue in his own name on a claim in his favor not taken into account on the settlement ... 784
9. purchase of assignor's farm for him by a third party—sale of it at a profit—assignor entitled to such profit—profit subjected to pay debt due by assignor in such a manner as to deprive him of his right to homestead in farm ... 848
ASSIGNMENTS BY OPERATION OF LAW—See Fraudulent Conveyances, 2; Homestead, 9, 10—
1. mortgage by insolvent debtor to antecedent creditor, with design to prefer, an unlawful preference, although pursuant to a promise made when debt was created ... 222
2. act of 1856 forbids mortgages with design to prefer pre-existing debts only ... 482
3. mortgage or conveyance to secure money loaned simultaneously therewith not an unlawful preference ... 482
4. mortgage to secure debt created simultaneously therewith—second loan by creditor and release of original mortgage and execution of new mortgage to secure both loans—no unlawful preference ... 482

ASSIGNMENTS BY OPERATION OF LAW—Continued. Page.
5. where mortgage is made after act operating as assignment is done, but before it is so denounced by a court, the mortgage is valid if lodged for record thirty days after its execution 483
6. debtor held not to have executed mortgage in contemplation of insolvency, although his debts exceeded his assets 580
7. mortgage with intent to prefer valid unless assailed within six months 592
8. failure of plaintiff to have return of nulla bona before assailing conveyance as an unlawful preference waived by failure to demur, 593
9. court of equity has jurisdiction of subject-matter of such action, although plaintiff has no return of nulla bona 593
10. assignment of interest in decedent's estate, consisting of land, merely a mortgage in certain case, and, therefore, a recordable instrument 654
11. such assignment may be assailed by creditors as an unlawful preference 654
12. even if mortgagee can attack mortgage to himself as an unlawful preference, evidence fails to sustain such allegation in this case.. 880
ASSAULT AND BATTERY—See Instructions, 38—
1. burden on defendant under plea of son assault demesne 159
2. act must be done with hostile intent to constitute assault and battery within meaning of statute as to survivor of actions 203
3. charitable school of reform not liable for injury done one by an assault by one of its employes who was incompetent and unfit ... 629
4. civil action for damages for—plea of self-defense presents good defense—instructions 708
ATTACHMENTS—See Assignment for Benefit of Creditors, 2, 3; Attorney and Client, 1; Frauds, Statute of, 3, 4; Jurisdiction, 6; Mortgages, 1—
1. wheat delivered to agent of creditor to pay off notes held for collection not subject to attachment 62
2. it matters not that some of the notes are not due 62
3. claimant of attached property failing to assert claim in attachment suit is estopped to assert claim in proceeding on bond executed by him to retain possession 125
4. purchasers of attached property, with notice of lien plaintiff had independent of his attachment, can not sustain their claim 125
5. after plaintiff had sold all defendant's property under attachment the court properly refused to allow him to file additional ground that defendant then had no property subject to execution 127
6. petition of claimant of attached property properly dismissed 127
7. mere lack of property subject to execution not sufficient to authorize attachment if defendant is able and willing to pay demand .. 128
8. attachment bond may be made payable to defendants jointly 161
9. mere insufficiency of property to satisfy plaintiff's demand not ground for attachment; it must also appear that collection will be endangered by delay 207
10. sufficiency of levy of attachment 367
11. officer may leave attached property in hands of attachment defendant at request of attorney for plaintiff 367
12. such request of plaintiff's attorney and act of officer and defendant does not create prima facie case of fraudulent collusion between the parties 367
13. plaintiffs must show that collection of demand would be endangered by delay, etc., as well as that defendant has no property, etc., in this State 458
14. priorities between trustee claiming under unrecorded deed of assignment and attaching creditor 458
15. on appeal, where there is equipoise of conflicting evidence, judgment discharging attachment will be sustained 654
16. damages for sale of property not belonging to defendant—liability of plaintiff 702
17. action may stand for trial as to a garnishee, although it does not as to the principal debtor 702
18. garnishee in such case failing to answer, order directing him to pay money into court proper 702
19. value at which attached property sold at public sale not conclusive as to value of defendant's property when attachment was sued out 818

ATTACHMENTS—Continued. Page.
20. attachment for debt not due—power of court or clerk to issue 844
21. action for wrongful seizure of goods under attachment—amendment of petition 847
22. pleading in such action—measure of recovery 847
23. one of two defendants who claimed title of attached property not entitled to same where attachment as to him was dismissed until he proved his ownership of entire property, which was denied.... 539
ATTORNEY AND CLIENT—See Champerty, 1, 2; Continuance, 1; Municipal Corporations, 2, 3, 4—
1. garnishee may retain in his hands the costs, including an attorney's fee 62
2. an attorney's fee can not be recovered as damages on breach of warranty of seisin where no eviction had..... 70
3. attorney estopped to make additional charge for defending cause of action set up in amended petition..... 159
4. rule requiring courts to scrutinize closely contracts between attorney and client does not apply when attorney is seeking relief 159
5. right of action is in personal representative for loss of intestate's life by another, and no other than such representative has authority to employ attorneys to bring action to recover damages for such loss of life 368
6. under certain contract attorney not entitled to contingent fee..... 369
7. in such case it is held the client did not prevent the happening of the contingency..... 369
8. but the attorney under the contract is entitled to recover the actual value of legal services rendered 369
9. attorney for plaintiff in attachment improperly receiving from sheriff proceeds of sale of attached property liable to sheriff therefor when attachment was dismissed and sheriff has been made to account to defendant for such sale 879
AUCTIONEERS—
1. auctioneer agent of vendor until bid is accepted 783
2. after acceptance of bid auctioneer is agent of both vendor and vendee to make written memorandum of sale..... 783
AWARDS—
answer alleging set-off against an award must set out origin and nature of debt, which is basis of set-off..... 666
BAIL—
1. forfeiture of bond—principal confined in a lunatic asylum of this State presents a good defense for sureties..... 491
2. allegation that accused was confined in jail in another county when case was called not sufficient answer by sureties on bail bond. 541
BANKS—See Bills and Notes, 9, 10, 11, 13, 14, 15—
1. national bank forfeits all interest by loaning money at usurious rates 4
2. where such usurious note is renewed and usury carried in face of new note only amount originally loaned, without interest, is recoverable by bank 4
3. money deposited by one and credited to another by mistake may be recovered by bank from person to whom it was credited and paid by the mistake 80
4. a collector of taxes who was indebted to a bank had the right to apply taxes on deposit to the payment of that indebtedness, and his sureties can not complain 99
5. national bank, although it has ceased to do business, may, in its own name, collect debts due it..... 127
6. right of national bank to hold title to real estate 211
7. authority of cashier to accept renewal of note 335
8. how such authority of cashier may be shown..... 335
BASTARDS—See Descent and Distribution, 4, 5, 6, 7.
BENEFIT SOCIETIES—
1. a beneficiary can not be changed if forbidden by the charter..... 68
2. constitution can not authorize a change of beneficiary if forbidden by the charter..... 68
3. a designated beneficiary unable to take, the benefit goes to person designated by the charter 68
4. supreme lodge having received from subordinate lodges contributions for benefit of cyclone sufferers, it had no right to withhold from distribution any part of fund thus contributed..... 134

BENEFIT SOCIETIES—Continued. Page.
5. member of Knights of Honor had right to make adult son beneficiary to exclusion of widow ... 183
6. benefit certificate issued by Knights of Honor to wife and children of member, the wife dying and insured dying after a second marriage, the children are entitled to whole of proceeds of certificate ... 572
BAWDY HOUSE—
1. definition of ... 333
2. letting house to be kept as a bawdy house—liability and punishment of lessor ... 333
3. definition of disorderly house—disorderly house not necessarily a bawdy house ... 333
BEER GARDEN—
beer garden in a city is not per se a nuisance ... 325
BILL OF EXCEPTIONS—See Prejudicial Errors, 4—
1. a bill of exceptions not filed in time can not be considered on appeal ... 61
2. not necessary to enable court to view judgment on verdict in obedience to peremptory instruction where no evidence was heard, 175
3. where judge does not certify that bill of exceptions contains all the evidence there can be no reversal upon ground that verdict is not sustained by the testimony ... 206
4. recital in bill of evidence that the introduction of a certain certificate on a trial proved a certain fact a mere conclusion and an erroneous one and not considered on appeal ... 385
5. Jefferson Court of Common Pleas can not extend time for filing bill beyond 120 days after date of judgment ... 477
6. bill filed and signed more than 120 days after entry of judgment not considered on appeal ... 477
7. bill signed by judge considered as true on appeal rather than a bill signed by bystanders ... 542
BILLS AND NOTES—See Alteration of Written Instruments, 1, 2, 3, 5; Evidence, 35, 47; Liens, 1, 2, 3, 4; Mistake, 5; Partnership, 1, 17, 18; Pleadings, 39, 40, 43—
1. maker, knowing that only one of two payees owns note, can not be credited with payments made to the one having no interest in it ... 28
2. rights of assignee of note when he discovers it is forged ... 60
3. diligence in such cases ... 60
4. note payable by agent of patent fence on certain conditions not collectible in particular case ... 94
5. unconditional promissory note can not be converted by oral evidence into conditional promise to pay ... 125
6. notice of dishonor is generally condition precedent to liability of endorser, but where endorser is the accommodated party he is not entitled to notice ... 207
7. any person who signs negotiable bill otherwise than as drawer or acceptor is endorser ... 207
8. discounting of note with notice of defense ... 271
9. bill of exchange sent to bank for collection—demand for payment when note was due sufficient, although bank thought that three days of grace were allowable ... 301
10. bank in such case mere collecting agent—liability for negligence in making demand of payment ... 301
11. certain notice of dishonor given in time ... 301
12. assignment of note after payment passes nothing ... 331
13. bill payable on certain day "fixed"—negligence of bank holding it for collection in demanding payment and giving notice of dishonor ... 361
14. bank holding bill of exchange for collection a mere collecting agent, and liable only for such negligence in making demand or giving notice of dishonor as results in loss to owner of note ... 362
15. delay by bank in giving notice of dishonor resulted in no loss in certain case ... 362
16. mere possession of note by assignee no evidence of ownership where assignment is denied by verified plea ... 580
17. answer alleging that certain stipulation was omitted from note by mistake presents a good defense ... 541
18. presumed that promissory note is based on valuable consideration. 609

BILLS AND NOTES—Continued. Page.
19. promissory note—maker may plead want of consideration against bank holding it as collateral security ... 646
20. what evidence is competent under plea of non est factum ... 784
21. certain note placed on footing of a bill of exchange ... 879
22. waiver of notice of nonpayment of note may be either oral or written ... 879
23. check not endorsed by payee until more than five years after its execution loses its character as commercial paper ... 846
24. plea of drawer of check of settlement and of limitation not inconsistent in certain case ... 846
BONDS—See Official Bonds; Attachments, 3—
1. bond good as common law bond, although not authorized by statute ... 127
2. essential to validity of sheriff's county levy bond that county court should consider sufficiency of sureties and accept it ... 520
3. such approval and acceptance must appear from orders of record of county court ... 520
4. orders of approval and acceptance of bond entered nunc pro tunc ... 520
5. sureties on such bond have right to appeal from entry of such nunc pro tunc order ... 520
6. bond not good as statutory or common law obligation if taken by court or officer having no authority to do so ... 548
BOUNDARY—
1. finding of facts by chancellor in controversy as to division line not disturbed in particular case ... 77
2. of patent correctly located ... 16
3. judgment fixing boundary between adjoining land owners supported by evidence ... 218
4. location of division line—adverse possession—judgment supported by evidence ... 227
5. certain party concluded by agreed location of disputed boundary line and report of processioners in conformity therewith ... 461
6. verbal agreement locating disputed division line not within statute of frauds ... 461
7. evidence sustains finding of chancellor locating certain boundary line ... 464
8. judgment of chancellor locating boundary line authorized by evidence ... 567
BRIBED VOTES—See Elections, 1, 3.
BROKERS—
rights of brokers to receive commissions on sale of whisky discussed. 94
BUILDING CONTRACTS—See Contracts, 5, 6.
BURDEN OF PROOF—See Assault and Battery, 1; Assignments; Carriers, 5; Insurance, 12; Instructions, 37—)
1. where receipt to railroad company is expressed to be in full settlement for personal injuries, burden is on person giving it to show he did not so understand it ... 129
2. reversible error to deny concluding argument to party entitled to burden ... 159
3. in action to recover land burden on plaintiff on whole case, although burden on defendant upon issue made by him as to mistake in deed filed with answer ... 175
4. burden being on plaintiff and no evidence introduced, judgment for plaintiff not sustained by pleadings ... 175
5. where defendant admits the plaintiff's ejectment from a car, which is his cause of action, and by answer pleads facts justifying it, burden is on defendant ... 380
6. on plaintiffs in ejectment, although possessed by their ancestor twenty years ago and their heirship is admitted ... 309
7. plaintiff has burden where defendant traverses allegations of petition ... 470
8. defendant not heard on appeal in such case to claim that his traverse was so defective as to put burden on him ... 470
9. burden on propounders of will to show testamentary capacity—on contestants to show exercise of undue influence ... 477
10. assignor of note and alleged assignee have burden to show bona fide assignment when assignment is assailed as fraudulent and void ... 815
11. party permitting other side, without objection, to first introduce evidence waives right to concluding argument ... 845

CARRIERS—See Venue of Actions— Page.
1. may by contract limit liability to loss occurring on its own line, so as not to be liable for accidents on connecting lines 446
2. presumed that damage to goods in custody of carrier was caused by its default 446
3. delay in delivering cattle where connecting line was to receive them—carrier not required to notify connecting line that cattle were behind time or when they would arrive 446
4. such failure to notify connecting line of arrival of cattle did not cause the damage in certain case, since the connecting line did not promptly receive cattle after receiving notice of their arrival. 446
5. shipment of live stock—injuries sustained during transit—burden of proof 656
6. carriage of passenger beyond destination through willful and reckless misconduct and neglect—punitive damages recoverable. 742
7. consignee presumptively the owner of goods, and may be treated as such by carrier unless otherwise directed by consignor 778
8. delivery of goods to consignee by carrier contrary to order of consignor—carrier liable to consignor 778
9. assignment of bill of lading by consignor to bank—joinder of consignor and bank as plaintiffs in suit against carrier for wrongful delivery of goods to consignee 778
CEMETERIES—See Adverse Possession, 4, 5, 6.
CERTIFICATE OF ACKNOWLEDGMENT—See Conveyances, 10.
CHAMPERTY—See Patents, 5—
1. contract by attorney to collect at own expense note assigned by client for one half sum collected champertous and void. 10
2. common law judgment on such note not conclusive on trustee of maker, not a party to suit—he may plead against the judgment the champerty of original contract 11
3. party may employ agent to look after and settle his controversies in or out of court—contract not champertous 269
4. when contract is champertous 269
5. where plaintiff fails to deny defendant's allegation that he was in possession of land in dispute at time plaintiff obtained his conveyance the conveyance to plaintiff must be treated as champertous 861
CHECKS—See Bills and Notes, 23, 24.
CHURCHES—
title to church property where five trustees are appointed instead of three, as authorized by law 382
CLAIM AND DELIVERY OF PERSONAL PROPERTY—
1. right of plaintiff to dismiss action before determination of issue as to right of defendant to possession of property taken 540
2. right of action on bond executed by plaintiff for order of delivery. 540
3. action for delivery of specific property—judgment for plaintiff should be in alternative—judgment only for value of property erroneous 812
CLERICAL MISPRISION—See Judgments, 15—
1. failure to give defendant a credit admitted by pleadings not a clerical misprision 606
2. judgment for $275 damages, where petition showed only $265 damages, although prayer was for recovery of $500, not a mere clerical misprision 750
CLERKS OF COURTS—
deputy clerk of court is not authorized to take depositions 863
CLERK OF COURT OF APPEALS—See Appeals, 43.
COMMON SCHOOLS—See Schools.
COMPROMISE—See Settlement—
compromise of will contest—revocation of agent's authority 539
CONDEMNATION—See Estoppel, 2; Mandamus, 1; Eminent Domain.
CONDITIONAL SALES—See Conveyances, 5, 6.
CONFESSION—See Instructions, 35—
1. confessions are competent evidence only against a person charged with a crime 396
2. ante mortem statements or dying declarations competent only when they relate to manner or circumstances of injuries to declarant that resulted in death, or to person that inflicted such injuries 396

CONFESSION—Continued. Page.
3. on trial of one for murder ante mortem statement of another that he committed the crime not competent 396
4. confession of defendant in criminal case does not authorize conviction in absence of other evidence that the crime has been committed 691
5 obtained through promise of release not competent 691
CONFLICT OF LAW—See Corporations, 5; Distribution.
COLLECTOR—
taxes collected and deposited in bank by a collector were subject to his control, and he had the right to satisfy his indebtedness to the bank out of the fund 99
CONSIDERATION—See Bills and Notes, 18; Pleadings, 39, 40, 43—
1. consideration necessary to support contract of guaranty or suretyship 237
2. no consideration for contract to convey certain land—contract void 740
CONSIGNOR AND CONSIGNEE—See Carriers, 7, 8, 9.
CONSPIRACY—See Evidence, 54.
CONSTITUTIONAL LAW—See Contracts, 16; Courts, 1; Municipal Corporations, 1, 2, 11, 12, 18, 19; Railroads, 40, 42; Taxation, 7—
1. election of circuit judges in November, 1892, was valid, although statute providing for was not properly passed, the Constitution fixing time of election 102
2. time for election of coroner under new Constitution 117
3. acts regulating practice in equity in courts of certain counties not repealed by or inconsistent with new Constitution 462
4. right to trial by jury—in what cases it exists 497
5. act authorizing city to give additional compensation to judge of chancery court not unconstitutional 528
6. act creating taxing district for turnpike purposes valid 578
7. impairment of obligations of contracts—repeal of grant of lottery privileges 581
8. statute with emergency clause—failure of governor to veto or sign within ten days 606
9. act of May 10, 1890, providing that appearance of certain defendants in actions to move to quash process shall operate as general appearance, constitutional and valid 632
10. statute with "emergency clause"—failure of governor to return bill 653
11. section 241 requires action to recover damages for death inflicted by negligence or wrongful act to be maintained by personal representative only where wrongful act is a negligent one—widow or child may sue for death of one by careless use of firearms 732
12. section 158 of Constitution, limiting authorized indebtedness of municipal corporations, effective from date of adoption of Constitution and before cities were classified 756
13. contract by city to pay annually a certain sum for a number of years—total sum of annual payments exceeding limits authorized by Constitution—contract is void 757
14. title of certain act embraces only one subject, and the act is valid, 793
15. extension of limits of town—evidence does not show that extension was unauthorized or for improper purpose 793
16. act donating public land to seminary—right of legislature to take title from seminary and vest it in trustees of a common school ... 857
17. land granted to trustees of an academy having reverted to Commonwealth, legislature had power to authorize county court to dispose of it for common schools 168
18. provision of new Constitution limiting grand jury to twelve persons took effect at once without legislation 179
19. construction of provisions of new Constitution as to tax rate of towns and cities and as to limitation of indebtedness. 188
20. provisions of new Constitution requiring uniformity of taxation are merely declaratory of what was always the law 188
CONTINUANCE—See Depositions, 4, 6—
1. a continuance should have been granted infants on account of absence of their attorney 53
2. error in refusing, upon trial for murder, on account of absence of material witnesses 149

CONTINUANCE—Continued. Page.
3. one continuance having been granted defendant on account of absent witnesses, not error to refuse a second one for same cause when affidavit for continuance was read as deposition of witnesses ... 238
4. refusal to grant not prejudicial where evidence on trial clearly establish facts that were to be proven by the absent witnesses ... 255
5. refusal of continuance not prejudicial when all the absent witnesses appeared and testified at trial ... 256
6. refusal of continuance on fourth trial of certain criminal case not error ... 265
7. refusal to grant in criminal case not prejudicial where witnesses present at trial testified to the facts expected to be proven by the absent witnesses ... 341
8. defendant entitled to a continuance to attempt to secure presence of important absent witnesses ... 591
9. for absence of witnesses whose evidence was merely cumulative, not required ... 873
10. refusal to grant four years after indictment was found not prejudicial in certain case ... 281
11. certain defendants not entitled to continuance since they exercise no diligence to secure presence of absent witnesses ... 557
12. affidavit for too vague—materiality of absent evidence not shown. 566
CONTRACTS—See Assignment for Benefit of Creditors, 5; Attorney and Client, 6, 78; Champerty, 1; Consideration, 2; Custom; Husband and Wife, 16, 17, 18, 19; Interest, 2; Landlord and Tenant, 9, 10, 11, 12; Married Women, 1, 11, 12; Master and Servant, 4, 5, 6, 7, 25, 26; Municipal Corporations, 8, 9; Parent and Child, 1, 3; Railroads, 22, 70; Rescission; Specific Performance; Subscriptions, 1, 2, 3, 4, 5—
1. good will of business defined ... 60
2. losing good will—failure of consideration of contract ... 60
3. right to recover of carrier upon verbal contract to deliver goods... 60
4. agreement to adopt child as heir not enforced—against public policy ... 89
5. rights of subcontractor against contractor ... 155
6. departure of contractor from specifications—method of arriving at difference in value of house as built and as it should have been built ... 158
7. in suit on contract for grading road the value of estimates made after completion of work was for the jury to determine ... 207
8. action for value of services rendered and improvements made on farm—limitation ... 274
9. contract between father, who owned farm, and son, who rented it, construed ... 274
10. liability of father for improvement put on farm by son under the contract ... 274
11. antenuptial contract—when enforcible against wife ... 353
12. certain antenuptial contract so inadequate in its provisions for support of wife as, in connection with circumstances attending its execution, that it will not be enforced against wife ... 353
13 failure of railroad to erect depot on right of way conveyed as required by contract—measure of damages ... 444
14. trustees of school not personally liable on a contract made by them as trustees ... 447
15. school trustees not personally liable by reason of certain contract. 481
16. impairment of obligation of contract—repeal of statute granting exemption from taxation ... 450
17. contract by one person to advance money to another—only person to whom advance was to be made can recover for breach of contract ... 541
18. for breach of contract by one to advance money to another, only party to whom advancement was to be made, and who made the contract, can maintain an action ... 570
19. contract exempting master from liability for negligent injury to servant void as against public policy ... 575
20. contract exempting master from liability to servant for negligence void as against public policy ... 601
21. certain antenuptial contract deprived contracting parties of all marital rights in property ... 725
22. contract to board "bell boys," etc., of hotel at certain rate construed ... 815

CONTRACTS—Continued. Page.
23. contract to purchase stock of certain corporation not specifically enforced where vendee acted upon mistaken belief that he was purchasing different stock from that actually sold 825
24. contract of lease of factory and hire of lessor—breach—damages ... 849
CONVEYANCES—See Evidence, 9; Trusts, 10—
1. whether a writing is a deed or a will depends upon maker's intention 219
2. certain writing a deed reserving a life estate and not a will 219
3. grant to C. and heirs of her body creates at common law an estate tail which is by statute converted into fee simple 241
4. covenant to convey a "good and legal title"—title must be clear of all encumbrances 278
5. intent of parties determine whether conveyance is a mortgage or a conditional sale 589
6. where such intent is doubtful conveyance regarded as a mortgage. 589
7. delivery to third party for vendee sufficient where vendee subsequently ratifies acceptance 597
8. sale by grantor of a part of the land after delivery of the deed to such third party, and before grantee accepted it, does not render delivery or acceptance void 597
9. certain commissioner's deed embraced certain land in contest 596
10. certificate of acknowledgment of married woman sufficient if statute is substantially complied with 598
11. certain conveyance for school purposes construed 644
12. under such conveyance lot must be used for school purposes unless ten-thirteenths of owners consent to other use 644
13. grantor will not be allowed in 1891 to claim against deed made in 1863 on ground that it was fraudulent as to his creditors 657
14. conveyance of certain boundary, excluding therefrom a certain mineral lease—fee to leased lands were not conveyed 765
15. certain instrument a deed and not a will 771
16. conveyance of land by wife to husband valid only when free from fraud or coercion 774
17. right and title of releasor passes by a release 859
18. words "bodily heirs" in deed used as words of limitation 109
19. deed conveying interest "descended and willed" to grantor passed interest he had inherited from another devisee 124
CORONER—See Constitutional Law, 2.
CORPORATIONS—See Husband and Wife, 13, 14; Mechanics' Lien; Summons—
1. fraud of original corporators by purchasing land for corporation and selling it at an advance without disclosing the facts 22
2. certain purchaser from such corporators held to have had notice of the fraud and charged with it 25
3. power of one corporation to purchase property and franchise of another—consolidation of corporation 25
4. liability of one corporation owning stock in another for the latter's acts 25
5. foreign corporation may be sued in this State for injury done in another State 160
6. stockholder not permitted to testify for corporation concerning transaction with a deceased person 302
7. stockholder of can not testify for it against a decedent as to transactions with such decedent 364
8. president of corporation, from evidence, fully authorized to execute deed of assignment for benefit of creditors 457
9. creditors must, at their peril, take notice of articles of incorporation limiting amount of debts to be contracted by corporation ... 458
10. president of has right to salary, although he promised success for corporation and venture was a failure 517
11. officer voluntarily leaving salary in treasury of corporation entitled to interest only from time he demanded payment of same.. 518
12. fraud of directors in securing to themselves part of purchase price paid for land purchased for corporation 518
13. president of corporation receiving part of purchase price so received by directors must refund same to corporation 518
14. service of summon on nearest officer of insurance company—judicial notice taken of fact that it is a corporation 703

CORPORATIONS—Continued. Page.
15. liable in punitive damages for injuries inflicted by tortious acts of employes 742
16. failure to keep proper records and refusal by corporation to show disposition of money paid in by stockholders—rights of stockholders 748
COSTS—See Assignment for Benefit of Creditors, 7; Attorney and Client, 1, 2; Divorce, 3, 4; Trusts, 2, 3.
COUNTERCLAIM—See Alimony, 3—
1. instruction allowing defendant to recover on counterclaim amount in excess of that claimed in pleadings erroneous 274
2. a properly-pleaded counterclaim or set-off may be prosecuted, although plaintiff dismisses action without prejudice 394
3. after motion of plaintiff to dismiss without prejudice it is too late to offer to file counterclaim or set off 394
4. claim for unliquidated damages connected with subject of action may be pleaded as a counterclaim 537
COUNTY—
may maintain action for injury to county road 734
COUNTY COURTS—
validity of conveyance by county judge alone, where county court was authorized to dispose of land for benefit of common schools. 168
COUNTY JUDGE—See Indictment, 8; Mandamus, 1—
1. sureties of county judge not liable for money received by him from fiduciaries 58
2. county judge not authorized to receive money from fiduciaries 58
COURTS—See Special Terms of Courts, 1, 2—
1. act authorizing judge of criminal division of circuit courts having four divisions to try civil cases transferred from some other division constitutional 289
2. judge of such criminal division is authorized to hear and determine civil cases so transferred 290
3. as to any particular order or judgment, 60 days after its entry is a "term" of the Jefferson Court of Common Pleas 477
4. such court can not grant more than 120 days after day of judgment for filing of bill of exceptions 477
5. for what length of time power remains in court to alter or amend orders 520
6. power to enter nunc pro tunc order 520
7. authority over order settling decedent's estate after adjournment of term 531
8. State courts have jurisdiction to enforce forfeiture of interest by national banks charging usurious rates under section 5198 of the Revised Statutes of the United States 748
COURTESY—
1. evidence not sufficient to show that issue was born alive—husband not entitled to courtesy 792
2. husband entitled to courtesy in land owned and possessed by wife, although neither husband nor wife ever resided upon or exercised acts of ownership over it 378
3. in certain case evidence is sufficient to raise a presumption of possession of the land by wife during coverture 378
CRIMINAL LAW—See Aiders and Abettors; Appeals, 15, 16, 24, 25, 27, 28, 45, 34; Bawdy House; Confessions; Continuance, 2, 7; Evidence, 6, 16, 17, 29, 30; False Swearing; Municipal Corporations, 4, 5; Self-defense—
1. instruction restricting defendant's right to rely on plea of self-defense not prejudicial in certain case 3
2. instruction for willful and felonious shooting following language of indictment not prejudicial if other instructions contain self-defense 43
3. argument of Commonwealth's attorney not prejudicial in certain case 43
4. improper instruction restricting right of self-defense 46
5. evidence that deceased was in the habit of carrying pistol admissible where deceased made the attack 46
6. evidence of violent and ugly temper of deceased competent in such case 46
7. falsely using printed letter head an obtaining of money under false pretenses 49

CRIMINAL LAW—Continued. Page.
8. assault and battery is a lower degree of an assault with intent to rob ... 51
9. instruction as to assault and battery proper on charge of assault with intent to rob ... 51
10. failure to give instruction as to manslaughter on trial for murder was error ... 149
11. reckless use of loaded pistol—homicide resulting therefrom is voluntary manslaughter ... 215
12. shooting in sudden heat and passion—degrees of offense ... 230
13. election by Commonwealth to prosecute under certain indictment for a misdemeanor only—rereference to grand jury—prosecution under new indictment for felony ... 247
14. malicious cutting with intent to kill—degrees of offense ... 247
15. presumed on appeal that admission of incompetent evidence prejudiced certain defendant found guilty of manslaughter and sentenced to the penitentiary for sixteen years ... 251
16. indictment for defacing brand on sawlogs sufficient ... 253
17. when aiders and abettors may be convicted as principals for statutory offense ... 253
18. verdict convicting defendant of murder sustained by evidence 257
19. unlawful shooting at another, with intent to kill him, without inflicting a wound, a degree of offense of willful and malicious shooting and wounding, etc ... 269
20. criminal case transferred by change of venue stands for trial at next term of court although record not filed ten days before commencement of term ... 265
21. misconduct of attorney for Commonwealth in argument—when prejudicial ... 265
22. instructions limiting defendant's right to rely on plea of self-defense not erroneous in certain case ... 281
23. absence of counsel of accused while proceedings were had on trial and other misconduct not disclosed by record ... 286
24. weight of verdict convicting of manslaughter where evidence seems to court to disclose a case of self-defense ... 286
25. verdict convicting of manslaughter sustained by evidence ... 321
26. irregularities in selection or formation of jury—how to be shown to court ... 341
27. verdict convicting of murder fully sustained by evidence ... 344
28. certain verdict convicting a defendant of manslaughter entirely unauthorized by evidence ... 357
29. harsh or abusive language does not justify an assault or a battery of any character ... 360
30. malicious shooting and wounding—instructions limiting defendant's right to plea of self-defense, in case he brought on the difficulty, erroneous in certain case ... 360
31. instruction concerning right to plea of self-defense of one indicted for murder of officer attempting to arrest him in the event he, by mistake, thought the officer another person at the time he shot more favorable to accused than he had a right to demand ... 386
32. verdict convicting of manslaughter supported by evidence ... 398
33. officer may not shoot person who is fleeing to avoid an arrest for a misdemeanor ... 408
34. but officer may shoot such person in self-defense if his own life is endangered ... 408
35. one assailed in his own house is not bound to retreat—self defense 437
36. verdict convicting of manslaughter authorized by evidence ... 477
37. jury are exclusive judges of facts ... 536
38. verdict convicting of horse stealing authorized by the evidence ... 536
39. shooting into a railroad car with intent to assassinate a passenger a common law offense ... 557
40. certain defendant, upon evidence, entitled to an instruction on law of self-defense ... 562
41. slanderous charges against female members of a family sufficient provocation to excite heat and passion on part of a husband so as to reduce murder to manslaughter ... 562
42. verdict convicting of shooting and wounding in sudden heat and passion authorized by evidence ... 591
43. homicide committed with deadly weapon used with purpose to kill —instruction concerning involuntary manslaughter ... 736

CRIMINAL LAW—Continued. Page.
44. weapon seized in transport of passion may reduce crime to manslaughter, but does not excuse it... 736
45. improper argument by Commonwealth's attorney not prejudicial in certain case... 736
46. act of April 10, 1893, a complete system of statutory laws relating to crimes and punishments and a repeal of all laws then relating to those subjects... 738
47. unlawful confederation of two or more persons who go forth armed or disguised for the purpose of committing a felony and who do commit a felony—punishment... 738
48. evidence shows party guilty of murder—conviction for manslaughter not reversed on appeal... 797
49. right of one to prevent violent abduction of his brother and to attempt to rescue his brother after the abduction... 798
50. one may use necessary force to rescue a brother from abduction—may pursue abductors to effect the rescue... 798
51. reckless firing upon and killing of abductor by one of several persons—aider and abettor... 798
52. certain incorrect statement in affidavit not sufficient to authorize conviction for false swearing... 803
53. evidence wholly fails to show conspiracy between defendant and those who actually committed certain homicide... 820
54. plea of self-defense available only when danger was impending or apparently impending at time of commission of homicide—instructions... 826
55. conviction of unlawfully confederating, etc., together and going forth disguised to commit a felonious act not authorized by the evidence... 828
56. verdict finding guilty of tearing up, etc., a railroad track so as to throw cars from track, etc., sustained by evidence... 835
57. "felonious breaking into outhouse"—what is an "outhouse"... 837
58. verdict convicting of murder authorized by evidence... 873
59. change of venue—discretion of trial court—when reversed on appeal... 873
60. discretion of court as to permitting introduction of evidence out of the usual order... 691
61. where proof of defendant's confession is introduced by way of rebuttal only, jury should be instructed to consider it only for that purpose... 691

CURATOR—...
1. appointment of for estate pending will contest—recovery of costs of curator where appointment was unauthorized... 543
2. circuit court can not appoint a curator pending appeal from a county court order probating a will... 543

CUSTOM—
custom not a part of contract if inconsistent with clear intent of parties... 31

DAMAGES—See Attorney and Client, 5; Assault and Battery, 3; Division Wall; Eminent Domain, 1; Instructions, 8; Injunctions, 5; Landlord and Tenant, 25; Railroads, 26—.
1. $5,000 damages for loss of two fingers excessive... 18
2. measure of damages for taking and detention of personal property, 61
3. plaintiff could amend his petition and claim damages on property up to the time of restitution... 62
4. necessary allegations in action for damages for overflowing plaintiff's land... 92
5. gross negligence authorizes punitive damages... 92
6. $2,000 exemplary damages for wrongful expulsion from train not excessive... 92
7. damages to trade for furnishing bad quality of hemp too remote.. 93
8. no damages recoverable for breach of contract of sale of goods, if agent of purchaser had no authority to make purchase... 93
9. gross negligence sufficient to warrant punitive damages... 185
10. verdict for $4,000 for pain, anguish, etc., not excessive... 185
11. verdict for $26,000 for injuries which may not be permanent is excessive... 185
12. both compensatory and punitive damages may be awarded where there is gross negligence... 199

DAMAGES—Continued. Page.
13. it being manifest that nothing was allowed by way of punitive damages, an instruction authorizing punitive damages was not prejudicial 208
14. $250 damages for putting passenger off at wrong station not excessive 240
15. measure of damages caused by mistake in transmission of telegram, 303
16. $1,000 for mental suffering due to failure to deliver telegram not excessive 334
17. one entering a railway car for the purpose of being ejected can recover only actual damages in any case 380
18. verdict for $500 damages for wrongful ejection of passenger from train not excessive 607
19. when special damages must be specially averred in pleading 656
20. $5,000 damages for loss of a hand through gross negligence not excessive 714
21. $10,000 for destruction of certain county road by a railroad authorized by evidence 734
22. corporation liable for punitive damages for injuries done by tortious acts of its employes 742
23. both mental and bodily pain element of compensatory damages ... 742

DAY—
1. law does not regard fractions of a day 411
2. day of election, upon which sale or gift of intoxicating liquors is forbidden, includes entire twenty four hours of such day 411

DAMAGES ON APPEAL—
appeal by assignee for benefit of creditors from order directing him to pay over certain sum in his hands—appellee entitled to 10 per cent. damages on affirmance 702

DEBTOR AND CREDITOR—
1. lower court should have allowed certain credit claimed by maker of a note 269
2. application of payments—intent of debtor to apply payment to certain debt inferred from circumstances 302

DECEDENTS' ESTATES—See Assignments by Operation of Law, 10, 11; Evidence, 13, 14, 21, 35, 96; Parent and Child, 3, 4—
1. sufficiency of evidence in particular case to charge a debt against a decedent s estate 61
2. action by administrator for settlement—reference to commissioner—creditor entitled to interest, although he made no demand 348
3. right of action for loss of intestate's life by negligence of another in personal representative only 368
4. when child may charge parent s estate for living with and taking care of him 374
5. devise of estate to creditors—creditors must be parties to action to settle estate 523
6. settlement of decedent's estate—power of court after adjournment of term to enter order changing order determining amount of advancements to be charged 531
7. value to be fixed on land advanced in certain case not that placed on it in will 531
8. action by administrator to compel devisee to contribute to pay debts of estate—jurisdiction of court to sell land of devisee in adjoining county 559
9. wrongful receipt of money from decedent by his child in his lifetime—fund received not held in trust so that land purchased therewith is impressed with trust 559
10. payment of taxes on property of deceased parent by daughter—sale of property to reimburse daughter 791
11. debtor of decedent, having no lien on land, not allowed to select particular tract or subject it to pay his debt merely by alleging existence of his debt 808
12. settlement of estate—order of sale of realty before order of reference to commissioner 839
13. property on which a vendor s lien exists can not be set apart to widow and infant children in lieu of certain exempted personal property 845

DEDICATION—
1. owner may dedicate ground to public use by any act which evidences his will without previous adverse user 126

DEDICATION—Continued. Page.
2. conduct of owners of land such as to show an implied dedication by them of certain land for street—acceptance of benefit of public improvements ... 430
DEEDS—See County Courts; Frauds, Statute of. 3—
1. delivery to third person for grantee is sufficient ... 101, 597
2. facts in particular case not sufficient to constitute delivery ... 101
3. deed executed in another State—sufficiency of seal of notary attached to certificate of acknowledgment ... 347
4. failure of clerk to index a deed properly recorded can not prejudice grantee ... 212
DEFEASIBLE FEE—See Devises, 1.
DELIVERY—
bond executed to perform judgment of court in suit for delivery of personal property is valid, although officer having order of delivery in his hands had no authority to execute it ... 127
DEPOSITIONS—See Practice in Civil Cases, 2—
1. clerk should include in record on appeal depositions used in the case, although not noted as filed ... 65
2. of witness living within twenty miles of place of trial—witness presumed to be unable from infirmity to attend court ... 238
3. a deputy clerk has no authority to take depositions under the provision of the Civil Code authorizing a clerk to do so ... 368
4. suppressed in certain case because taken during term time—continuance not allowed for retaking of them ... 651
5. objection to reading of deposition comes too late if made for first time in appellate court ... 572
6. depositions of a defendant, delaying to take them until the term began, suppressed in certain case—defendant not entitled to a continuance to retake depositions ... 573
7. defendant's exceptions to deposition erroneously overruled—defendant having taken deposition of same witness not prejudiced by such error ... 845
DESCENT AND DISTRIBUTION—
1. child of two slaves may inherit as heirs if parents were married according to customary matrimonial rites among slaves ... 308
2. executors in certain case had right to pay distributable share of a married woman in her father's estate to her alone, notwithstanding protest of her husband ... 488
3. stock of corporation owned by a wife—husband's rights therein on death of wife ... 770
4. bastards of same mother may inherit from her and from each other. 708
5. legitimate children can not inherit from their mother's illegitimate children, nor the illegitimate from the legitimate ... 708
6. devise by putative father to infant bastard—death of bastard during infancy unmarried—mother of bastard and her illegitimate children inherit the estate ... 708
7. real estate of bastard acquired by devise from putative father does not pass to father's heirs on death of bastard unmarried and without issue ... 708
DEVISES—See Limitation, 16, 17; Remainders—
1. construed to create fee defeasible upon death without children before time of distribution ... 97
2. devise with power of disposition carries fee ... 163
3. where devise has a power and also an interest the intention is the great object of inquiry ... 163
4. construction of devise to "wife and children" ... 197
5. devise to children of several persons, to be equally divided among them, means divided per capita ... 312
6. under certain devise a widow takes estate for life, with remainder to her son ... 384
7. devise of "what little property I have left after payment of my debts" a devise of estate to creditors ... 523
8. devise to one for life, with power of appointment as to remainder, does not vest fee simple in the life tenant ... 523
9. under certain devise testator's wife took absolute estate in one-third of testator's bank stock as well as other personalty ... 541
10. wife took one-third of husband's personalty estimated before certain sums were paid to certain devisees under the will ... 541

DEVISES—Continued. Page.
11. devise of rent to widow—widow entitled only to net rents after repairs are made 711
12. devise to widow for life, remainder to son, who was to use land for benefit of widow while she lived, construed 737
13. devise of land to trustee for use of L. and her infant son, L. to have right to live on land and one-fourth of proceeds thereof to go to the son—rights of L. and the son respectively as to the proceeds 750
14. construction of devise—dying without heirs 795
15. devise to three grandchildren, and if one die without issue his estate to go to survivors, and if all die without issue estate to go to testator's heirs—grandchildren take a defeasible fee 817

DISMISSAL WITHOUT PREJUDICE—
1. plaintiff has absolute right to demiss action without prejudice at any time before final submission 394
2. rules of Jefferson Circuit Court do not and can not require plaintiff to give notice of such motion 394
3. plaintiff may dismiss without prejudice after court has sustained motion by defendant for peremptory instruction and before such instruction is given 680

DISORDERLY HOUSE—See Bawdy House—
1. actual disturbance of peace not necessary to constitute offense of keeping disorderly house 176
2. one who controls house where persons assemble to gamble in futures keeps disorderly house 176

DISTRIBUTION—
distribution in this State of sum recovered by an administrator under foreign statute for loss of life of his intestate 367

DIVISION WALL—
1. tenant may recover damages resulting from tearing down division wall, although the landlord consented to it—instructions 542
2. fact that tenant was in arrears for rent constitutes no defense to such action 542
3. instruction as to damages recoverable by tenant in such case not misleading 542

DIVORCE—See Res Adjudicata, 2—
1. in actions for separation the relief may be granted for any cause in the discretion of the court 63
2. no ground for granting divorce from bed and board and alimony in particular case 64
3. husband bound for costs of wife, including attorney's fee, in action for divorce, no matter how suit results 64
4. husband liable for her costs unless wife in fault and has means .. 64
5. husband not entitled to divorce on account of lunacy of wife 86
6. evidence of adultery—credibility and good character of witness not shown 750
7. $300 per annum alimony for wife not excessive where husband's estate is worth $5,000 or $6,000 750
8. when husband may be required to pay all costs and wife's attorney's fee when divorce is granted to him 801
9. alimony allowed wife in certain case where the divorce was granted the husband 801
10. evidence sufficient to entitle husband to divorce on ground of adultery of wife 878

DOGS—
1. owner may maintain action for the killing of his dog without showing a compliance with act of May 7, 1886 448
2. a dog is property independently of the act of 1886 448

DOWER—See Assignment for Benefit of Creditors, 5—
1. wife not entitled to dower in land sold to satisfy lien created by a mortgage in which she united 229
2. right of widow to dower in land in which husband had only reversionary interest, but not possession 349
3. wife not entitled to dower in land in which her husband had a remainder interest, subject to a life estate of his mother, where he died before his mother 384
4. deed executed by wife alone to trustee conveys her potential right of dower in land previously conveyed by the husband to the trustee for benefit of creditors 673

DOWER—Continued. Page.
5. widow entitled to dower in land of husband which had been sold by the husband's assignee under an order of court ... 707
DYING DECLARATIONS—See Confessions, 2, 3—
1. consciousness of impending death by deceased at time of making statement may be inferred from the surrounding circumstances .. 323
2. certain statement competent as a dying declaration ... 502
EJECTMENT—See Burden of Proof, 3, 6; Pleadings, 54—
1. finding of jury in ejectment in particular case not disturbed ... 42
2. petition must describe land so it may be identified ... 154
3. defendant by asserting claim to land does not assume burden of proving it ... 154
4. failure to deny ownership of plaintiff's ancestor or plaintiff's heirship—burden of proof ... 154
5. sufficiency of description of land claimed in certain petition ... 635
6. if plaintiff proves he is entitled to any part of land sued for judgment for defendant is erroneous ... 765
ELECTION—
1. one alleging both facts can not be compelled to elect whether he will charge that certain stipulation was omitted from contract by fraud or by mistake ... 447
2. plaintiff properly required to elect whether he would prosecute action for contract price or upon quantum meruit ... 158
ELECTIONS—See Constitutional Law, 1, 2—
1. subscription by city in aid of railroad—when receiving of illegal votes by officers of election renders election void ... 13
2. presumed that majority of legal votes were in favor of railroad tax when plaintiff contesting election does not allege the contrary. 13
3. allegation that "large number of votes were bribed" not equivalent to allegation that majority were bribed ... 13
4. allegation that a majority "were not unbribed" not statement that majority were bribed ... 13
5. law forbids sale or gift of intoxicating liquors during any part of the twenty four hours of the day on which an election is held ... 411
6. failure of officers of election to take oath—effect on vote of precinct ... 504
7. notice of contest—must be so definite as to apprise on opponent of grounds of contest ... 504
8. defects in notice of contest waived in certain case ... 504
9. weight of judgment of chancellor in contested election case ... 504
10. allegation that quorum of council was present at time of election and that plaintiff received a majority of votes, sufficient to show prima facie right to office ... 870
11. where the time for holding an election is fixed by law a notice of election not necessary ... 118
EMINENT DOMAIN—See Estoppel, 2; Mandamus, 1; Railroad, 28—
1. measure of damages for land taken as right of way of railroad 7
2. cost to railroad to secure any other than the way taken not an element to be considered in measuring damages ... 7
3. authority by legislature for railroad to use a county road for its roadbed not presumed in the absence of clearly expressed intent to that effect ... 734
EQUITABLE ASSIGNMENT—
1. of debt or chose in action may be by parol—no particular form necessary ... 602
2. equitable assignment of rents by parol ... 602
EQUITY—
when issue of out of chancery for trial by jury must be granted by chancellor ... 497
ESTATE TAIL—See Conveyances, 8.
ESTATE UPON CONDITIONS—
1. upon condition broken grantee must re enter to defeat estate ... 272
2. right to recover rents after condition broken ... 272
ESTOPPEL—See Arbitration and Award, 2; Attachment, 13; Jurisdiction, 6. Execution, 9; Landlord and Tenant, 3, 15, 30; Partnership, 13—
1. can not be relied on unless pleaded ... 125
2. married woman estopped to deny validity of condemnation proceedings ... 126

ESTOPPEL—Continued. Page.
3. mortgagee who purchased at sale made to enforce his lien estopped to claim a part of mortgaged land which mortgagor had conveyed to another with his consent and which was excluded from sale, although included in commissioner's deed 142
4. sale of land at auction by decedent's heirs—one heir estopped to claim many years thereafter damages from other heirs on ground that land sold was his and not decedent's 246
EXAMINING COURT—
power to change charge in warrant 493
EXCEPTIONS—See Appeals, 9; Bills of Exceptions.
EXECUTIONS—See Limitation, 15—
1. levy on personal property owned jointly—how lien created 31
2. promise of joint owner in possession to sheriff to take care of personal property binding 31
3. writ of fi. fa. binds estate of defendant from time it is delivered to officer to execute 333
4. such writ creates lien on personalty in defendant's possession at time of delivery of writ to officer, although another claims property under a fraudulent purchase 353
5. execution is valid, although it was issued upon payment of jury fee by sheriff, rather than by successful party 493
6. property of railroad subject to sale under execution 494
7. levy of execution on personalty owned jointly by defendant and other—effect of 399
8. officer holding execution can not sell the property in such case—lien must be enforced by action in equity 399
9. but if officer sell such property by execution—plaintiff's order, the latter is estopped to deny officer's right to sell in action against sale by officer passes no title 399
10. sale of land under execution without any previous appraisement void 719
11. where owner remained in possession for eight years, and execution was lost and never returned, purchaser at sale will be allowed lien on land for sum paid by him 719
EXECUTION SALES—
purchaser at judicial sale subject to prior mortgage lien is estopped to question validity of such prior lien 753
EXECUTORS AND ADMINISTRATORS—See Husband and Wife, 7; Married Women, 5—
1. marriage of executrix terminates her authority as such eo instanti, 324
2. duties of certain executrix were altogether executorial in nature and terminated by her marriage 324
3. administrator appointed in this Sttate not allowed costs of defending suit in another State to which he was no party, and which was brought against administrator of decedent appointed in such State 482
4. liability of one executor for wrongful acts of joint executor 710
5. when limitation begins to run where executor holds fund as trustee for devisee 710
6. settlement of estate—irregular partition of lands—devisee estopped to attack settlement or regularity of partition 711
7. administrator may purchase realty of defendant in execution sold to satisfy judgment obtained for decedent's estate—purchase being for benefit of the estate 831
8. such administrator obtaining sheriff's deed for land so purchased may maintain action to recover its possession 831
9. sheriff's deed to plaintiff as "administrator"—term "administrator" merely descriptive of grantee 831
10. sureties of personal representative not liable for rents received by him which accrued after death of landlord because representative had no authority to collect such rents 780
11. after settling estate executor chargeable as trustee with interest on funds in particular case 55
12. when duties as executor cease and as trustee begin 55
13. an administrator, with the will annexed, having advanced money to pay debts of testator, entitled to be subrogated to his land 68
14. personal representative having agreed to serve without compensation not entitled to claim commissions 68

EXEMPTIONS— Page.
1. may be sold by debtor without regard to claims of his creditors... 30
2. debtor entitled to $40 for each member of family where he has not on hand exempted provisions 751
3. right to such exemption not affected by fact that the children have property 751

EXPERT EVIDENCE—
1. expert evidence concerning laws of force and motion not admissible to prove how a person having self control and power of voluntary action would fall from a car in motion 748
2. certain witness not qualified to express expert opinion of the question 748

EVIDENCE—See Adverse Possession, 8; Appeals, 9; Banks, 8; Confessions; Contracts, 7; Criminal Law, 5; Expert Evidence; Depositions; Decedents' Estates, 1; Divorce, 6. False Swearing, 2; Libel, 2, 3; Partnership, 3, 5; Municipal Corporations, 17; Sales of Personal Property, 5, 6, 7; Street Railways, 4; Tax Collector, 4—
1. statement of employe of railroad ten minutes after certain accident a part of the res gestæ and competent 17
2. contradiction of witnesses—when allowed 29
3. oral evidence not competent to show that unconditional promissory note was to be payable only on a certain condition 125
4. of absent witnesses upon trial for murder was material, and it was error to refuse continuance 149
5. part of a conversation having been brought out by defendant, competent for plaintiff to prove all that was said 185
6. expression of injured person a few seconds after accident part of res gestæ 185
7. writing competent evidence as to what contract was, although not signed by either party 207
8. not error to allow juror to interrogate witness, although case had been submitted 208
9. deed itself determines grantor's intention—parol evidence to vary effect of words in deed not admissible 241
10. letter from husband to wife incompetent evidence against husband. 251
11. record of trial, in which perjury is charged to have been committed, competent evidence against one on trial for such perjury 262
12. reputation for veracity of an absent witness for defendant, whose deposition is used, may be impeached by Commonwealth 281
13. stockholder in corporation not to testify for corporation concerning transaction with a deceased person 302
14. defendant testifying as to transaction with his decedent, plaintiff may also testify concerning same matter 302
15. all that was said during a game of cards, ending in a homicide, by all engaged in it competent as part of the res gestæ on trial for murder 321
16. admission of what was said by son of deceased at time of homicide not prejudicial to accused in certain case 321
17. what occurred at a different game of cards, with which accused had no connection, incompetent 321
18. certain evidence concerning the reputation of a witness competent, 321
19. statement of witness, who admits that he was indicted for perjury, explaining origin of indictment, competent in certain case, 342
20. statements of relatives of accused, not made in his presence, not competent against him 342
21. stockholder of corporation not allowed to testify for it as to a transaction with one who is dead when evidence is offered 364
22. but such evidence is competent when representative of decedent, who was present at time of transaction, first testifies concerning it, 364
23. reputation of witnesses for defendant in criminal case may be impeached, although their evidence is immaterial 396
24. evidence of bad reputation of witness for veracity two years before time of trial competent 396
25. proof that ties were sawed off after accident competent to prove neglect of railroad in allowing ties to project too far in certain case, 445
26. exclusion of question by court not reviewable on appeal unless avowal of expected answer is made 474
27. exclusion of certain conversation had in testator's presence not prejudicial to contestants in certain case 474

EVIDENCE—Continued. Page.
28. evidence incompetent which seeks to contradict statement of witness as to a conversation with a defendant on a collateral matter, 552
29. opinions of one's neighbors as to his insanity competent . . . 562
30. evidence of statements made to a defendant as to slanderous remarks made by deceased about the defendant's family competent in certain case . . . 562
31. delivery of deed by grantor to attorney for grantee—attorney competent witness for grantee after grantor's death . . . 597
32. evidence being admitted without objection, too late to insist on appeal that it ought not to be considered . . . 606
33. two passengers on train traveling together and ejected from train at same time—what conductor said to each part of res gestæ as to the ejection of other . . . 607
34. witness can not be contradicted by other evidence as to distinct collateral matter brought out on cross-examination . . . 607
35. payee of note not allowed to state consideration received by deceased maker—where "no consideration" is pleaded by maker's executor . . . 610
36. such evidence not prejudicial in a particular case . . . 610
37. exclamations of bystanders at time of homicide, who seemed to be acting in concert with defendant, competent . . . 659
38. one serving in penitentiary a competent witness—when conviction of crime renders one infamous . . . 660
39. evidence concerning contents of certain note alleged to be from accused on trial for murder to his co-conspirators incompetent in certain case . . . 661
40. evidence of statement made by Commonwealth's witness to a third party, not in presence of accused, incompetent . . . 661
41. without avowal of expected answer exclusion of question to witness not considered on appeal . . . 686
42. admission of evidence concerning rule of railroad requiring brakeman to use coupling stick not prejudicial in certain case . . . 686
43. when court may permit introduction of evidence in a criminal case out of the usual order . . . 691
44. statement of one not made in presence of defendant or his alleged co-conspirators incompetent against defendant . . . 694
45. evidence of what occurred at a time prior to the homicide, and when accused was not present, incompetent . . . 694
46. defendant jointly indicted with others for murder not allowed to prove good character of the other . . . 694
47. payee of note can not testify in favor of one to whom he has transferred it as collateral security as to transaction with deceased maker of it . . . 783
48. withdrawal by court of incompetent evidence from jury—prejudicial error . . . 782
49. conspiracy to murder—evidence of one not a conspirator who was near scene of crime competent . . . 798
50. evidence of meetings of alleged conspirators being admitted, proof that they had certain party bound over to keep the peace competent to show lawful purpose of their meetings . . . 798
51. letter not written by or in presence of defendant not competent on trial for false swearing . . . 803
52. false statement in affidavit for continuance—indictment for false swearing—certain amended petition filed in civil case by said accused not competent evidence . . . 803
53. killing of stock on railroad—evidence of certain witness that train could be stopped in certain distance competent . . . 815
54. statements made by persons committing murder not in presence of defendant incompetent against him, no conspiracy to murder being established . . . 820
55. parol evidence of a judgment not admissible—judgment itself being best evidence . . . 872

FALSE ARREST—
what false arrest and imprisonment consists of . . . 845

FALSE SWEARING—See Criminal Law, 52—
1. to constitute offense oath must be knowingly and willfully false . . . 182
2. persons who wrote false affidavit made by defendant having stated he did not write it as directed should have been permitted to tell what defendant directed him to write . . . 182

FELLOW SERVANTS—See Master and Servant, 9, 10, 13— Page.
1. master not liable for injury of one servant by gross neglect of fellow servant 600
2. brakeman not fellow servant of engineer or fireman 600
FEME SOLE—See Husband and Wife, 11.
FINAL ORDER—See Judgments, 16; Appeals, 8—
1. judgments dissolving injunction final, although it did not dismiss counterclaim filed with answer 258
2. order enjoining defendant "until further order of court" from prosecuting an action in another State, and requiring him to dismiss such action, a final order from which right of appeal exists. 718
3. order overruling demurrer to answer not final unless followed by a judgment disposing of the case 782
FORFEITURE OF BAIL BOND—See Bail.
FORGERY—
1. alteration of figures or any material part of a check on a bank a forgery 264
2. evidence sufficient to require submission of defendant's guilt or innocence to jury 264
FORMER JEOPARDY—
plea of not sustained by proof of one mistrial and subsequent return of new indictment because original one was defective 838
FRAUD—See Attachment, 12; Conveyances, 13; Corporations, 1, 2, 12, 13; Mechanics' Lien, 1; Principal and Agent, 2; Roads, 12—
1. allegation of exchange of land obtained by fraud in particular case not sustained 85
2. contract for sale of mineral rights in land rescinded for fraud ... 105
3. court properly refused to allow recovery on note executed for worthless stock in hedge fence company, contract being tainted with fraud, and plaintiff having no title to certificates of stock, tender back was not necessary 125
FRAUD, STATUTE OF—See Husband and Wife, 19; Master and Servant, 6; Partnership, 11; Vendor and Vendee, 13, 14, 15—
1. verbal agreement to convey land to a person, in consideration of his supporting another for life, can not be enforced, and in action to recover the land the board and improvements set off against rental value 148
2. receipt for purchase price describing land sufficient compliance with statute 161
3. deed executed pursuant to previous verbal contract does not overreach intervening attachment lien 161
4. lien of parol purchaser not in possession for purchase price paid by him is subordinate to attachment lien 161
5. parol agreement to buy of another a tract of land when he should obtain patent is within statute 165
6. promise to answer for debt of another, who still remains bound, within statute if supported by no new consideration 239
7. verbal agreement between owners of adjoining lands, fixing disputed division line, which has been executed, not within statute. 461
8. verbal agreement of purchaser at judicial sale to convey to another, if he was paid purchase price with interest, within statute 514
9. contract for sale of standing trees, in contemplation of their immediate removal from soil, not within statute 541
10. contract for sale of standing trees, in contemplation of their immediate removal from soil, not within statute 570
11. parol sale of five years' lease of real estate within statute 627
12. parol division of land between life tenant and widow of remainderman void 737
13. verbal partition of land between joint tenant within statute 761
FRAUDULENT CONVEYANCES—See Homesteads, 9, 10—
1. in suit to set aside creditor obtaining attachment has prior lien .. 174
2. in suit to set aside error to adjudge that there has been an assignment by operation of law 174
3. certain conveyance to a wife at instance of her husband not fraudulent as to husband's creditors, the wife's equity being superior to that of the creditors 425
4. evidence sufficient to show that insolvent debtor paid consideration for the land conveyed to his son-in law 699
FRAUDULENT REPRESENTATIONS—See Principal and Agent, 2.
FUTURES—See Disorderly House, 2.

Page.
GAMING—See Disorderly House, 2.
GARNISHMENT—See Attachments, 17, 18; Attorney and Client, 1.
GIFTS—
evidence sufficient to establish a gift in a certain case 368
GOOD WILL—See Contracts, 1, 2.
GRAND JURY—
consists of twelve persons since adoption of new Constitution 179
GUARANTY—See Consideration, 1.
GUARDIAN AND WARD—See Sale of Infants' Real Estate, 1, 3, 12; Parent and Child, 1—
1. guardian of infant woman ceased to be such upon her marriage .. 237
2. guardian of husband becomes also guardian of his wife upon marriage 237
3. neither guardian nor husband of a married woman can encumber her land for her support and maintenance 237
4. purchase of ward's land by guardian at judicial sale constructively fraudulent 305
5. vendees for value from guardian, having no notice of fraudulent purchase of guardian, considered innocent purchasers for valuable consideration 305
6. venue of action by ward against guardian for settlements of accounts 332
7. action against guardian alone to surcharge settlements need not allege that bond of guardian was approved by county court .. 334
8. such action, being in nature of action for relief from fraud, not barred if brought within five years from discovery of fraud 334
9. objection to allegation that fraud was not discovered "until shortly before institution of the action" as vague, waived by failure to move to make it more specific 334
10. liability of guardian for interest 334
11. stepfather not allowed compensation for stepchild's support 335
12. manner of settling certain guardian's accounts determined 741
13. settlement of guardian's accounts by county court—ward must appeal to circuit court if dissatisfied 749
14. ward being party to settlement of guardian's accounts by county court must appeal if dissatisfied—he can not sue in circuit court to surcharge accounts without appealing 777
15. power of foreign guardian to sue in this State 847
16. guardian who purchased ward's land at public sale presumed to do so for benefit of ward 855
HOMESTEAD—See Husband and Wife, 3; Assignment for Benefit of Creditors, 9—
1. land occupied as a homestead, but neither paid for nor occupied as such until after creation of debts, is subject to the debts 47
2. debtor may pass to wife or child by will 180
3. debtor entitled to homestead in land devised to him against debts created either before or after he acquired title 180
4. where a widow accepts provisions of will devising the homestead neither she nor the testator's children can claim a homestead right 197
5. money set apart to a debtor in lieu of his homestead can not be subjected by creditors who consented to its payment to him 208
6. old dwelling house occupied as a homestead torn down—new one erected on its site—right of homestead therein against antecedent creditor 278
7. abandonment—fixed intent to return not shown 288
8. right to in two tracts that are connected by passway and used as one farm 429
9. voluntary conveyance by an insolvent debtor of homestead not fraudulent as to creditors 489
10. if land conveyed is indivisible and worth more than $1,000 creditors may have whole sold and receive proceeds in excess of $1,000, 489
11. mortgage of by husband without wife joining in deed—other creditors of husband can not object to it because of failure of wife to unite in it 708
12. homestead may be subjected to satisfy lien for street improvement, 886
13. abandonment of wife by husband pending suit to enforce such lien—judgment enforcing lien without notice to wife—wife allowed to redeem after expiration of statutory period 886

HUSBAND AND WIFE—See Contracts, 11, 12; Fraudulent Conveyances, 3; Guardian and Ward, 1, 2, 3; Homestead, 13; Landlord and Tenant, 10, 11, 12; Married Women, 8, 9; Mortgages, 15— Page.
1. certain postnuptial contract between husband and wife created lien enforcible against only such land as husband owned at time of his death 21
2. when husband agrees that wife shall hold her personal property as her separate estate agreement will be upheld against husband's creditors if not fraudulently made 29
3. payment by wife of lien debt on husband's homestead—agreement by husband that she should have lien—assignment of notes to wife in discharge of lien 29
4. husband by marriage becomes absolute owner of all personal estate in possession of his wife 237
5. duty of husband to support wife, and he can not encumber her land for that purpose 287
6. a father may make a reasonable advancement to his child, and this is no fraud on the marital rights of wife 353
7. payment by executors of her distributable share in father's estate to a wife alone, notwithstanding protest of insolvent husband, valid 488
8. improvement of wife's property with husband's money—evidence. 572
9. antenuptial contract construed—wife acquired no marital rights in husband's property by marriage 725
10. wife having no rights in husband's property has no interest entitling her to appeal from an order probating his will 725
11. right of wife to decree empowering her to trade as feme sole where husband's creditors object thereto 751
12. reasonable advancement by father to a son not a fraud on wife's marital rights 755
13. stock of corporation owned by wife—husband's rights therein. 770
14. such stock wife's separate estate only when for "use" of wife as shown by certificate or transfer book 770
15. conveyance of land by wife to husband valid only when free from fraud or coercion 774
16. improvement of wife's land by husband—no contract by wife to reimburse husband implied 862
17. express promise of wife to pay husband for improvement or for paying off a lien on her land not ordinarily enforced as a charge on the land 862
18. purchase of land by husband in name of wife—presumed to be an advancement or provision for her 862
19. parol agreement by wife to charge her land to pay husband for improvement or for satisfying a lien upon it within statute of frauds—when without consideration 862
20. sale of wife's land by husband and wife by title bond—death of wife before making deed—recovery of land by heirs of wife—liability of husband to purchaser for improvements put on land 879

INDICTMENT—See Local Option, 6, 10—
1. found by grand jury of twelve persons since adoption of new Constitution is valid 179
2. for violation of local option law closely following language of statute sufficient, although incorrect date of enactment of statute is averred 239
3. no arrest of judgment if indictment avers commission of a public offense within jurisdiction of the court 239
4. certain indictment for obtaining the signature of one to a paper with intent to commit a fraud insufficient 249
5. time alleged in indictment for perjury immaterial 262
6. indictment for manslaughter, alleged to have been committed "unlawfully, willfully, maliciously, feloniously, in a sudden affray," etc., sufficient 284
7. certain indictment for willful and malicious shooting and wounding, etc., sufficient—omission of word "willful" in accusatory part of indictment 292
8. indictment against county judge for malfeasance in office too indefinite in certain case 568
9. for feloniously, etc., in the nighttime, breaking, etc., into a dwelling with intent to commit a felony—particular felony defendant intended to commit need not be alleged 569

INDICTMENT—Continued. Page.
10. indictment for using false scales—necessary averments ... 654
11. for obtaining money by false statement sufficient in certain case . 619
12. bad on demurrer unless endorsed "a true bill" when returned into court ... 662
13. for rape must, under the statute, allege offense was done feloniously ... 856
INFANTS—See Railroads, 8, 47—
1. sale of real property of infants by their father can not be confirmed so as to pass title by subsequent order of court of equity ... 41
2. title of infants can pass only by sale ordered by a court ... 41
INJUNCTIONS—See Appeals, 8; Nuisance, 2, 3; Passway—
1. to prevent defendant from maintaining dam obstructing spring belonging to city ... 108
2. an injunction dissolved on final judgment continued in effect where plaintiff supersedes the judgment and appeals ... 258
3. injunction dissolved on final judgment—mode of reinstatement ... 258
4. when defendant, on dissolution of injunction, may recover on the injunction bond a reasonable attorney's fee ... 576
5. conjectural profits, which defendant might have made by use of land while he was enjoined from using it, too remote and uncertain to be recovered as damages on dissolution of injunction ... 576
INSANITY—See Evidence, 29; Assessor.
INSTRUCTIONS—See Appeals, 33, 48; Criminal Law, 1, 10, 30, 40; Master and Servant, 7, 18, 22; Neglect, 36; Practice in Civil Cases, 1; Prejudicial Error, 2, 3; Wills, 3—
1. instruction directing jury's attention to a single fact proven improper ... 29
2. if whole of instructions embody law of case, one instruction's being abstract will not authorize a reversal ... 31
3. peremptory instructions to find for defendant proper where plaintiff fails to reply to plea of contributory negligence ... 49
4. uncontradicted fact properly assumed in instruction ... 185
5. instruction based on evidence excluded without objection was properly refused ... 206
6. instruction as to punitive damages was not prejudicial, it being manifest nothing was allowed by the jury on that account ... 208
7. injury to passenger alighting from street railway—instructions as to neglect proper ... 209
8. instruction that party could recover no damages for increased suffering due to disobedience of physician's orders improper ... 209
9. malicious cutting with intent to kill—when instruction as to cutting in sudden heat and passion is authorized ... 247
10. instructions qualifying defendant's right of self defense not authorized by any evidence ... 261
11. use of words if defendant "brought on the difficulty," etc., in such instruction erroneous—words being of too general a character ... 261
12. on trial for murder—as to effect of threats and assaults of deceased on accused prior to the homicide ... 285
13. concerning an issue not made by pleadings properly refused ... 302
14. instructions based on hypothesis which is sustained by no evidence erroneous ... 304
15. instructions concerning self defense, in event accused "brought on" difficulty with deceased and "sought his life" ... 281
16. certain instruction concerning self defense not prejudicial ... 281
17. error to require jury to believe that danger of accused was real before they may acquit on plea of self defense one accused of murder ... 328
18. one has right to kill in self-defense where danger was apparent to him, and not necessarily real ... 328
19. jury not required to believe beyond reasonable doubt that accused, after provoking difficulty, abandoned difficulty in good faith before killing deceased in order to allow him benefit of plea of self-defense ... 328
20. definition of malice aforethought as a premeditation to do the act without lawful excuse, however suddenly the premeditation is formed, not erroneous ... 344
21. certain definition of "considerable provocation" not erroneous ... 344

INSTRUCTIONS—Continued. Page.
22. instruction limiting defendant's right to plea of self-defense, in case he "brought on the conflict by attacking deceased with a pistol," not erroneous in certain case ... 356
23. on trial for statutory criminal offense instructions need not follow language of statute in totidem verbis ... 360
24. right of self defense of officer seeking to arrest party for misdemeanor - right of party being arrested to plea of self-defense ... 408
25. extreme length of instructions, otherwise proper, no ground for setting aside verdict ... 445
26. instruction concerning right of plea of self-defense if accused "brought on" difficulty not prejudicial in certain case ... 694
27. particular instruction as to aider and abettor of murderer erroneous ... 694
28. use of certain words as expressing idea of aiding and abetting condemned as misleading and erroneous ... 694
29. proper instruction as to contributory neglect having been given—railroad company not entitled to certain additional instruction asked for by it ... 715
30. instruction concerning voluntary manslaughter more favorable than defendant was entitled to ... 786
31. in civil cases party can not complain of failure of court to give an instruction not asked for by him ... 752
32. instruction concerning aider and abettor not erroneous—use of word "assent" in instruction not prejudicial ... 797
33. conspiracy to murder - right of one to use force to rescue a brother from abductors—instructions ... 798
34. instruction that brother might devise peaceable means to prevent abduction of a brother erroneous ... 798
35. statement of certain defendant were equivalent to a confession, and reference in instructions to such "confession" was not prejudicial ... 835
36. plaintiff not prejudiced by erroneous instruction where defendant was entitled to a peremptory instruction ... 844
37. instruction that burden of proof is on one of the parties never proper ... 495
38. error to instruct that plaintiff is not required to prove assault complained of by two witnesses ... 495

INSURANCE—See Burden of Proof, 9—
1. tobacco burned in warehouse, purchaser entitled to pro rata part of insurance ... 36
2. a contract of life insurance is personal contract and can not be made without consent of insured ... 125
3. insured not bound by false answers written by agent in application, although the agent is a mere soliciting agent with restricted powers, which appear in the application ... 208
4. the failure of the insured to state the existence of the smaller of two mortgages did not invalidate policy, as agent, in writing answers, failed to state existence of the mortgage of which he was told ... 208
5. fire policy expiring on May 2, 1892—allegation of fire loss on "— day of ——, 1892," bad on demurrer ... 502
6. wearing apparel insured "while contained" in certain house—effect of removal of apparel from such house ... 441
7. accident policy to be liberally construed in favor of insured ... 469
8. accident through "external, violent and accidental means"—accident may be internal if means producing it is external ... 469
9. such policy covers accident where piece of beefsteak is lodged in windpipe in act of swallowing ... 469
10. insured not bound by settlement procured by fraud of company ... 540
11. failure of applicant for fire insurance to disclose encumbrances or facts material to risk regarded as a concealment, whether inquiry was made of him or not ... 574
12. accident insurance—Burden of proof on plaintiff to show that death resulted from an accident ... 667
13. insured found in river drowned with no evidence of suicide—question of cause of death—whether accidental, for jury—peremptory instruction erroneous ... 667

INSURANCE—Continued. Page.
14. defense that insured was drunk when accident happened—proof that he was drunk when last seen, without evidence as to exact time of accident, not sufficient to authorize peremptory instruction 667
INTEREST—See Banks, 1, 2; Corporations, 11; Decedents' Estates, 2; Judgments, 3, 4, 5; Taxation, 10—
1. on claim for street improvements properly refused 126
2. contractor entitled to interest on amounts overpaid subcontractors. 156
3. contract by vendor to pay vendee 10 per cent. interest for money advanced in consideration of reconveyance by vendee not usurious 435
4. but contract to pay 10 per cent. on sums thereafter to be advanced was usurious 435
5. note consideration for land, bearing 8 per cent. interest, bears 8 per cent. only to its maturity 607
6. obligor on note, who agreed to pay 10 per cent. interest on certain note, bound by agreement—other joint obligors bound to pay only legal rate 780
7. amount due under ambiguous mortgage bears interest from date for payment fixed by mortgage 785
INTERPRETATION OF STATUTES—
1. particular words used in a statute, leading to an absurdity, disregarded where legislative intent is manifest 578
2. word width used in statute read as if word depth was used 578
INTOXICATING LIQUORS—See Local Option—
1. can not be given away or sold during any part of the twenty-four hours of the day on which an election is held under the act of 1891 2 411
2. license to sell as a druggist—what notice of application therefor must be given 567
3. license to sell as a druggist ought not to be granted to one not a druggist in good faith 567
4. when such license to sell can be granted one who has been selling without the requisite license 567
JEFFERSON COURT OF COMMON PLEAS—See Courts, 3, 4.
JOINDER OF ACTIONS—
action against railroad for unlawful entry upon and hauling over land may be joined with action for damages against the said railroad caused by filling a ditch and obstructing natural flow of water over land 238
JOINDER OF PARTIES—See Carriers, 9.
JOINT TENANT—See Frauds, Statute of, 7, 13; Sales of Infants' Real Estate, 11—
1. parties claiming land under joint tenants, between whom no partition has ever been made, have no cause of action, the one against the other, for any specific part of the land 761
2. where one joint tenant encloses part of land jointly owned presumption is that his holding is friendly and not adverse to joint title 706
3. partition of joint estate—enclosed land assigned to tenant holding it 706
JOINT OWNERS—See Partition—
when liable for purchase price in proportion to interest in land only. 231
JUDGES—
act allowing city to give additional compensation to judge of chancery court of Commonwealth not unconstitutional 528
JUDGMENTS—See Champerty, 2; Claim and Delivery, 3; Mandate, 2; Vendor and Vendee, 6, 16—
1. on hearing of motion for temporary injunction error to dismiss petition to vacate a judgment, no preparation of case on merits having been made 30
2. judgment rendered on defective constructive service of process is void 70
3. judgment enforcible by execution or like final process only bears interest 94
4. judgment for taxes against water company does not bear interest. 94
5. discussion of judgments bearing interest 94

JUDGMENTS—Continued. Page.
6. judgment requiring removal of obstructions which had been affirmed on appeal should have been specifically enforced, and plaintiff not required to accept money in lieu of removal of obstructions 114
7. appellate court will not award mandamus to compel lower court to enforce judgment unless there has been an absolute refusal to enforce 114
8. judgments can not be set-off where third parties will be prejudiced, 126
9. limitation as to judgment runs from return of former execution.. 127
10. judgment not void because summons served by officer having name similar to plaintiff's 154
11. motion to vacate judgment because rendered prematurely must be made on or before third day of next succeeding term 332
12. default judgment not to be set aside on motion of defendant who offers with motion no defense 333
13. error to set aside at a subsequent term a judgment awarding compound interest against a guardian and sureties 333
14. erroneous judgment can not be set aside at a subsequent term .. 333
15. judgment containing clerical misprision should not be set aside at subsequent term, but misprision may be corrected. 333
16. judgment filing an action away for want of prosecution not a final order or a bar to a subsequent action on same cause 389
17. defective affidavit for warning order—collateral attack of judgment based thereon 510
18. judgment for sale of land to satisfy vendor's lien must describe land so as to identify it 556
19 judgment describing such land as that "set out and described in the petition" erroneous 556
20. personal judgment not prayed for erroneous but not void 608
21. judgment notwithstanding verdict—when proper under the Civil Code 610
22. petition to vacate judgment must set out valid defense to action.. 827
23. judgment not vacated on ground of fraud—no fraud in obtaining it being shown 827
JUDICIAL ACTS—See Mandamus, 1.
JUDICIAL NOTICE—See Corporations, 14—
Bell Circuit Court takes judicial notice that Pineville is in Bell county 542
JUDICIAL SALES—See Estoppel, 3; Frauds, Statute of, 8—
1. where commissioner refused to accept sureties he had agreed to accept, without giving defendant time to procure other sureties, a second sale was properly set aside 107
2. where debtor owned one-seventh interest in each of several indivisible lots, commissioner should have been required to offer to sell less portion than the one-seventh interest 133
3. error to assume that lot was not divisible 137
4. purchase of land by defendant's agent and attorney—evidence 217
5. advertisement of sale properly proven by commissioner ... 239
6. survey of lands being necessary to identify lands, order of sale before survey premature 242
7. each tract of land to be sold, if susceptible of advantageous division, ought to be divided 242
8. mistake of purchaser as to quantity of land sold—when sale will be set aside therefor 558
9. purchaser at judicial sale in certain case not thereby estopped to deny validity of order of sale. 560
10. sale of property to satisfy last of three unpaid bonds of purchaser at judicial sale erroneous—property should be sold to satisfy all three bonds 730
JURISDICTION OF APPELLATE COURTS—
suit for $2,500—counterclaim for $1,400 - judgment for plaintiff for $90, whole counterclaim being denied - reversal by Superior Court on appeal by defendant—plaintiff not entitled to appeal to Court of Appeals as a matter of right, no cross appeal having been taken by him 816

JURISDICTION—See Appeals, 26; Assignments by Operation of Law, 9; Courts, 8; Infants; Landlord and Tenant, 14, 15, 16; Justice of the Peace, 1— Page.
1. indictment for murder transferred to another county by change of venue—brought back for trial to county in which it was found on motion of defendant—latter court has jurisdiction of the case. 265
2. courts of equity have no jurisdiction to enforce tax liens existing in favor of a county on the property of its citizens... 397
3. Louisville City Court alone has jurisdiction to try one committing a certain nuisance within the city, for which the city ordinance prescribes as a punishment a fine not exceeding $20, although the same offense at common law was punishable in a different mode 446
4. transitory action in quarterly court against one defendant served in county and other defendants—judgment in favor of defendant served in county—appealed to circuit court in which such defendant was not made appellee—neither circuit nor quarterly court had jurisdiction to render judgment against the other defendants, 574
5. settlement of decedent's estate—sale of land of heir for contribution—jurisdiction to order sale of land in another county 559
6. in action on attachment bond defendant estopped to claim bond is void because court in which he sued out attachment had no jurisdiction 606
7. transfer of indictment to another county by change of venue—court of county where offense was committed has no jurisdiction thereafter of subject-matter of indictment, and another indictment returned for same offense is void 637
8. authority of court to rent out land pending appeal from judgment concerning right of conflicting claimants to it 682

JURY—
1. special findings by not prejudicial in particular case 44
2. irregularities in selection or formation of—how to be shown to court 341
3. when court may order jurors for criminal case from an adjoining county 342
4. when court may appoint bailiffs to summon petit jurors 342
5. no evidence to show that officer summoning jury was influenced by a desire to secure a reward offered for conviction of accused... 344
6. when right to jury trial exists 497
7. issue out of chancery—when chancellor must grant 497
8. when right to jury trial exists—transfer to equity 702

JUSTICE OF THE PEACE—
summons against railroad corporation issued by justice of one district—served upon defendant in another district—case must be tried in district where summons was served 399

LACHES—See Estoppel, 4.

LANDLORD AND TENANT—See Division Wall, 1, 2, 3; Partnership, 8; Railroads, 67—
1. immaterial as between landlord and tenant in possession whether landlord has good title to tenement 339
2. possession of tenant for fifteen years makes landlord's title good against the world 339
3. where party in possession under void patent becomes tenant of owners of legal title and holds as such for more than fifteen years, during which time he purchases the undivided interest of one of his landlords, he is estopped thereafter to claim that his landlords had no title and they induced him to attorn to them by fraud 339
4. execution by tenant and joint owner of certain deed for part of leased land not a disclaimer of allegiance to his landlords 339
5. measure of damages for landlord's breach of contract 400
6. landlord must protect tenant against any paramount title 400
7. landlord has no right by his acts to destroy beneficial enjoyment of premises by tenants 400
8. jury can not determine amount of damages tenant suffered by reason of such acts of landlord without any evidence on the subject. 400
9. when certain term of 25 years ended 663
10. stipulation of lease giving vendors option to renew lease for another term of 25 years—time was of the essence of the contract and option had to be exercised on day old lease expired 663

LANDLORD AND TENANT—Continued. Page.
11. contract of landlord, a husband and wife, to take and pay for, at end of term, improvements put on premises by lessee not collateral to contract of lease and is binding on the wife ... 663
12. stipulation in such lease creating lien on premises leased—which belonged to the wife—to secure pay for such improvements, binding on both husband and wife ... 663
13. such stipulation equivalent to mortgage of premises to secure pay for the improvements ... 663
14. jurisdiction of court to rent land pending litigation between conflicting claimants ... 682
15. lessee of court's commissioner in such case is estopped to question authority of court to make the lease ... 682
16. even if court had no jurisdiction the real owner has a right to ratify the act of the court in making such lease ... 682
17. evidence in certain case shows a son occupied father's land as tenant and not as purchaser ... 690
18. assignment by tenant for one year of part of leased premises assignee may sue assignor for failure to deliver possession ... 783
19. refusal of landlord to consent to the assignment no defense for assignor's failure to deliver possession to assignee ... 783
20. assignor estopped by written assignment to plead parol agreement of assignee to obtain consent of landlord to assignment ... 783
21. junior lessee, taking possession of mineral land with notice of rights of prior lessee, liable to latter for damages done him ... 782
22. if junior lessee had actual notice of prior lease it is immaterial whether or not prior lease were recorded ... 782
23. lease for thirty years—nonuser of leased premises for fifteen or eighteen years—abandonment of lease ... 782
24. eviction by landlord—action to recover damages by tenant—instructions ... 812
25. what damages are too remote to consider in such action ... 812
26. liability of tenant for rent where he loses use of tenement through inevitable casualty—duty to repair ... 814
27. parties may rescind original contract of lease and make new one after injury to tenement ... 815
28. certain new contract of lease construed ... 815
29. proof that tenant was to pay "at the same rate of first contract" not sufficient to sustain allegation that tenant was to pay so much per acre for land cultivated ... 815
30. lease of kitchen furniture of hotel—tenant liable for articles he fails to return—evidence of value of such articles ... 816
31. purchase of such property by lessee—resale to lessor—rescission ... 816

LIBEL—
1. when criticisms of conduct of public officers by newspaper is libelous—instructions ... 412
2. charge that plaintiff had given poison to a wife to poison her husband, and that plaintiff was criminally intimate with the wife—evidence ... 877
3. proof of contents of a letter from the wife to plaintiff, never delivered to plaintiff but burned by the wife, incompetent ... 877
4. where libelous words are actionable per se special damages need not be alleged with particularity ... 877
5. punitive damages for libel may be awarded without proof of an intention to injure plaintiff ... 877
6. instruction as to damages not erroneous ... 877

LIENS—See Attachments, 4, 14; Frauds, Statute of, 3, 4; Husband and Wife, 17; Jurisdiction, 2; Married Women, 2, 3, Parties, 3—
1. recital in face of note that it is executed for money advanced maker to pay for house and lot on which payee is to have lien—no lien or equity on house thereby created ... 402
2. such note does not even create equitable lien as between parties to it ... 402
3. lien on house and lot acquired by attachment superior to subsequent mortgage lien acquired by payee of note ... 402
4. such mortgage lien does not by relation take effect as of day note was executed ... 402
5. one loaning money to life tenant to pay off liens on land created by testator, under whom life tenant claims, not substituted to rights of lien holder ... 523

6. judgment finding that party had not been induced to pay for land, on representation that certain lien thereon had been discharged, sustained by evidence 542
LIFE ESTATES—See Devisees, 8; Liens, 5; Mortgages, 8.
LIMITATION—See Guardian and Ward, 8; Partnership, 12; Taxation, 14; Vendor and Vendee, 5—
1. when party relying on plea of limitation must aver time when statute began to run and when this time may appear from pleading of plaintiff 28
2. bond of special commissioner—when right of action thereon accrued 28
3. owner of land by possession for more than fifteen years protected in particular case 83
4. courts will not correct mistakes in such cases after fifteen years 83
5. for injury by railroads to abutting property five years' limitation applies 95
6. a new cause of action set up by amended petition, limitation runs from filing amended petition 95
7. limitation as to judgment runs from return of first execution 127
8. action on parol contract for value of services rendered barred by lapse of five years 274
9. what character of acknowledgment or new promise will revive debt barred by limitation 400
10. will new promise revive a judgment barred by limitation? 400
11. mortgage by one to secure debt of another—fifteen years' statute of limitation applies 495
12. when statute begins to run where executor holds fund as trustee under the will 710
13. to action on implied warranty of title arising from partition between joint devisees does not begin to run until actual eviction by paramount title 821
14. plea of limitation good where suit on check was not instituted for more than seven years after execution of check 846
15. statute begins to run against purchaser of land at execution sale when time allowed defendant in execution to redeem expires 855
16. limitation did not begin to run against claim of negroes under a will until their actual freedom was attained in 1865, although the will directed that they be liberated in 1858 865
17. elapse of twenty years after freedom of slaves before institution of suit by them bars their action under a will 865
LIQUOR SELLING—
1. act of November 11, 1892, repeals privilege of distillers to sell without license under act of March, 1876 654
2. sale without license within six months prior to application for license—payment of increase tax does not exempt applicant from penalty already incurred by selling without license 654
LIS PENDENS—
action by executor to compel child to restore fund unlawfully obtained from deceased father does not create lis pendens lien on land purchased by child with fund so obtained 559
LOCAL OPTION—See Liquor Selling; Warrant of Arrest—
1. repeal of local option law as to a town by authority conferred by charter to license coffeehouses, etc 8
2. mandamus to compel comparing board of local option election to purge poll books 240
3. act of 1884, applicable to Hardin county, repealed by act of 1890 concerning said county 270
4. one act concerning unlawful sale of liquors may repeal another, although it prescribes no penalties for its violation 270
5. intent of legislature to repeal a former act by a subsequent one being plain, other acts of same legislature can not be sought to indicate a different intent 270
6. indictment for violation of local option law defective 270
7. act of 1888, applicable to Hardin county, repealed by act of 1890 concerning that county 297
8. one act concerning local option may repeal another, although it prosecutes no penalties for its violation 298
9. intent to repeal an act being evident, other acts of same legislature can not be sought to indicate a different intent 298
10. indictment for violation of local option law defective 298

LOCAL OPTION—Continued. Page.
11. shipment of liquor "C. O. D."—place of sale 332
12. act applicable to Fleming county did not become operative until certificate of examining board of result of election was recorded in office of county clerk 385
13. one can not be convicted of violating said act unless the evidence shows that said certificate was so recorded 385
14. certain act does not prescribe one penalty for physicians and another for other persons violating it—two offenses are denounced by it 466
15. one section of local option law not construed as limiting offenses denounced in preceding sections 466
16. local option law to be construed according to its plain intent 466
17. under Fleming county law druggist may fill prescription of physician for whisky 466
18. such prescription can be filled only once by druggist, however . 466
19. other than druggist can not, under said act, fill prescription for whisky of physician 466
20. where local option law is in effect party can not be indicted under general law for keeping a tippling house 495
21. act of 1884, applicable to Hardin county, not repealed by act of 1890 671
22. act of 1884 re-enacted by amendment to it of May, 1890 671

LOTTERIES—
1. grant of lottery privileges for Henry Academy expired by limitation 581
2. right of legislature to repeal grant of lottery privileges—impairment of obligation of contracts 581

LUNATICS—
liability of State for whole allowance to harmless, incurable lunatics who have been confined in and legally released from an asylum... 263

MANDATE—See New Trial, 3; Practice in Civil Cases, 11—
1. may issue immediately when judgment of conviction in criminal case is affirmed on appeal 255
2. mandate should direct proceedings consistent with opinion, and not for a new trial, where error is merely in form of judgment .. 812

MANDAMUS - See Appeals, 41, 42; Local Option, 2; Judgments, 7—
1. act of county judge in refusing writ of ad quod damnum was judicial act and mandamus did not lie 110
2. does not lie to compel county court to probate will where that court has heard testimony as to testator's residence and determined that it has no jurisdiction 130
3. mandamus will not issue to compel city to abate nuisance created by plaintiff seeking to abate it 400
4. from Court of Appeals, proper remedy to compel lower court to grant an appeal 718

MARRIAGE—
evidence necessary to prove marriage of two slaves ..... 308.

MARRIED WOMEN—See Conveyances, 10; Landlord and Tenant, 11, 12, 13; Mortgages, 14—
1. contract of sale of land by married woman void, and not specifically executed against her 1
2. vendee paying purchase money under contract allowed lien on land for amount paid where married women refuses to convey... 1
3. assignee of purchase money note executed by vendee allowed lien on married women's land in such case for sum actually paid for note 1
4. married woman estopped to deny validity of condemnation proceedings 126
5. authority of executrix terminates with her marriage 324
6. can make will only when authorized by statute 346
7. can not, by will, dispose of separate estate unless the estate was created by deed or devise 346
8. can not loan husband's money and take notes payable to her separate use, and make a will without husband's consent disposing of such notes 346
9. has no right to convert her own property into a separate estate against her husband's will so as to devise it by will and deprive him of his marital rights 346

MARRIED WOMEN—Continued. Page.
10. right to make will when so authorized by written antenuptial contract ... 581
11. executory sale of wife's land by husband and wife—devise by wife to executor with power to sell—sale by executor—specific execution of contract ... 658
12. note of married woman, executed to pay for share of stock of corporation for her own benefit, binding on her separate estate, she having no other property ... 812
MASTER AND SERVANT—See Contracts, 20; Corporations, 15; Fellow Servants; Neglect; Survivor of Actions—
1. master must, by the use of ordinary care, avoid exposing servant to extraordinary risks ... 95
2. duty of master to minor servant ... 96
3. failure of master to comply with promise to repair—risk assumed by servant ... 148
4. discharged employe suing before period of employment would have expired can recover only damages sustained up to time of trial ... 301
5. contract to give permanent employment—damages for its breach ... 301
6. contract to give permanent employment not within statute of frauds ... 301
7. damages for unlawful discharge of servant—instruction—prejudicial error ... 301
8. concealment by master from servant of hazardous nature of employment ... 311
9. master not liable for injury to one servant by gross neglect of fellow servant ... 575
10. brakeman of a train not fellow servant of a fireman or engineer ... 575
11. defective appliances furnished by master—no recovery for injury thereby sustained by servant who knew or might, by exercise of ordinary care, have known of defect ... 655
12. injury to servant through defective appliances furnished—when master is liable therefor ... 699
13. master not liable for injuries to one servant through gross neglect of fellow servant ... 727
14. master liable civilly for wrongs committed by servant within scope of his employment ... 749
15. discharge of servant must be in unambiguous terms ... 781
16. servant may recover if he held himself in readiness to perform duties and master did not require him to do so ... 781
17. servant entitled to agreed wages in such case—evidence as to servant's habits as to liquor incompetent ... 781
18. instructions concerning measure of recovery by servant in such case not prejudicial, even if erroneous ... 781
19. servant employed for indefinite term must be discharged in unambiguous terms ... 809
20. servant may recover agreed wages if not discharged, although master required him to render no service ... 809
21. evidence of value of servant's labor not competent in action to recover stipulated wages ... 810
22. instruction in such action, allowing jury to find value of services, erroneous but not prejudicial ... 810
23. injury to servant—contributory neglect being proven, no right to recovery exists ... 848
24. punitive damages not recoverable by servant where there is no gross neglect ... 848
25. servant who compels master to discharge him because of fraud and dishonesty liable to master for failure to comply with contract of employment ... 849
26. certain contract between employer and employe did not create partnership ... 849
MECHANIC'S LIEN—
property improved by plaintiffs treated in equity as belonging to builder, who owned 998 shares of 1,000 of corporation having legal title—fraud ... 721
MINERAL RIGHTS—
mineral right in land subject to taxation as real estate ... 513
MISTAKE—See Banks, 5; Bills and Notes, 17; Judicial Sales, 8—
1. where receipt is expressed to be "in full settlement" for personal injuries, it is binding unless mistake is pleaded and proved ... 129

MISTAKE—Continued. Page.
2. deed of partition reformed on ground of mistake 145
3. mistake in record as to date of attachment 269
4. money or property paid or delivered under clear mistake of law and facts can be recovered 400
5. answer alleging that certain agreement was omitted from face of a note by mistake set out a good defense 570

MORTGAGES—See Actions, 2; Assignments by Operation of Law, 1, 2, 3, 4, 5; Dower, 1; Estoppel, 3; Homestead, 3, 11; Interest, 7; Liens, 3, 4; Power of Appointment, 2; Railroads, 61, 62, 63, 64; Res Adjudicata, 3; Vendor and Vendee, 4—
1. an attachment on land already mortgaged, alleging fraudulent intent and design to prefer mortgagee, improperly sustained without proof 67
2. a mortgagee is not the owner of the fee 70
3. evidence sufficient to show that consideration expressed in mortgage was the true one 206
4. mortgage by son of all his interest in his father's estate embraces son's remainder interest in land assigned ancestor's widow as dower 349
5. action to set aside mortgage, on ground that contract secured was fraudulent, can not be maintained unless it also seeks to set aside the contract 388
6. mortgage by one to secure debt of another—limitation 495
7. agreement by purchaser of land to convey to another who paid $50 on purchase price if the latter paid purchaser entire purchase price—conveyance to such purchaser not regarded as a mortgage for the $50 514
8. mortgagee loaning money to a life tenant must take notice of character of mortgagor's title 528
9. record of mortgage destroyed by fire - duty of mortgagee to restore record 580
10. record of mortgage being burned, mortgage regarded as an unrecorded one—purchaser regarded as an innocent one without notice 580
11. sale to satisfy mortgage debt—mortgagor can not object to issuing of writ of habere facias on ground that a mortgage older than the one foreclosed is outstanding 584
12. intent of parties determines whether conveyance is a mortgage or a conditional sale 589
13. where intent is doubtful conveyance is regarded as a mortgage ... 589
14. contract by wife creating lien on her property to secure payment to a lessee for value of improvements he was to erect thereon equivalent to a mortgage 668
15. a married woman may mortgage her estate to secure compliance by her husband with his contracts 668
16. evidence fails to show that mortgagee authorized or ratified a sale of the mortgaged property 751
17. one who purchased at a judicial sale subject to a prior mortgage is estopped to question validity of such mortgage 758

MUNICIPAL CORPORATIONS—See Actions, 5; Constitutional Law, 12, 13, 19, 20; Judges; Jurisdiction, 3; Mandamus, 3; Street Improvement, 3, 9. Streets and Alleys, 3, 4, 5, 12; Taxation, 13, 14—
1. the new Constitution does not divest municipal corporations of their powers of taxation under their old charters 33
2. amendment to city charter does not repeal any provisions except it uses express words of repeal, or by necessary implication 33
3. general tax for construction of sewer not one of inherent powers of city government 33
4. city ordinance is a "statute" within meaning of section 3, article 1, chapter 29, General Statutes 446
5. where city ordinance prescribes penalty for a common law offense, one committing such offense in the city must be punished only under the ordinance 446
6. persons contracting with municipal corporations must, at their peril, inquire into authority of its officers to make the contract .. 506
7. mayor of city has no authority to employ counsel for it 506
8. threatened encroachment on city property creates no emergency authorizing mayor to employ counsel 506

MUNICIPAL CORPORATIONS—Continued. Page.
9. employment of attorney by mayor not ratified by common council in certain case 506
10. damages to property by "tumultuous" assemblage—right of action —pleadings 745
11. section 158 of Constitution, limiting authorized indebtedness, binding on cities from date Constitution was adopted—even before cities were classified 756
12. agreement by city to pay sum annually for number of years—"indebtedness incurred" is total sum of all annual payments..... 757
13. title of act extending limits of town does not embrace more than one subject 793
14. extension of limits—authorized by facts 793
15. amendment of record of one board of trustees by their successors.. 840
16. signing of minutes of proceedings of council by chairman after he has gone out of office 840
17. parol evidence to show acceptance of town officer's bond..... 840
18. terms of all municipal officers elected before November, 1893, expired at that November election and when their successors qualified 852
19. even where no charter in conformity to new Constitution had been adopted for certain cities in November, 1893, terms of officers expired at that time..... 852
20. petition to recover municipal office required to set out only substance of ordinance creating office..... 870
21. authority of city council to create certain office under charter 870
22. city liable for injury to private property from negligent grading of street 126
MUNICIPAL TAXATION—See Municipal Government, 1, 3—
appointment of a member of council assessor is void..... 63
NATIONAL BANKS—See Banks; Usury, 2, 3.
NEGOTIABLE INSTRUMENTS—See Bills and Notes.
NEGLECT—See Bills and Notes, 10, 14; Decedents' Estates, 3; Constitutional Law, 11; Evidence, 25; Fellow Servant, 1; Instructions, 7; Master and Servant, 9, 12, 18, 23; Pleadings, 25, 44, 45; Railroads; Telegraph Companies—
1. plaintiff proving one or more of several negligent acts alleged as cause of injury may be entitled to recover 17
2. rule as to liability of master furnishing servant defective machinery—when servant must inspect 17
3. what acts of neglect caused injury a question for jury 17
4. contract by brakeman to use coupling stick—failure to do so—contributory neglect..... 17
5. neglect if brakeman is thrown from train by improper speed 31
6. plaintiff's pleading in such case does not show contributory neglect, 31
7. a personal representative may recover for bodily suffering of intestate, resulting from negligence 74
8. owner of premises in particular case not responsible for damages resulting to stranger..... 75
9. facts showing a case res adjudicata for negligence..... 80
10. railroad company not chargeable with negligence for injury to trespasser in particular case..... 87
11. although plaintiff was guilty of contributory negligence, he may recover if defendant could, by reasonable diligence, have discovered his danger in time to protect him. 185
12. no such thing as "willful neglect" in action for injuries not resulting in death 199
13. although plaintiff was negligent he may recover if defendant could have prevented the injury after seeing his danger..... 208
14. injury to passenger alighting from street railway—evidence sufficient to support verdict..... 209
15. attempt to board moving electric car—for jury to say if it was contributory neglect..... 209
16. delay in delivering of telegram—damages recoverable for mental suffering alone..... 334
17. evidence sufficient to show neglect in failing to deliver telegram.. 334
18. no evidence to show neglect of street railway in killing certain infant 409
19. existence or nonexistence of neglect a question of law and fact to be submitted to jury if evidence is conflicting..... 423

NEGLECT—Continued. Page.
20. contributory neglect may be pleaded as a defense where personal injuries not resulting in death are alleged to have been caused by defendant's "willful negligence" 447
21. but if the act causing the injury was "willfully done" contributory neglect could not be pleaded 447
22. instruction defining gross neglect correct 575
23. contributory neglect may be pleaded as a defense to all actions except those for willful neglect from which death resulted.. 575
24. contract exempting master from liability to servant for neglect void as against public policy 575
25. certain definition of gross negligence in instruction correct 600
26. contributory negligence may be pleaded as a defense to all actions except one for "willful neglect," resulting in death, brought under section 3, chapter 57, General Statutes 601
27. contract exempting master from liability to servant for negligence void 601
28. administrator can maintain action for death by willful neglect under section 3 of chapter 57, General Statutes, only where decedent left widow or child 612
29. "gross neglect" signifies less degree of neglect than "willful neglect" 613
30. death resulting from negligent act—one action can not be maintained for suffering before death and another for the death 613
31. railroad liable for injury to brakeman of freight train by act of employes on passenger train only when neglect of latter was gross. 626
32. failure of engineer of passenger train to see brakeman of freight train sitting on track not gross neglect 626
33. industrial school of reform maintained by State aid as a charity not responsible to inmate for assault by a negligent or incompetent employe 629
34. action for death by willful neglect—evidence showing death of boy was caused by his own neglect, peremptory instruction was proper, 680
35. evidence as to gross neglect being conflicting, verdict of jury will not be set aside 686
36. where plaintiff fails to prove gross neglect, alleged as cause of action, and verdict is for defendant, incorrectness of instructions as to contributory neglect is immaterial 686
37. failure by brakeman to use coupling stick not contributory negligence in certain case 714
38. injury to prevent by gross neglect of fellow servant—master not liable 727
39. injury to car inspector by neglect of superior officer of railroad—road not liable unless neglect was gross 813

NEW TRIAL—See Appeals, 5, 39—
1. granted because of absence of plaintiff and attorney from court room when case was called 112
2. court has no right to require plaintiff to remit part of verdict in order to avoid granting of new trial 184
3. that mandate of appellate court was filed without notice on day case was set is not ground for new trial, as defendant announced ready after mandate was filed 206
4. ought to have been granted for newly-discovered evidence in certain case 240
5. motion for must be made within three days after default judgment, 808
6. assignment of ground that court erred, etc., "in its instructions to the jury in refusing to instruct * * * as asked," make both giving and refusing of instructions ground for new trial—word "and" evidently being omitted by mistake 835
7. petition for not filed in time 889
8. newly-discovered evidence in will contest not sufficient to authorize new trial unless of a decisive or controlling nature 477
9. new trial improperly awarded—on appeal judgment based on second verdict reversed with order to enter judgment on first verdict, 494
10. new trial not granted on ground that verdict is against evidence, unless palpably so 494
11. party detained at home by illness of family during trial not entitled to new trial of certain case 574
12. opinion of some spectators that attorney was too ill to try case will not authorize granting of new trial 574

NEW TRIAL - Continued. Page.
13. not granted for newly discovered evidence which is merely cumulative or which impeaches an opposing witness 749
14. new trial not granted for a foolish remark made by successful party after judgment which is inconsistent with his right of recovery.. 749
15. surprise of plaintiff by testimony of defendant's witnesses—when a sufficient ground for a new trial 781
16. a new trial not to be granted for newly discovered evidence that could have been discovered at first trial by ordinary diligence.... 781
NOTICE—
of nonpayment of negotiable note may be waived either orally or in writing 879
NUISANCE—See Streets and Alleys, 10, 11, 13, 14—
1. beer garden in a city not per se a nuisance 325
2. when a threatened nuisance may be prevented by injunction..... 325
3. opening of a beer garden will not be enjoined as a threatened nuisance 325
4. one has a right to improve his own property, but no right to do so in such a manner as to create a nuisance 400
5. what obstruction of a public street is a nuisance 572
6. use of property which corrupts atmosphere and fills it with stenches and smells is a nuisance 574
7. hog pen within sixty feet of party's door a nuisance 574
8. when obstruction of public street is a nuisance..... 650
NUNC PRO TUNC ORDERS—See Courts, 5, 6.
OFFICE AND OFFICERS—See Municipal Corporations, 18, 19, 20, 21—
insanity of assessor creates vacancy in his office..... 276
OFFICIAL BONDS—See Bonds; Municipal Corporations, 3—
1. concealment for surety at execution of bond of material facts releasing co-sureties—sheriff's county levy bond 838
2. authority of agent to sign name of his principal as surety to bond must be in writing—verbal authority not sufficient to bind surety. 775
3. official bond so executed as to be void as to one surety named in body of it is void as to all sureties 775
4. sheriff's revenue bond executed or accepted by county court after time fixed by statute not binding on sureties..... 775
5. such bond not obligatory if county court never accepted or approved it 775
6. if part of sureties signed bond after time fixed by statute for its execution it is void as to all sureties..... 775
ORCHARD—
what constitutes an orchard..... 40
OUTHOUSE—See Criminal Law, 57.
OPTIONS—See Landlord and Tenant, 10, 11, 12.
PARENT AND CHILD—See Husband and Wife, 6—
1. mother not authorized to bind her child, either personally or as to its estate, by contract..... 332
2. stepfather not allowed compensation for stepchild's support..... 335
3. evidence not sufficient to show an enforcible contract by a father to pay his son for taking care of him 374
4. but where the aged father took all the son's attention he should be allowed compensation after father's death, and should be charged with rental value of the father's land..... 374
PARTIES TO ACTIONS—See Assignments for Benefit of Creditors, 8; Carriers, 9; Decedents' Estates, 5; Street Improvement, 5; Vendor and Vendee, 11—
1. taxpayers of school district not necessary parties to action for debt against trustees 92
2. plaintiff claiming disputed boundary as heir of father—other heirs properly allowed to be made parties and to quit-claim in plaintiff's favor 227
3. in consolidated actions to enforce liens on land—error to order sale before all lienholders have been made parties 242
4. county court may maintain action against a tax collector and his sureties on a bond executed to it without joining the county as a party 405
5. conveyance of right of way to railroad—failure of road to erect depot thereon—holder of legal title entitled to maintain action, even though he holds land in trust for one to prevent creditors from subjecting it 444

PARTIES TO ACTIONS—Continued. Page.
6. where such equitable owner was joined as party plaintiff, and was stricken out on defendant's answer, alleging that he had no interest in action, defendant not thereafter heard to complain of defect of parties 444
7. contract with one railroad company as to fencing right of way—right of way and contract used by another road—parties to action, on contract 876
PARTIES TO APPEALS—See Appeals, 31, 32, 51.
PARTITION—See Frauds, Statute of, 13; Joint Tenants; Mistake, 2—
1. a verbal agreement of partition sustained in particular case 81
2. where one of several joint owners owned adjoining land his interest should have been allotted to him next to his land, although rest of land was indivisible 140
3. verbal agreement by a mother with her children held to estop her from claiming a partition of land which they owned jointly 192
4. in partition of land a son was properly required, under peculiar circumstances, to make an annual contribution to the support of his mother in lieu of the allotment to her of any part of the land. 192
5. deeds of partition made nearly a century ago not invalid because six instead of two commissioners made the division—all parties in interest having acquiesced in such division 545
6. parties claiming only by adverse possession not heard to question validity of such partition 545
PARTITION BETWEEN JOINT DEVISEES—
as to implied warranty of title, see Warranty, 6, 7, 8.
PARTNERSHIP—See Principal and Agent, 3; Pleadings, 52—
1. a note signed by one member and endorsed by the partnership, and discounted and placed to credit of and checked out by partnership, is a partnership transaction 53
2. judgment finding nothing due a partner, whose creditors are seeking to subject his interest in a venture, sustained by the evidence, 243
3. evidence not sufficient to show one partner was indebted to the other fifteen years after close of partnership 472
4. partner who keeps firm books must keep them so accurately as to show state of accounts between the partners 472
5. partner so failing to so keep firm books not allowed to make entries in the book from memory fifteen years after close of partnership 472
6. liability of one held out as a partner in a firm without his knowledge or consent 539
7. if contract by creditor of firm was made before he knew of such holding out of one as a partner such creditor can not avail himself of subsequent holding out to fix liability on such party 539
8. lease of real estate held by partners is personal estate of firm; but contract for sale of such lease by either partner must be in writing, 627
9. evidence sufficient to show division between partners of certain partnership personalty 642
10. evidence sufficient to establish existence of partnership in certain land 642
11. where agreement to hold land jointly is in writing, statute of frauds does not apply to action on such contract by either partner, 642
12. limitation does not run against claim of one partner to interest in land held by other partner 642
13. partner qualifying as executor of deceased partner not thereby estopped to claim his interest in partnership land, of which legal title was in decedent 642
14. party sued as member of defendant partnership for whom answer was filed by mistake—entitled to file amended answer denying he was member of firm and entitled to peremptory instruction in his favor 677
15. judgment being reversed as to such person not reversed as to defendants, who actually composed firm—prejudicial error 677
16. failure to dismiss action as to such defendant before trial not prejudicial to other defendants, even though they were denied full benefit of his evidence on the trial. 677
17. notes executed in individual names of two members of firm binding on all three members where loan was made to firm at request of third partner 763

PARTNERSHIP—Continued. Page.
18. death of one member of firm—renewal of firm note in name of other members—dead partner not released unless holder of note so intended 763
19. agreement by master to pay servant certain per cent. of commissions earned did not create partnership 849
PASSWAY—
passway over land condemned and ordered opened—surveyor enjoined from opening it because party for whose benefit it was opened had not paid damages assessed—damages being tendered by surveyor, injunction must be dissolved 649
PATENTS—See Adverse Possession, 1, 7—
1. covering land enclosed and held adversely by one for fifteen years void, although occupant's deed does not embrace land in its calls 8
2. entry under Virginia treasury warrant—subsequent dedication of land for military purposes—patent issued on entry valid 585
3. patent issued by Kentucky valid, even if entry under Virginia law was invalid 585
3. patent can not be assailed in collateral proceeding 585
4. suit by plaintiff claiming under junior patent—subsequent purchase by him of senior patent conferred right only as of date of purchase 499
5. such purchase of senior patent for land in possession of defendant champertous 499
6. land patents issued to trustees of academy can not be called in question upon ground that the land was not a part of the territory subject to appropriation for academies under act of 1798..... 168
PAYMENT—See Bills and Notes, 1; Debtor and Creditor, 1, 2—
1. action by assignee on assigned note—maker denied credit by court for a note assigned plaintiff's assignor—plaintiff can not, after obtaining judgment for full amount claimed, credit it by value of note defendant assigned his assignor so as to prevent defendant suing party to whom he assigned note on it for its full value. 267
2. verdict in favor of plaintiff where defendant pleaded payment of notes supported by evidence 607
PEREMPTORY INSTRUCTION—See Instructions, 3—
1. if defense be affirmed and sustained by no evidence peremptory instruction for plaintiff is proper 31
2. for plaintiff proper where defendant wholly fails to establish his defense to the note sued on 847
PERJURY—See Evidence, 52; Indictments, 5.
PLEADINGS—See Alimony, 3; Alteration of Written Instruments, 4, 5; Assignments by Operation of Law, 8; Attachments, 18, 21, 22; Awards; Bills and Notes, 16, 17; Burden of Proof, 4; Champerty, 5; Counterclaim, 3; Decedents' Estates, 6, 11; Election; Elections, 2, 3, 4, 7, 8, 10; Ejectment, 2, 5; Guardian and Ward, 7, 9; Limitation, 1; Mistake, 1, 5; Municipal Corporations, 20; Railroads, 50, 51, 52, 69; Roads and Passways, 5; Tax Sales, 7, 8, 9, 11—
1. delay by one interested in subject matter of suit, but not party to it, in offering answer no reason for refusal to permit it to be filed. 15
2. anticipation in petition of defense 28
3. matters of evidence alleged in answer not admitted by failure to reply 31
4. failure of defendant to rejoin in particular case was no admission of allegations of reply in particular case. 44
5. a plea of contributory negligence is admitted by failure to reply .. 49
6. failure to verify pleading—a general objection, without specifying defect, insufficient 60
7. cross petition properly stricken from files in particular case 69
8. pleadings treated by the parties as correct by trial and introduction of evidence on issue raised can not be questioned on appeal.. 68
9. the representative capacity in which plaintiff sues appearing in body of petition sufficient, although omitted in the caption 74
10. pleading illy drawn, voluminous, inconsistent, irrelevant or indefinite not cured by demurrer 93
11. motion to strike out, elect or make more definite the proper remedies in such cases 93
12. defendant's answer considered, although he failed to comply with order requiring him to paragraph 126

PLEADINGS—Continued. Page.
13. quaere: is amended petition seeking to recover on quantum meruit not an abandonment of original action to recover contract price .. 158
14. defect in petition cured by answer, although there was a demurrer. 159
15. objection to pleading on account of failure to sign waived by not taking advantage of by rule 161
16. court did not abuse discretion in rejecting amended answer 165
17. petition to enforce vendor's lien must allege conveyance or ability to convey by vendor 269
18. allegation that loss by fire occurred on — day of ——, 1892, and "while said policy was in full force and effect"—conclusion of pleader 303
19. amended answer offered during trial, denying facts admitted by answer, comes too late 316
20. where railroad in answer admits it built road on plaintiff's land against his protest, an amendment claiming it was built with his consent not good as a plea of confession and avoidance 317
21. amended petition offered two years after institution of action properly rejected by court 335
22. amendment filed in clerk's office in vacation by permission of court considered as merely tendered—must be noted by order as filed to become part of record 346
23. error to strike out second paragraph of certain answer setting out specifically facts that might have been proven under general allegation of first paragraph 346
24. denial that plaintiff is owner and holder of certain check bad on demurrer 346
25. allegation that railroad willfully inflicted an injury by its brakeman does not show that act of brakeman was willful 390
26. allegations of answer stating merely converse of facts of petition constitute a mere traverse—no reply necessary 390
27. in common law actions plaintiff, under general allegation of neglect, may prove either gross or ordinary neglect 427
28. objection that answer is not styled "counterclaim" in certain case waived by filing reply 439
29. judgment allowing wife a divorce authorized by allegations filed by her in a suit consolidated with husband's action for a divorce. 439
30. vendee must point out defects in vendor's title, and not merely deny vendor's ability to convey good title 462
31. failure to file exhibit with pleading not ground for demurrer 496
32. such failure to be taken advantage of by rule requiring its filing.. 496
33. error to dismiss action for failure to file exhibit before rule is issued requiring such filing 496
34. answer alleging pendency of another suit in same cause of action presents a bar unless replied to 529
35. amended answer inconsistent with original answer—power to file in certain case and then require election by defendant 542
36. amended answer inconsistent with original answer—proper to allow filing of amendment and then require election of defendant. 570
37. prayer for relief—personal judgment not prayer for—judgment erroneous but not void 608
38. trespass on highway by corporation—assignment of corporation and trespass continued by assignee—election as to action against corporation or its assignee 577
39. petition on promissory note need not allege the consideration therefor 609
40. reply not necessary to defective plea of no consideration for such note 609
41. failure to paragraph pleading not ground for demurrer—but only for motion to paragraph 609
42. objection to pleading because not paragraphed waived by filing answer or reply thereto 609
43. particular answer was only a plea of non est factum and not a plea of no consideration as well 609
44. allegation that death was caused by "gross and willful neglect" puts action under section 3 of chapter 57, General Statutes 613
45. where petition alleges "gross and willful neglect" as cause of death, and amended petition alleges "gross neglect" alone, without withdrawing allegation of petition, action is still under section 3 of chapter 57, General Statutes 613

PLEADINGS—Continued. Page.
46. demurrer to answer carried back to petition and sustained to it—judgment can be reviewed on appeal, although no reply to answer was filed ... 614
47. defendant's appearance is entered to amended petition if he files general demurrer to it ... 635
48. ignorance of rights or duties no excuse for defendant's failure to file answer when due ... 635
49. answer of defendant sued for staves wrongfully detained, that "he is informed" another person than plaintiff "claims land where staves were cut," insufficient ... 648
50. pleading tendered but rejected not considered on appeal unless made part of record by order of court or bill of exceptions ... 649
51. when special damages must be specially averred ... 656
52. party sued as partner of firm filed answer by mistake—should be allowed to file amendment denying he was a member of defendant firm ... 677
53. answer of personal representative alleging want of information, etc., as to goods alleged to have been sold decedent, equivalent to a denial of sale by decedent ... 751
54. rejection of amended petition in ejectment merely alleging evidence or origin of title not prejudicial ... 766
55. if demurrer is sustained to original petition an amended petition should be permitted to be filed, even if it fails to cure the defects of the petition, and demurrer to petition as amended should then be considered ... 880

POSSESSION—
where married woman had legal title to unenclosed land, and no one ever held or claimed it adversely to her, it must be presumed that whoever had possession held as her tenant, although she never exercised any act of ownership—her husband entitled to curtesy therein ... 378

POWER OF APPOINTMENT—
1. intent of donee to exercise power must clearly appear ... 522
2. execution of mortgage by donee of power of appointment not intended as exercise of power in certain case ... 522
3. exercise of power of appointment by will—general rule changed by statute ... 522
4. certain devise of property considered as exercise of power by testator ... 522

PRACTICE IN CIVIL CASES—See Appeals, 1, 2, 7; Judgments, 1; New Trial, 3; Pleadings, 46—
1 where instructions given were not prejudicially erroneous, party can not complain because they did not embody whole law of case. 29
2. case formerly reversed after record corrected to show depositions part of record, then affirmed ... 65
3. time of counsel in argument to jury properly limited to twenty-five minutes ... 185
4. not error to allow juror to interrogate witness in presence of court and parties, although case had been submitted to jury ... 208
5 modification of instructions after submission of case to be avoided if possible ... 238
6. sending jury to view premises—discretion of court not abused by refusal ... 238
7. plaintiff may dismiss without prejudice at any time before final submission ... 394
8. no notice of motion to dismiss without prejudice can be required by rules of court ... 394
9. in certain case only question decided was one of law, which will be considered on appeal without motion for new trial or separation of conclusions of law and fact ... 460
10. new trial improperly awarded—second judgment reversed on appeal with order to enter judgment on first verdict ... 494
11. judgment against sureties for two separate items—reversal on appeal as to one item—sureties not entitled to a retrial in lower court as to other item ... 643

PRACTICE IN CRIMINAL CASES—See Appeals, 15, 16; Mandate— Page.
1. attorney employed to prosecute may state Commonwealth's case to jury 342
2. discretion of court as to allowing view of premises by jury not abused 342
PREJUDICIAL ERRORS—See Continuance, 7; Criminal Law, 15; Damages, 13; Master and Servant, 7; Partnership, 15, 16—
1. erroneous exclusion of evidence in certain criminal case not prejudicial—crime clearly proven by evidence that was admitted 292
2. erroneous instructions not prejudicial to a plaintiff having no case, 335
3. error in instructing the jury that they could compute certain element as damages to abutting owner of land, growing out of operation of railroad, prejudicial, even though amount of verdict shows that such element was not considered by the jury 444
4. in absence of bill evidence appellate court will not hold refusal to allow party opportunity to contradict certain witness prejudical. 574
5. admission of certain incompetent evidence not prejudicial where court subsequently admonished jury not to consider it 653
6. error in giving instruction not a reversible error unless made a ground for a new trial 783
PRESUMPTIONS—See Appeals, 15, 16—
similarity of names does not authorize presumption of identity 154
PRINCIPAL AND AGENT—
1. one employed as agent to purchase railroad ties has no power to employ subagent so as to bind principal 445
2. fraudulent representations made by agent who believed statement to be true—principal who deceived agent liable for injury suffered by third party and not the agent 539
3. agent employed to sell commodity not liable as partner, although his compensation was measured by amount of his sales 539
4. revocation of agent's authority—compromise of will contest 559
PRINCIPAL AND SURETY—See Sureties—
parol evidence is competent to show that party first signing note was merely a surety of a subsequent signer 879
PROCESS—
defective service on nonresident defendants in particular case 70
PROHIBITION, WRIT OF—
1. what writ of prohibition is 399
2. when it may issue 399
3. where lower court has jurisdiction of action and renders erroneous judgment appellate court will not issue writ of prohibition to lower court—error must be corrected by appeal 806
QUANTUM MERUIT—See Election, 2; Pleading, 13—
person may recover on quantum meruit for building of house, although work done defectively 158
QUESTIONS FOR COURT AND JURY—See Neglect, 3, 15, 19; Wills, 15—
1. in action to recover for work done under contract for grading road the value of estimates made after completion of work was for the jury 207
2. authority of brakeman of passenger car to eject trespasser a question of law for court to determine 390
3. whether or not injury of passenger by brakeman was willful a question for jury 390
QUIA TIMET—See Actions to Quiet Title
RAILROADS—See Burden of Proof, 5; Damages, 6, 10, 11, 14, 17; Eminent Domain; Executions, 6; Fellow Servants, Evidence, 33; Master and Servant; Neglect; Roads and Passways, 11; Settlement Specific Performance, 5; Subscriptions; Taxation, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19—
1. injury to brakeman—failure to use coupling stick—contributory neglect 18
2. purchase of property and franchise of one railroad by another 26
3. liability of one railroad owning majority of stock of another for the latter's acts 26
4. liability for flooding lands of adjoining proprietor 29
5. injury to switchman in coupling cars—verdict sustained by evidence 170
6. injury to passenger leaving train in motion and on opposite side from platform was result of his own negligence 178

RAILROADS—Continued. Page.
7. company not liable to injured brakeman for failing to furnish him coupling stick or to warn him of danger of not using such a stick, 181
8. company not liable for failing to warn minor servant of danger where he had represented himself as of full age 181
9. fireman acting as engineer negligent in leaving car on side track in dangerous proximity to main track 185
10. brakeman riding on ladder of car not guilty of contributory negligence 185
11. negligence to move detached cars in city without any servant to control their movements or give warning of their approach. ... 194
12. duty to persons walking on track by license of company... 194
13. company not liable where person walking on track is struck by cars which have become detached by accidental breaking of train. 194
14. gross negligence as to passenger in failing to flag approaching freight train 199
15. passenger not guilty of contributory negligence in entering passenger car standing fifty feet from platform 199
16. company liable for injury resulting from failure to keep crossing in repair 206
17. killing of stock on track—presumption of neglect overcome..... 238
18. putting passenger off at wrong station—liability of railroad..... 240
19. duty to trespasser upon track..... 244
20. killing of stock on track—verdict for plaintiff not authorized by evidence..... 268
21. contract as to fencing of track considered as rescinded—killing of stock on track..... 268
22. contracts as to fencing of track abandoned by both parties—killing of stock on track..... 295
23. agreement as to fencing of right of way—duty as to the stock on track 308
24. agreement of railroad to furnish material and owner of adjoining land to build fence along right of way—failure of owner to build within a reasonable time after materials were furnished—duty to stock found on track 304
25. refusal to accept passenger's ticket—exemplary damages 333
26. failure of carrier to carry passenger—damages that may be recovered by action in assumpsit and in tort 333
27. killing of stock on track—statutory presumption of negligence overcome 335
28. may institute proceeding to condemn a right of way it has taken unlawfully—owner will not be allowed writ of possession therefor until railroad has been given time to condemn such way. 317
29. certain rule making cash or conductor's fare for passengers in excess of ticket fare not unreasonable or oppressive..... 380
30. passenger having notice of such rule and failing to buy ticket not entitled to recover for being ejected for refusal to pay conductor's fare..... 380
31. brakeman has authority, as an incident to his employment, to eject from train trespasser refusing to pay fare..... 390
32. railroad not liable for injuries willfully and maliciously inflicted on person on train by employe..... 390
33. liable where engineer of one train is killed by gross neglect of those in charge of another train—but not if neglect is only ordinary..... 423
34. liable even where the injuries resulted from such engineer jumping from engine to avoid danger, apparent rather than real, in such case 423
35. injury to abutting property by unusual noises made by construction of road—nuisance..... 444
36. damages to abutting property not recoverable because of ordinary noises of moving trains..... 444
37. injury to abutting property by construction of road—diminution in value of house commenced before construction of railroad, but not finished until afterwards, recoverable 444
38. defendant company liable for damages growing out of operation of road as constructed by it, although it was leased to another company 444
39. failure to comply with contract to erect depot on right of way conveyed—measure of damages..... 444

RAILROADS—Continued. Page.
40. railroads constructed after Hewitt act took effect not entitled to any exemption from taxation for any period after their construction ... 457
41. one road may refuse to receive car from a connecting line if it is in such condition as to render handling of it unsafe ... 548
42. section 213 of the Constitution was not intended to compel a railroad to receive such cars ... 548
43. what risks brakeman assumes by accepting employment ... 548
44. road must furnish brakeman all appliances necessary for faithful discharge of his duties ... 548
45. car of another road so constructed as to render coupling of it to cars of company handling it dangerous—liability of road for injury to brakeman incurred in coupling such car ... 549
46. duty of railroad as to inspection of cars received from a connecting line ... 549
47. injury to infant employe, who caused accident by his own act—railroad not liable for injury ... 613
48. injury to brakeman of freight train by neglect of employe on passenger train—railroad liable only when negligence was gross. 626
49. engineer not required to always look ahead for trespassers on track. 626
50. action for damages to employe—no presumption of negligence on part of railroad arises from injury alone ... 655
51. petition must aver particular negligence causing injury in such case ... 655
52. defect in such petition cured by answer. ... 655
53. injury to trespasser on track—failure to stop at crossing—contributory neglect ... 599
54. statutory duty of train to stop before crossing track of another road not intended for protection of trespassers on track ... 599
55. rule requiring passenger to purchase tickets or pay higher train fare reasonable ... 605
56. but notice of such rule must be given public, and reasonable opportunity to purchase ticket must be afforded. ... 605
57. failure to stop to take on passenger—damages—peremptory instruction ... 703
58. killing of stock on track—presumption of neglect overcome by defendant's evidence ... 731
59. killing of stock on track—no neglect of railroad shown—verdict for defendant ought to have been returned ... 750
60. killing of stock on track near crossing—effect of evidence that train did not whistle for crossing ... 760
61. mortgage of net earnings received from or over branch road construed ... 785
62. mode of ascertaining such net earnings—expenses of road regarded as a unit ... 785
63. amount of such net earnings, when ascertained, bear interest from day they were due under the mortgage ... 785
64. road can not apply such net earnings to pay loss in operation of branch line, the mortgage controlling the question ... 785
65. injury to car inspector—failure to give notice of movement of train not neglect when inspector was situated where he could observe such movements ... 813
66. railroad compelled to specifically execute contract to give certain party annual pass for life ... 814
67. liability of lessee of railroad under such contract by lessor ... 814
68. right to sue receivers of railroad appointed by U. S. court without leave of court ... 814
69. killing of stock on track—plaintiff, to recover damages, not required to allege he was not guilty of negligence ... 815
70. contract as to fencing right of way—right of owner of land to plead cost of fencing as a set-off to claim of road against him ... 875
71. action to recover for killing of stock on track—allegation as to notice to railroad of appraisement ... 876
72. notice of appraisement—what to contain—presumed on appeal that proper notice was given in absence of bill of exceptions ... 876

RATIFICATION—See Sureties, 2.

REAL ESTATE AGENT—
entitled to commission if he procures purchaser satisfactory to principal at price fixed by principal although principal subsequently sells at lower prices ... 494

RECEIPT—See Mistake, 1. Page.
RECEIVERS—
1. refusal of court to appoint receiver in certain case proper 12
2. right to sue receivers of railroad appointed by U. S. court without leave of such court 814
RECORDABLE INSTRUMENTS—See Assignment by Operation of Law, 10.
RELEASE—
a release of interest in land, while not technically a conveyance, passes right and title of releasor 859
REMAINDERS—
devise construed to create contingent remainder, which is subject to payment of remaindermen's debts 133
RENTS AND IMPROVEMENTS—See Frauds, Statute of, 1; Contracts, 8, 9, 10—
1. remaindermen suing to recover land not entitled to rents, as they obtained deed of release from life tenant only at time action was instituted 171
2. accruing after death of landlord belong to heirs and not to personal representative 780
REPEAL OF STATUTES—See Local Option, 3, 4, 5, 7, 8—
1. repeal of local option by implication 8
2. special liquor law of Harlan county not repealed by revenue and taxation law or local option law of 1892 239
RES ADJUDICATA—See Champerty, 2—
1. sureties of special commissioner concluded by judgment determining right to a fund misapplied by commissioner 28
2. wife waiving benefit of judgment concerning custody of her children bound by a subsequent judgment as to the same subject rendered in an action by her husband for a divorce 302
3. determination of court, in suit to enforce mortgage lien as to right of mortgagor to certain creditor, conclusive on parties to the suit. 490
RES GESTÆ—See Evidence, 1, 6, 15.
RESCISSION OF CONTRACT—See Vendor and Vendee, 9—
1. contract for sale of mineral rights in land rescinded for fraud 105
2. contract for sale of stock in hedge fence company rescinded for fraud, and tender back of certificates of stock was not necessary, plaintiff having no title to them 125
3. one to whom insurance policy was assigned in consideration of conveyance of land can not claim rescission, although policy has been forfeited for nonpayment of premiums by third person who had undertaken to pay them 151
4. contract of purchaser of land not rescinded because vendee agreed to pay double value for property, or its enforcement will work a hardship 278
5. false representation by vendor as to value of land—inspection by vendee—rescission 278
6. vendee entitled to rescission because of outstanding mortgage lien in certain case 278
RESULTING TRUSTS—See Trusts, 4.
REVIVOR—
limitation of one year runs from first term of court after death of party 105
REVIVOR OF JUDGMENTS—
1. when judgment may be revived against personal representative of defendant 781
2. motion to revive must be sustained if no defense to motion is made. 781
ROADS AND PASSWAYS—See Pleadings, 38—
1. right of sheriff to appoint another day for inquest where jury to assess damages for opening of new road fails to meet on day appointed 6
2. viewers' report sufficiently definite in certain case 6
3. viewers may amend their report at any time before final action by the court 6
4. defective order for opening public road 40
5. defective order not cured by statements of petition filed 40
6. public road can not be opened through an orchard 40
7. what constitutes an orchard 40
8. evidence sufficient to authorize finding of court that road ought not to be discontinued 503

ROADS AND PASSWAYS—Continued. Page.
9. county may maintain action for injury to county road 734
10. $10,000 damages for destruction of certain county road not excessive, 734
11. railroad is not authorized to use county road as its right of way in absence of clear legislative authority 734
12. turnpike road company reported to county as of certain length—receipt by president of company of so much money from county for each mile so reported—if road is in fact shorter president is liable to county for excessive sum received, the fraudulent report of the commissioners being imputed to him 876
13. act creating taxing district for construction of turnpike constitutional 578
14. failure to erect barriers on side of road—when liable for damages suffered by such failure 656
SALE OF INFANTS' REAL ESTATE—
1. in action for by guardian—effect of service of summon by a deputy sheriff who was interested in suit 305
2. service of summon on infant by one not a sheriff, who signs returns as a deputy, void 305
3. under Code of 1851, where statutory guardian is plaintiff, it is not necessary that summon be served on him as well as the infant defendants 305
4. necessity for service of summons on infants, each of whose interest is worth less than $100 309
5. petition for sale of one tract of land—amended petition for sale of another—necessity for service of summon on amendment 309
6. authority of chancellor to order such sale derived wholly from statute 387
7. chancellor can not order a sale of one part of infants' land to improve a dwelling house on the remainder of their land 387
8. such sale absolutely void and not merely erroneous 387
9. right of purchaser who pays money under such void sale that is used to improve remainder of infants' land 387
10. infants' interest in remainder in land held by their father for life by the curtesy can not be sold under section 490 of Civil Code ... 421
11. such infants are not joint tenants in possession with their father.. 421
12. even if nonresident guardian had no right to institute certain action for infants, amended petition filed by their next friend cured any defect 482
SALES OF PERSONAL PROPERTY—See Damages, 7, 8—
1. measure of damages for failure of purchaser to receive tobacco ... 32
2. vendee can not require delivery except at place and price mentioned in contract of sale 32
3. damages of vendee because of damaged condition of property waived by acceptance and payment without complaint 32
4. when title passes 36
5. evidence of custom that buyer was to take last weight competent on trial of question as to when title passes 36
6. entries in book of sales of tobacco sold contemporaneously evidence of terms of sale 36
7. opinions of witnesses as to when title passes incompetent evidence. 36
8. receiving goods after inspection, or a fair opportunity to do so, vendee can not sue for damages for breach of contract 93
9. receipt of goods becomes acceptance unless right to reject exercised in reasonable time 93
10. doing of acts which none but owner have right to do is acceptance. 93
11. a demand for goods sold must be made in reasonable time 93
12. unreasonable delay in making demand for whisky purchased in particular case 93
13. sales of personal property without transfer of possession void as to creditors, but purchaser having mortgaged property to raise money for vendor, who signed note as surety, mortgage treated as that of vendor 152
14. rescission of contract and recovery by vendor of property fraudulently purchased 543
15. vendor in such case is not limited to remedy allowed by section 250 of the Civil Code 544
16. where possession of personal property is delivered after sale, but before creditor of vendor has acquired lien thereon by service of process, sale is valid 238

SALES OF PERSONAL PROPERTY—Continued. Page.
17. shipment of liquor "C. O. D."—place of sale 332
18. issue as to warranty—evidence being conflicting, verdict not reversed on appeal 677
19. on issue as to warranty or no warranty in sale of cow—evidence of warranty offered to other parties not competent 677
20. passing of title on sale of stock of merchandise—necessity for invoice 877
21. sale of enough standing trees to make 100,000 feet did not pass title to any particular tree 878
SCHOOLS—See Constitutional Law, 16, 17; Contracts, 15; Parties, 1—
1. trustee of common school may accept land for schoolhouse on condition that it shall revert to donor if not used for school purposes, 80
2. trustees may release donor of land from taxation to build schoolhouse in consideration of his gift 80
3. decision of county superintendent, refusing to allow resident of one district to send to school in another, conclusive until set aside by board of education 127
4. conveyance of lot for school purposes construed 644
5. answer of party claiming right to use such lot for other purposes insufficient 645
6. a tax may be imposed to restore or renew a schoolhouse, even to extent of rebuilding it, under the law authorizing a tax to "repair" a schoolhouse which has been condemned 880
SCHOOL OF REFORM—
maintained by State aid as a charity not liable for injury done an inmate by an assault by one of its employes 629
SCHOOL TAX—See Schools, 2—
1. when county court can enter order for election concerning tax for free graded schools 244
2. what provisions of law concerning school tax election are mandatory and to be strictly pursued 244
SEALS—See Deeds, 3.
SELF-DEFENSE—See Criminal Law, 1, 22, 29, 30, 31, 34, 54; Instructions, 9, 10, 11, 17—
1. right of one summoned to aid officer in making arrest to kill parties resisting rather than retreat 328
2. fact that such person returned with gun to aid officer after being driven away by rioters should not form basis of instruction limiting his right to rely on plea of self-defense 328
SEPARATE ESTATE—See Husband and Wife, 13, 14; Married Women, 7, 8, 9, 12.
SEPARATION OF CONCLUSIONS OF LAW AND FACT—
1. where there is no separation in ordinary action submitted to court only sufficiency of pleading to support verdict considered on appeal 231
2. what is before the court on appeal where no separation of law and facts by lower court 59
3. in absence of such separation in ordinary action submitted to court only sufficiency of pleadings to support verdict considered on appeal 270
4. finding of facts, if not full enough, must be objected to when filed —too late to make objection on motion for new trial 271
5. agreed facts submitted to court—no necessity for separation of conclusions of law and fact in such case 506
6. action at law submitted to chancellor—in absence of separation of conclusions of law and fact only sufficiency of pleadings to support judgment considered on appeal 575
7. certain judgment not sustained by pleadings 575
8. failure to except to conclusions of law and fact—only sufficiency of pleadings to support judgment considered on appeal 605
9. where there is no bill of evidence, and the pleadings support judgment, it must be affirmed 607
10. finding of facts authorized by evidence 780
11. if finding of facts are too meager, party should request that it be made more specific 780
12. failure to separate in common-law action submitted to court—only sufficiency of pleadings to support judgment considered on appeal, 846
13. ordinary action submitted to court—what reviewable on appeal without motion for new trial or a separation of conclusions of law and fact 879

SET-OFF—See Counterclaim, 2, 3; Judgment, 8; Vendor and Vendee, 16.
SETTLEMENT— Page.
where receipt to railroad company is expressed to be in full settlement for personal injuries burden is on person giving it to show he did not so understand it ... 129
SHERIFF—See Actions, 4; Bonds, 2; Official Bonds, 1, 2; Tax Collectors.
SLANDER—
1. certain words spoken by execution debtor concerning a constable levying such execution do not impute want of integrity or official wrongdoing to officer ... 598
2. immaterial whether slanderous words were made on defendant's own knowledge or upon information from another ... 844
SPECIAL COMMISSIONERS—See Limitation, 2.
SPECIAL TERMS OF COURTS—
1. what call or order therefor must contain ... 292
2. act of June 10, 1893, concerning special term, not retroactive ... 292
SPECIFIC EXECUTION OF CONTRACT—See Contracts, 4, 23; Married Women, 1, 11; Trusts, 15—
1. party creating a nuisance on property and thereby compelling third party to purchase it—no equity in his favor exists to authorize enforcement of parol contract of purchase by him of party's interest in property made before such sale ... 27
2. of contract of sale of lot bought at public auction—representations of auctioneer as to location of lot not misleading ... 783
3. when chancellor ought to compel specific execution of a contract as a matter of course ... 814
4. chancellor has no right to refuse such specific execution in certain case merely because party can recover damages for breach of contract ... 814
5. agreement by railroad to grant party annual pass over road during his life—company compelled to execute agreement ... 814
6. liability of lessee of railroad under such contract ... 814
STATUTES—See Constitutional Law, 3—
1. statute limiting charge for street improvements not repealed by General Statutes ... 126
2. emergency clause—failure of governor to veto or sign within ten days ... 606, 653
STATUTES, INTERPRETATION AND REPEAL OF—See Local Option, 1, 3, 7—
1. act prescribing duties of fiduciaries construed ... 85
2. legislature of 1888 did not construe Hewitt act as not repealing act of May, 1884, by adopting compilation of statutes containing both acts ... 450
3. contemporaneous construction of statute resorted to in aid of interpretation only when meaning is doubtful or uncertain ... 450
4. act of 1856—right of legislature to repeal act exempting railroads from taxation for five years after beginning of construction ... 450
STATUTE OF FRAUDS—See Frauds, Statute of.
STREET IMPROVEMENTS—See Homestead, 12, 13; Taxation, 4, 5, 6—
1. statute limiting charge for street improvements construed, and held not repealed by General Statutes ... 126
2. interest on claim for street improvement properly refused ... 126
3. under particular ordinance contractor entitled to lien for cost of constructing sidewalk—passage and publication of ordinance was constructive notice to owner ... 139
4. contract with city to construct streets—agreement to keep in repair—retention of part of cost of work as security ... 233
5. parties to action by assignees of contractors to recover the sum retained ... 233
6. pleadings—right to trial by jury in action on such contract ... 233
7. lien for making sidewalk abutting on property of a married woman—copy of ordinance requiring the improvement must be delivered to the wife as well as to her husband ... 494
8. ordinance directing such improvement must describe such property as the wife's and not as her husband's ... 495
9. apportionment of cost for in city of Louisville ... 547
STREETS AND ALLEYS—
1. where persons have acquired prescriptive right to use of alley, that right not affected by refusal of city to accept it as a public way ... 114

STREETS AND ALLEYS—Continued. Page.
2. city liable for injury to private property from negligent grading of street ... 126
3. legislature may authorize construction of either steam or electric railway in the streets of a city ... 417
4. council of city may grant right to operate electric railway in streets of the city when so authorized by the legislature ... 417
5. construction or operation of electric railway operated by trolley system not so dangerous or burdensome to street as to impose additional burden on land abutting thereon—owner of such land not entitled to compensation therefor ... 417
6. conduct of owners in accepting benefits of public improvements, etc., such as to show an implied dedication of way as a street, although their deeds of partition recite that no dedication is intended ... 430
7. general ordinance prescribing grade, etc., for sidewalks, etc., does not apply to a carriageway not then established ... 445
8. ordinance establishing such carriageway must itself prescribe mode and extent of work—engineer can not prescribe it ... 445
9. general council may establish a wider sidewalk on one side of a street than upon the other ... 445
10. any unreasonable obstruction of a public street or highway is a nuisance ... 446
11. every actual encroachment upon a street by a fence is a nuisance, although it does not obstruct public travel ... 466
12. general council of Louisville has full control over all streets of the city, and may pass ordinances to punish encroachments thereon. 446
13. what obstruction of street amounts to a nuisance ... 572
14. what obstruction of a public street amounts to a nuisance ... 650
15. word "alley" used in description of lot sold does not imply necessarily a way open to the public ... 783

STREET RAILWAYS—See Instructions, 7, 8; Neglect, 14, 15, 18; Streets and Alleys, 3, 4, 5—
1. right to make reasonable rules for regulation of its employes and passengers ... 351
2. where driver on car, by mistake in making change, retains amount of one fare he can not compel passenger to pay an additional fare into the cash box of the car ... 351
3. company liable in damages if such passenger is ejected upon his refusal to pay a fare in addition to that retained by driver ... 351
4. statement of driver to passenger that he would see that company corrected mistake competent in mitigation of damages ... 351

SUBCONTRACTORS—See Contracts, 5.

SUBMISSION OF ACTIONS—
when there is a final submission ... 680

SUBROGATION—See Personal Representatives, 13.

SUBSCRIPTIONS—
1. subscription by town to stock of railroad upon condition that road would build machine shop in town—town merely a stockholder of road and not a creditor ... 314
2. town has no lien on property of railroad to secure compliance with conditions of subscription ... 314
3. railroad, after building shops in town, not required to forever maintain them by terms of subscription ... 314
4. right of town to any lien on railroad waived by failure to assert it in action for sale of road ... 314
5. purchaser of road for value may remove machine shops and not be liable to town in damages therefor ... 314
6. subscriptions to stock of proposed corporation—change of conditions of subscription by consent of subscribers—all parties obligated by amended conditions ... 782

SUMMON—See Sale of Infants' Real state, 1, 2, 3, 4, 5; Judgments, 10—
1. service of on corporation—court takes judicial notice from name of defendant that it is incorporated ... 703
2. warning order against nonresident insane defendant sufficient ... 889

SUPERSEDEAS—
effect of execution of supersedeas bond and taking of appeal on injunction dissolved by the final judgment ... 358

SURETIES—See Assignments; Banks, 5; County Judge; Executors and Administrators, 10; Official Bonds; Practice in Civil Cases, 11; Res Adjudicata, 1; Tax Collector— Page.
1. surety not bound by act of agent in signing his name to note on mere verbal authority ... 28
2. written ratification by surety of such act of agent binding even if without new consideration ... 28
3. the sureties of a collector of taxes, who has applied the taxes to payment of his indebtedness to a bank, can not require the bank to account to them therefor ... 99
4. surety on note released by alteration of note changing name of payee made without his consent ... 270
5. authority of agent to sign name of surety must be in writing ... 775
SURVIVOR OF ACTIONS—
action against master to recover for personal injuries resulting from negligent driving of servant survives to personal representative of person injured ... 203
TAX COLLECTORS—
1. collector appointed under certain act to collect railroad tax entitled only to such exonerations and exemptions as are allowed sheriff as collector of State revenue ... 405
2. allowance of greater exonerations to such collector by commissioner and by county court does not preclude county from recovering balance due from collector and his sureties ... 405
3. such tax collector not chargeable with interest on certain taxes collected but not paid over by request of county court ... 405
4. tax receipts executed by sheriff are competent evidence to show that he has collected taxes from parties reported by him as delinquents ... 405
5. of town required to pay over taxes January 1st—suit before that day for failure to pay over not maintainable ... 841
TAX LIENS—See Jurisdiction, 2.
TAXING DISTRICTS—See Constitutional Law, 6.
TAX SALES—
1. a burden on purchaser to show that all steps required by statute were taken—neither certificate or deed can be relied on to show facts ... 167
2. where two tracts of land exposed to sale, when one might be sufficient, sale passes no title ... 167
3. assessment of 18,750 acres as land of D.—sale passed no title to undivided one fourth interest in tract of 67,000 acres owned by D. at date of assessment but sold before date of tax sale ... 211
4. when five years' statute of limitation begins to run against grantee of D. in action by him to set aside auditor's deed ... 211
5. void tax sales—lien of purchaser ... 212
6. Commonwealth may maintain action to recover possession of land purchased by it at delinquent tax sale ... 633
7. but such right of recovery exists only where substantial compliance with all requirements of statute is alleged and proven ... 633
8. plaintiff in such case has burden of proof and must show due assessment and all legal steps necessary for such sale ... 633
9. where there is no allegation or proof that owner of land had no personal estate subject to distraint, etc., plaintiff has failed to establish valid sale ... 633
10. property of deceased mother sold under decree to pay amount of taxes paid for the mother by her daughter—purchaser acquires good title, even if mother was a married woman when the land was assessed ... 791
11. one claiming land as purchaser at sheriff's tax sale must allege and prove substantial compliance with all statutory requirements, 808
TAXATION—See Constitutional Law, 6, 12, 13, 19, 20; Statutes, Interpretation and Repeal of, 2, 3, 4, 5—
1. sufficiency of summons issued by clerk of county court against delinquent taxpayer ... 61
2. requisite to recovery by school trustees of tax against railroad company ... 160
3. to enforce collection of taxes each step necessary to constitute valid assessment must be specifically pleaded ... 177

TAXATION—Continued. Page.
4. section 9, article 1, chapter 92, General Statutes, exempts certain charitable institutions from State taxation—such institutions are liable for local assessments for street improvements ... 318
5. exemption of orphans' home from "assessment and taxation" under revenue laws of the Commonwealth, or "under any ordinance" of Louisville, does not exempt it from liability for assessments for street improvements ... 318
6. statutes under which exemptions from taxation are claimed to be very strictly construed ... 318
7. Hewitt revenue law was intended to be a complete general revenue system ... 449
8. act of 1884 exempting railroad from taxation for five years after beginning of construction repealed by Hewitt law, which took effect September 14, 1886 ... 449
9. railroads commenced after passage of act of 1884 and before its repeal are entitled to exemption for five years from date of beginning ... 450
10. tax due and unpaid bears interest only when statute so provides ... 450
11. railroads constructed after Hewitt act took effect not entitled to any exemption from taxation ... 457
12. mineral right in land may be assessed against owner as real estate ... 518
13. section of city charter making "tax bill" prima facie evidence of valid assessment, etc., valid ... 615
14. when limitation begins to run against city as to right to maintain suit to recover taxes ... 615
15. of railroads within school district for school purposes—assessment of length and value of road therein ... 880
16. prior to act of 1890 the law provided no means for ascertaining the length and value of a railroad within a school district ... 880
17. an allegation of such length and value in an action to recover taxes for the year 1888 can not avail since a court can not by evidence ascertain or fix values for taxation ... 880
18. petition to recover such tax for a school district is fatally defective in failing to allege that the auditor notified the railroad company and the county clerk of the amount assessed against the defendant ... 880
19. to recover under the act of 1890 it must be alleged that the county school superintendent furnished the railway with the boundary of the district ... 880

TELEGRAPH COMPANIES—See Neglect, 16: Damages, 15—
1. mistake in transmission of telegram—measure of damages ... 803
2. duty of telegraph company as to delivery of message to one residing in the country—instructions ... 813
3. "guaranteed" message to one in the county—what effort to deliver is due diligence ... 814

TENDER—See Rescission, 2—
refusal of money tendered only because the amount is insufficient—party can not afterwards offer as excuse for refusal that tender was not a legal one or require tender of exact change ... 704

TIME—See Indictments, 5; Day.

TRADE-MARK—
right to use one's own name in business—simulation of brand or trade mark of another having same name ... 866

TRANSFER OF SUIT—See Jury, 6, 7; Street Improvements, 6—
1. plaintiff entitled to have legal issue tried by jury before action transferred to equity docket ... 206
2. when court may transfer action to equity ... 702
3. transfer of certain action to equity erroneous ... 704

TRESPASS—See Actions, 6; Pleadings, 38—
agreed division of land between widow and heir—even when division was by parol widow can not maintain action of trespass against heir for entering upon land assigned to him in the agreed allotment ... 872

TRIAL—
action may stand for trial as to a garnishee, although principal defendant is not before the court ... 702

TRUSTS—See Benefit Societies; Churches; Contracts, 14; Assignments for Benefit of Creditors, 5; Executors and Administrators, 11, 12; Limitation, 13— Page.
1. evidence not sufficient to show that one partner held certain land in trust for his insolvent co-partner 419
2. faithful trustee removed solely because of ill health may have settlement of accounts at cost of trust estate 480
3. costs growing out of resistance to removal by such trustee must be paid by him 480
4. resulting trusts abolished by statute 515
5. beneficiaries entitled to final settlement of certain trust 515
6. distribution of land under certain trust deed 515
7. advancement of money by mother to pay for home for a married daughter, with written agreement by daughter that mother was to have interest in property equal to money so advanced—husband of daughter, having taken deed to property to himself, holds in trust for the mother to extent of her advancements 573
8. fund unlawfully received by child from father and invested in land land not impressed with trust 559
9. deed of trust for benefit of wife for life construed—power of trustee and wife and her husband to convey title to trust estate 859
10. conveyance by father for benefit of children—deed construed as reserving to father absolute power to sell and convey the trust land. 688
11. such conveyance by father not controlled by section 23, chapter 63 of General Statutes 688
12. only trustees who hold land as pledge or security for debts must, under statute, have judgment authorizing sale of land before making it 688
13. when executor holds fund as trustee and not as executor 710
14. trustee for a married woman had authority under deed of trust to sell trust land 817
15. contract of sale made by such trustee specifically enforced, all parties in interest being before court, although predecessors in office of trustee had not conveyed title to plaintiff 817
16. under certain deed of trust executed by a father his children took a vested estate in one-half of the provision for them, which they could dispose of by will, the other half passing at their death to their heirs 376
TURNPIKES—
1. location of gates within certain distance of town—mode of measuring distance 448
2. location of a gate for every five miles of road construed—gates need not be precisely five miles apart 448
UNLIQUIDATED DAMAGES—See Counterclaim.
USURY—See Banks, 1, 2—
1. reducing 10 per cent. interest to 8 per cent., after 6 per cent. collectible, not usurious in particular case 96
2. forfeiture of by national banks—State courts have jurisdiction to force forfeiture 748
3. usury carried into several renewals of a note by a national bank—entire interest may be eliminated from last note 748
VACATION OF JUDGMENTS—See Judgments, 11, 12.
VACANCY IN OFFICE—See Assessor.
VENDOR AND VENDEE—See Decedents' Estates, 11; Guardian and Ward, 5; Interest, 3, 5; Married Women, 1, 2, 3, 11; Pleadings, 37; Rescission of Contracts, 4, 5, 6—
1. a deficiency of eighty-two acres in sale of land in gross in a tract purporting to contain between 350 and 400 acres too great 62
2. measure of value in such cases 62
3. rule for determining whether sale of land was in gross 76
4. one to whom land was mortgaged to obtain money to discharge vendor's lien entitled to priority over former mortgage, of which he did not have actual notice 120
5. where vendor sues for purchase money, prayer by vendee for conveyance prevents limitation from being a bar 137
6. error to render judgment for whole of purchase price where one of the two vendors insisted that entire purchase money had been paid 137
7. action to enforce vendor's lien—pleading 269

VENDOR AND VENDEE—Continued. Page.
8. preponderance of evidence shows that certain sale was of a certain boundary and not by the acre ... 486
9. vendor unable to make good deed—rescission twenty years after contract to convey—liability of vendee for rents ... 494
10. failure to convey entire boundary sold—error to require mere nominal party to deed to make good the deficit by conveying his own land ... 486
11. vendee in possession claiming under deed of record not affected by judgment for sale of his property to enforce lien upon it and other property created by his vendor, he not being a party to suit, 807
12. vendor's lien on lot—sale of part of it to subvendee—order in which parts of original lot must be sold to pay original lien ... 807
13. verbal sale of land confers no equitable interest whatever on any party to it, although collateral equities may arise from the transaction, such as a lien for purchase money paid ... 631
14. answer by vendee to action by vendor on parol sale does not operate as written confirmation of it where equities or rights of third parties have intervened ... 631
15. sale by deed to another after previous parol sale—title conveyed by deed prevails—first vendee may have lien for purchase money paid 631
16. where vendee's notes for land were not to become due until deed was made by vendor, vendor can not plead such notes as set-off to judgment held against him by vendee before deed is made by him—interest ... 653
17. vendor not permitted to claim against deed made twenty eight years ago on ground that was fraudulent ... 657
18. conveyance of land held adversely for fifteen years by vendor against H. conveys good title as to H.'s interest in land ... 684
19. evidence not sufficient to establish sale or gift of land by father to son ... 690
20. sale of standing trees in contemplation of their immediate removal—branding of trees with knowledge of vendor—constructive delivery ... 878
21. contract of sale of such trees enforcible against vendor and against subsequent purchaser of land with notice ... 878
22. but purchaser of land, without notice of sale of trees, is entitled to trees—purchaser of trees must look to his vendor for damages. 878
23 vendor's lien for price of goods—when lost ... 848

VENUE OF ACTIONS—See Guardian and Ward, 6—
1. venue of action against common carrier for injury to passenger where carrier is a nonresident and injury received in another State ... 160
2. evidence of on trial for murder sufficient in certain case ... 659

VENUE, CHANGE OF—See Appeals, 50; Jurisdiction, 1, 7—
discretion of trial court as to granting of in a criminal case—when reversed on appeal ... 873

VERDICT—
1. court can not require plaintiff to remit part of verdict in order to avoid granting of new trial ... 184
2. not to be set aside as against evidence unless palpably so ... 494
3. verdict not against evidence where only evidence is that of litigants, which is contradictory ... 494
4. for $25 more than claimed in petition—remitter of excess ... 877

VESTED ESTATES—
under certain deed of trust by a father his son took a vested interest in one-half the estate conveyed to the trustee for him which he could dispose of by will ... 876

VIEWERS' REPORT (concerning proposed new road)—See Roads, 2, 3.

WAREHOUSE RECEIPTS—
1. pass title to property represented ... 716
2. holder of receipts in certain case a bona fide one, and has prior lien on property represented to claim asserted by warehouseman ... 716

WARNING ORDER—
1. fifteen years after entry of order of sale of land, based upon a warning order, it will be presumed that it was based on a sufficient affidavit in the absence of conclusive evidence to the contrary, and the sale will not be held void ... 414

WARNING ORDER—Continued. Page.
2. sufficient to bring nonresident defendant before the court whether be is sound or of unsound mind ... 889
3. mode of entry of by clerk ... 889
4. defective affidavit for warning order—presumption in favor of regularity of proceedings ... 510
5. defective affidavit for renders judgment voidable but not void ... 510
WARRANT OF ARREST—
1. alleges no public offense in charging that defendant "has been guilty of offense of selling liquor to C. in town of J. on or about December 1, 1892, in violation of town law" ... 332
2. power of examining court to change charge in warrant ... 493
WARNING ORDER—See Appearance, 3—
valid if verified petition sets out all requisite facts, although affidavit annexed to petition may not do so ... 690
WARRANTY—
1. covenant of warranty of seisin is broken as soon as made, and no eviction necessary to maintain action ... 70
2. measure of damages in such case ... 70
3. no recovery for breach of warranty if plaintiff's own laches enabled party to dispossess him ... 77
4. no recovery in such case if record shows speculation of attorney ... 77
5. judgment of chancellor concerning alleged breach of warranty as to a horse sustained by evidence ... 575
6. implied warranty of title arising from partition of land between joint devisees survives to heir of parcener evicted by a paramount title ... 821
7. such implied warranty does not run with land so as to benefit vendee of one parcener ... 821
8. limitation to action on implied warranty by such parcener does not begin to run until actual eviction by paramount title ... 821
9. by owner of stallion that he is a sure foal-getter—failure of stallion as a foal-getter—right of action of owner of mares who lost increase from mares—pleadings ... 875
WAY, RIGHT OF—
1. over unenclosed, uncultivated woodland may be acquired by prescription ... 415
2. right of way over land of another may be discontinued by county court and a different way established ... 416
3. fifteen years' continuous, adverse use of way—presumed there has been a dedication ... 679
4. evidence sufficient to show that use of certain passway was adverse and not merely permissive ... 705
5. verdict fixing location of right of way of railroad sustained by the evidence ... 724
WILLS—See Appeals, 4; Burden of Proof, 9, Curator; Mandamus, 2; Married Women, 6, 10; New Trial, 8—
1. construction of devise to a daughter and her lineage ... 79
2. will of Samuel Todd construed ... 90
3. whether a writing is a deed or a will depends upon the intention of the maker ... 219
4. necessity for probate of paper referred to in will as a part of it ... 294
5. when parol evidence is admissible to identify such paper referred to in a will ... 294
6. married woman can make will only when authorized by statute ... 346
7. propounder of will of married woman must offer evidence to show that she was authorized to make it ... 346
8. verdict finding certain testator lacking in sufficient testamentary capacity contrary to evidence ... 427, 432
9. religious enthusiasm of testator not sufficient to show that devise by him to a religious charity was result of "religious insanity" ... 432
10. instruction that unequal distribution of estate among children is circumstance to be considered concerning testamentary capacity of testator misleading and erroneous ... 427
11. change by testator in will, at request of son, so as to keep estate devised from son's creditors, not evidence of exercise of undue influence by son over testator ... 427
12. testamentary capacity—evidence competent to show incorrectness of accounts of advancements contained in alleged will ... 474

WILLS—Continued. Page.
13. propounder not required to ask or prove by any one witness all facts necessary to establish testamentary capacity 474
13½. verdict sustaining certain will authorized by evidence 477
14. right of a married woman to make a will when authorized by written antenuptial contract 587
15. question as to exercise of undue influence over testator one peculiarly belonging to jury 500
16. evidence sufficient to show exercise of undue influence in particular case 500
17. compromise of will contest—revocation of agent's authority 539
18. agreement to allow such will contest to remain on court docket, after compromise, to prevent contestant's creditors subjecting his interest, not of such immoral character as to vitiate agreement .. 540
19. testamentary capacity of paralytic who could utter only three words, "yes." "no" and "well" 639
20. wife has no right of appeal from order probating will of husband when by antenuptial contract she has no marital rights in his estate 725
21. will revoked by marriage 725
22. certain instrument a deed and not a will 771
23. devisee accepting bequest ordinarily estopped thereafter to question validity of will 830
24. but where acceptance of such bequest was procured by fraudulent concealment of facts surrounding execution of will the devisee may contest validity of will 830
25. not necessary in such case for devisee to pay back bequest before contesting probate of will 830